X. SUMMARY RECORD OF THE SECOND HALF-DAY SPECIAL MEETING ON "THE LAW OF THE SEA"JOINTLY ORGANIZED BY THE INTERNATIONAL TRIBUNAL ON THE LAW OF THE SEA – THE GOVERNMENT OF MALAYSIA AND AALCO, HELD ON WEDNESDAY, 19TH AUGUST 2009 AT 2:30 PM

His Excellency Mr. Ebo Barton Odro, Vice-President of the Forty-Eighth Session of AALCO in the Chair.

1. The **Vice-President** called the second half-day special meeting on the Law of the Sea to order. He informed the delegates that the deliberations in the meeting would focus upon the themes of "Maritime Security and Piracy" and "Delimitation of Maritime Boundary" and there was a very eminent panel that would present its view on the identified themes for the meeting.

A. Working Session on "Maritime Security and Piracy"

2. The **Vice-President** invited H. E. Judge Jose Luis Jesus, President of the International Tribunal for the Law of the Sea to make his presentation on "Role of the International Tribunal for the Law of the Sea (ITLOS) as regards Piracy". Introducing the panelist, the Vice-President informed that Judge Jesus has been member of ITLOS since 1st October 1999 and was elected its President on 1st October 2008. He read law at the School of Law, Classical University of Lisbon in 1978 and obtained International Law Certificate from the Saint John's University, New York in 1985, as well as an M.A. in Government and Politics, from the same University in 1985. The Vice-President mentioned that Judge Jesus professional experience demonstrated his long-term experience with the Law of the Sea. He had been the Delegate and Head of Cape Verde delegation to the Third United Nations Conference on the Law of the Sea (1979–1982); Sixth Committee of the United Nations General Assembly (1979–1994); Counsellor (Legal Adviser) (1981–1987), Ambassador and Deputy Permanent Representative of Cape Verde (1987–1991), Ambassador and Permanent Representative of Cape Verde to the United Nations in New York (1991–1994); Chairman, Group of 77 for the Law of the Sea (1986); Chairman, Group of African States at the United Nations (1986); Head of the Cape Verde delegation to United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna (1986); Chairman, Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (1987–1995); President, United Nations Security Council (July 1992 and November 1993); Special Envoy of the Secretary-General of the United Nations for the Great Lakes Region, Central Africa (1994); Ambassador of Cape Verde to Portugal, Spain and Israel (1994–1996); Secretary of State for Foreign Affairs and Cooperation (1996–1998); Minister of Foreign Affairs and Communities (1998–1999); Chairman, National Commission on the Delimitation of Maritime Boundaries, Cape Verde; Legal Consultant for technical assistance in the drafting of fisheries legislation, FAO; Lecturer at several seminars on the law of the sea, humanitarian law and international relations.

Presentation by H.E. Judge Jose Luis Jesus, President of the ITLOS on the "Role of the Tribunal as regards Piracy"

3. **Judge Jose Luis Jesus**, the President of ITLOS in his presentation gave a theoretical introduction to the issue of piracy as it was reflected in international law. Thereafter, he highlighted the possible role that the Tribunal may play in this respect.

Legal Possibilities for Protecting Foreign Ships against Piracy

1. Historical background

4. Judge Jesus stated that history shows piracy to have been a practice carried out since man first ventured out to sea, a venture that brought riches and fame to some and disgrace to others. It had persisted and thrived for millennia. Its origin was lost in the beginnings of time. As two writers have put it, "the very first time something valuable was known to be leaving a beach on a raft, the first pirate was around to steal it.[1] Recorded history showed that at least since the days of ancient Greece and the Roman Empire, piracy had been a constant hurdle to maritime trade, affecting at different times every maritime region of the world, from the Mediterranean and northern European seas, to the seas of Asia, the Middle East, Africa and, of course, the Americas.[2] After its heyday in the seventeenth and eighteenth centuries, piracy dwindled to a controllable activity which went almost unnoticed at the end of the nineteenth century, only to make a strong comeback, although in a different cast, in recent years.

5. Judge Jesus observed that indeed, at the turn of the nineteenth century and for the greater part of the twentieth century, piracy seemed to have faded into the mists of history. Although piracy was as old as shipping and maritime trade, it was thought to have been eradicated when suddenly, in the 1970s and 1980s, attacks on ships for private ends began to increase. It had unfortunately came back to haunt them in a very violent way, using modern means and methods to the extent that this day it had become a major source of concern for crews, shipowners, insurers, coastal communities and concerned international organizations.

6. The significant increase in acts of piracy and armed robbery against ships in recent times might be attributable to many factors, from the poverty of coastal populations and sheer greed, the weakness of some States' policing functions, to the demise of age-old geopolitical strategies[3] and the deficiencies or lacunae found in the regulations on legal protection or in the weak enforcement of such regulations.

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[1] Jolly Rogerwith an Uzi "The Rise and Threat of Modern Piracy" (Naval Institute Press, 2000, University of Virginia, Annapolis, H D), p.1.

[2] Corinne Touret, *La Piraterie au Vingtieme Siecle*, Librairie Generale de Droit et de Jurisprudence, E.J.A., 1992, p.4.

[3] Villar, *Piracy Today*, Carmichael and Sweet (Portsmouth) Ltd., 1985, p. 61. See also Stuart McMillan, "Piracy: An old menace re-emerges", *New Zealand International Review*, 2002, p.23.

7. In that regard, the focus of Judge Jesus presentation was only on the legal protection aspect and he attempted, on the one hand, to identify the existing international rules applicable to piracy at sea and, on the other, to assess the role which the ITLOS may play in this respect.

2. The International Legal Framework on Piracy

8. Judge Jesus stated that in the midst of mounting concern about maritime piracy and against the background of countermeasures already taken, what was the role played in the struggle against piracy by the current protection that was afforded to shipping by international law? Such legal protection of shipping seemed to be based on the following rules:

(a) The rules of international law applicable to piracy at sea, as contained in articles 14 to 19 of the 1958 High Seas Convention (HSC), which was the first legal instrument to codify such rules, and the United Nations Convention on the Law of the Sea ("the Convention" or "UNCLOS"), which reproduces the same regime in its articles 100 to 107;
(b) The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 ("the SUA Convention"), which regulates, amongst States Parties, unlawful acts against the safety of maritime navigation;
(c) The 2005 Protocol to SUA Convention, to cover situations when a ship is used as a weapon.

2.1 The Piracy regime under the HSC and UNCLOS

2.1.1 *Nature of the piracy regime*

9. States' jurisdiction over ships, whether it was jurisdiction in terms of policing or enforcement or in terms of judicial means, did not, as a rule, apply to other States' territorial waters[4] and, as had been recognized – according to the principle of the freedom of the seas – also cannot be imposed on foreign-flagged ships on the high seas. The long-established principle had, therefore, been that no State shall interfere with any foreign-flagged ship on the high seas, let alone in a third State's internal or territorial waters. However, the global needs and troubles which were particularly prevalent today had led to the international acceptance of some exceptions to that principle, allowing any State or the States most involved, as the case might be, to exercise police, and sometimes, full jurisdiction over such ships on the High Seas.[5]

[4] Article 27 of UNCLOS on jurisdiction over crimes committed on board ships in the territorial sea recognizes the jurisdiction of the flag State and the coastal State over such crimes, depending on the factual situations.

[5] Article 110 of UNCLOS justifies boarding and inspection of foreign-flagged ships on the high seas if there are unreasonable grounds for suspecting that the ship is involved in piracy, slave trade, or unauthorized broadcasting, or in the absence of a ship's nationality and when a ship has in fact the same nationality as the warship intercepting it. Article 111 of UNCLOS on hot pursuit also introduces an exception to the principle.
Article 220 of UNCLOS also authorizes States to take enforcement measures against foreign-flagged vessels (which includes boarding, escorting, investigation and detention (Article 226) on the high seas with respect to pollution or threat of pollution from marine casualties).
Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances authorizes the search and seizure of vessels engaged in narcotics trafficking, if there are reasonable grounds for suspicion; a

10. In the case of piracy, historically considered a crime against the human race, an exception was made to this principle[6] via customary law a long time ago, recognizing the jurisdiction of any State over pirate ships or ships taken by pirates on the high seas. After the entry into force of UNCLOS, by operation of its article 58, the reference to the High Seas, in that context, also included the EEZ.

11. That exception to the above principle meant that, when confronted with acts of piracy perpetrated by a foreign-flagged ship, which, according to the existing definition of piracy as contained in the Convention[7] had to take place on the High Seas, the extraordinary and common jurisdiction of any State to visit, search and seize the ship, cargo and other property, arrest offenders- whatever their citizenship – try and punish such offenders according to its own domestic laws and dispose of the ship and other property seized is also recognized.

12. Judge Jesus stated that from the foregoing, it seemed clear that the fundamental nature of international law governing piracy at sea was no more and no less than a special reason for any State to assert their jurisdiction[8] over a foreign-flagged vessel, its cargo and offenders. In a way, it all amounted to an enabling authority to act. It was an exceptional legal authorization to exercise police and judicial functions over a foreign-flagged ship, cargo and persons, applying its own domestic law, on the assumption that a pirate is the enemy of the human race and as an "enemy of all he is liable to be punished by all".[9]

13. The piracy regime contained in the 1982 Convention dealt only with the "powers, rights and duties of the different States inter se, leaving to each State the decision how and how far through its own law it will exercise its own powers and rights".[10] It did not impose on the State any obligation to prosecute and punish the offenders and dispose of the property.

14. How then can a ship be identified as a pirate ship or a ship taken by pirates, so as to prompt and legitimize intervention on the part of a warship vis-à-vis a foreign-flagged ship on the high seas? The answer to this question leads us to the analysis of the definition of piracy.

2.1.2 ***Definition of Piracy***

15. In accordance with UNCLOS,[11] piracy consists of any of the following acts:

Party should notify the Flag State and request authorization from the flag State to take appropriate measures in regard to the vessels.

[6] In fact for centuries it was the only exception to the principle of the flag State's exclusive jurisdiction over its ships on the high seas in peacetime.

[7] Article 101(a) (i).

[8] Harvard Research in International Law, Draft Convention on Piracy, 26 *AJIL* (Suppl. 1932), pp. 825-6.

[9] Barry H Dubner, *Supra* note 42, 758.

[10] Harvard's Research Convention on Piracy, *supra* note 42, 758.

[11] Article 101.

(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

16. The origin of the piracy provisions contained in UNCLOS was basically the rules found in articles 14 to 21 of the HSC.[12]

17. He further mentioned that in fact, although the rules on piracy were applied as an emanation of customary international law, it was through their codification for the first time in 1958 in the High Seas Convention that a clear and uniform definition of piracy was retained, putting an end to the quite wide discretion of States as regards what they considered as acts of piracy.

18. Notwithstanding the above, that definition was often criticized for lack of clarity. Its interpretation seemed to raise a number of difficulties for many commentators and publicists. Since it was a set of provisions that was to be applied on the spur of the moment by warships as they encountered acts of piracy in the process of being committed, it would be useful if the understanding of that article on definition were to be streamlined.

2.1.3 ***Essential requirements for an act to be considered one of piracy***

19. According to the definition of piracy, any act of violence or detention or any act of depredation was an act of piracy, provided that the following three conditions were met cumulatively:

(a) It was practised by the crew or the passengers of another private ship or aircraft (two-ship requirement);
(b) It was driven by "private ends";
(c) It took place on the high seas, including the EEZ.

2.1.3.1 *The two-vessel requirement*

[12] Articles 100 (a), 107 and 110.

20. The issue of whether an act involving only one ship, such as its takeover by the crew or passengers or as a passenger stealing from another passenger on board the same ship, qualifies as piracy has always received a mixed review from different commentators.

21. Most commentators hold that piracy must involve another vessel, other than the vessel that falls prey to piracy. Judge Jesus was of the view that the two-vessel requirement disregarded situations in which only one vessel might be involved. The seizure of their own vessel by the crew or passengers is excluded from the definition of international piracy at sea. At such, the seizure of the ship by its own crew or its takeover by its own passengers or the beating or killing of the crew by the passengers or vice versa, or even the depredation of cargo and other property on board by the crew or by the passengers would not legitimize intervention on the part of a foreign warship, on the grounds of common piracy jurisdiction, because such acts clearly would not constitute piracy according to the definition and would have to be dealt with under the jurisdiction of the flag State. He mentioned that many other commentators tended to hold a different view, maintaining that such acts involving only one ship should also be considered acts of piracy according to the above definition. A simple act of violence on the part of the crew or passengers did not in itself constitute the crime of piracy.

22. He further observed that the only instance in which, under the article 101 definition, acts of piracy involving only one vessel could take place was in the case foreseen in paragraph (a) (ii), which addressed an entirely different situation. Here, the acts of piracy were directed against a ship, aircraft, person or property in a place outside the jurisdiction of any State. The wording of that paragraph, which was inspired by article 3 of the Harvard Research Draft Convention on Piracy, refers to acts committed in a place which is not owned by any country, therefore, outside the jurisdiction of any State, a place considered *terra nullius*.[13] Today it was impossible to find an area of the sea which is not under the State jurisdiction other than the high seas. The obsolescence of that provision seemed clear, since nowadays no *terra nullius* was left.[14] Therefore, that provision served no useful purpose today. It was fair to say, especially bearing in mind the *travaux preparatoires*, that the definition of piracy did not and was not supposed to contemplate the one-ship situation.

2.1.3.2 The "private ends" requirement

23. Judge Jesus mentioned that for an illegal act of violence or detention or any act of depredation against a ship to be considered an act of piracy it had also to meet the "private ends" requirement. Neither the HSC nor UNCLOS provided a definition of "private ends". "Private ends" in the view of some commentators did not necessarily mean stealing. Although a substantial number, if not the majority, of writers tended to espouse the classic definition of

[13] Oppenheim's International Law, cited by the Harvard Research Draft Convention on Piracy, criticizes the view of some writers that were upheld by the Harvard Research in its draft and which inspired Article 101 (a) (ii) in the following terms "if a body of pirates land on an island unappropriated by a civilized power, and rob and murder a trader, who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy".

[14] Possibly the only place it might apply in Antarctica, in case the sovereign claims are not recognized.

piracy as a violent act with the intent to plunder, the 'animus furandi' no longer seems to be for other commentators a necessary element of piracy.[15] "Private ends" could be theft or the desire for gain, but it could also translate into acts of personally motivated hatred or sheer vengeance.[16]

24. As stated by the American Justice Story, referring to the pirate, "if he wilfully destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, as if he did it solely and exclusively for the sake of plunder, *lucri causa*".[17]

25. This requirement seemed to exclude from the definition of piracy purely politically motivated acts directed at ships or their crews. In the past, the issue of whether a politically motivated act was an act of piracy drew substantial support from some publicists and governments.

26. The piracy rules, specifically tailored to deal with acts of piracy, were in the past stretched in their interpretation and application by some national jurisdictions[18] and by some commentators to cover also, by default, other unlawful, politically-related, acts against ships and persons on board, such as terrorist acts. Today, however, especially after the adoption of the SUA Convention, it would appear to be a lost cause to continue insisting on considering politically-motivated acts of this nature as piracy.[19]

27. Moving on further, Judge Jesus stated that if, in the past, politically-motivated acts of violence or depredation carried out against ships and persons aboard, short of being piracy,[20] were omitted from the international regulatory system, as it were, today these were covered by article 3 of the SUA Convention. Likewise, the "private ends" criterion seemed to exclude acts

[15] *Yearbook of the International Law Commission (1956 II)* commentary on article 39, p. 282.

[16] "Certain authors take the view that the desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or desire for vengeance", *Report of the Sub-Committee of the League of Nations,* cited by the Harvard Research Draft Convention, p. 789.

[17] United States v. Brig. Malek Adhel, cited by Malvina Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", *The American Journal of International Law,* 269 (1988), p. 274.

[18] One such claim was the politically-motivated seizure in 1961 of the Portuguese passenger ship *Santa Maria* by Enrique Galvao, which intended to draw the world's attention to the fascist regime in Portugal and the colonial situation, a seizure which was then incorrectly characterized by the Salazar fascist regime as an act of maritime piracy. The *Achille Lauro* episode is another example of a politically-motivated act incorrectly characterized by some as piracy. This incident revealed the weakness of the international legal regime on piracy at sea for dealing with acts of terrorism and was to lead, some years later, to the negotiations on and adoption of the SUA Convention.

[19] The comments made in the Harvard Research Draft Convention definition on piracy (page 769) made it clear that in the "traditional" wisdom there was no unified view as to which acts should be considered piracy and indeed highlighted the fact that there was "a chaos of expert opinion as to what the law of nations include, or should include in piracy" and conclude the comment by recognizing that there was "no authoritative definition".

[20] Excluded from the piracy rules are also acts authorized by any State or acts of belligerency. Acts of rebel groups with the status of national liberation movement or of a non-belligerent party also seem to be excluded from the definition of piracy. Although the views differ from writer to writer, non-belligerents or unrecognized insurgency attacks on ships seems to be excluded from the definition of piracy if the attacks are limited to the ships of the State from which they seek independence or whose government they wish to overthrow.

of violence and depredation exerted by environmental activists in their quest to protect the marine environment. That clearly seemed to be a case in which the "private ends" criterion was excluded.

2.1.3.3 The "high seas" requirement

28. He stated that the commission of an act of piracy depended upon the part of the oceans in which it took place. If the act was committed on the high seas or, in application of article 58 of UNCLOS, in the EEZ, it is considered piracy under international law. If the same act took place in the internal waters, territorial sea or archipelagic waters of a State, it was not covered by the international rules on piracy. As a matter of fact, it might not even be considered a crime under the domestic law of the coastal State. Therefore, under UNCLOS provisions on piracy, foreign warships were barred from exercising jurisdiction over a ship against which such an act was being committed without the authorization of the flag State.

29. As absurd as it might seem, under the existing piracy regime, the offended State or any other State, whatever the gravity of the offence, even if it involves the killing of crew members or passengers, had no legal recourse, because it lacked jurisdiction to take any enforcement actions against a foreign-flagged State and secure the prosecution and adequate punishment of offenders, unless authorized by the coastal State in whose territorial waters the act took place.

30. In that case whether or not and to what extent such act will be prosecuted depended entirely on the coastal State or the flag State, for the "extradite or prosecute" clause did not apply to piracy.[21]

31. Although the piracy law recognized the common jurisdiction of any State,[22] which included the exercising of police jurisdiction to board, inspect and arrest ships involved in piracy, in exercising this jurisdiction States should observe the following:

(a) They should use only warships or "any other duly authorized ships clearly marked and identifiable as being on government service";[23]
(b) They should exclude from the special jurisdiction warships and ships owned or operated by a State and used only on government non-commercial service;[24]
(c) They should pay compensation for any loss and damage caused by the seizure of the foreign-flagged ships without adequate grounds.[25]

[21] A foreign State which is a party to the SUA Convention might, however, ask the State party where the offender is present to extradite or prosecute and punish the offenders under the SUA Convention if the offence falls within the definition of unlawful acts of its article 3, or extradite him for prosecution.
[22] Any State, even if it is not party to the 1982 Convention or to the 1958 High Seas Convention can exercise this common jurisdiction, owing to the customary nature of the piracy law.
[23] UNCLOS, Article 110 (1) and (5).
[24] *Id.*, articles 95, 96 and 110 (1).
25 article 106.

2.2 APPLICATION OF THE CONVENTION ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION TO CERTAIN ACTS OF PIRACY OR ARMED ROBBERY

2.2.1 *Acts of Piracy covered by the SUA Convention*

32. Moving on further, Judge Jesus observed that until 1992, before the entry into force of the SUA Convention, the only international rules dealing with acts of piracy at sea against ships, cargo, crews and passengers were those of the HSC and UNCLOS.

33. After the adoption of the SUA Convention, the issue was whether an act of piracy or armed robbery against ships could also be termed an unlawful act covered by the SUA Convention. The regulations of that Convention for some commentators seemed to apply to acts of piracy or armed robbery against ships. It was believed, for example, that the hijacking of ships by pirates or the perpetration of armed robbery against ships, to the extent that it involved the seizure or "the exercise of control over a ship by force",[26] or injury inflicted on or killing of persons on board a ship in connection with the commission or attempted commission of an act of seizure and control of the ship by force, would also qualify as unlawful acts under the SUA Convention.

2.2.2 *Concurrent application*

34. If any State, in the exercise of common jurisdiction under the international rules of piracy, arrests the pirates and prosecutes the offenders in its own court system or if the coastal State, in the case of acts of armed robbery against ships, arrests the offenders and brings them to justice, then the SUA Convention regulations would not apply. It would seem that this Convention would apply, however, only in the absence of judicial action against the pirates or against the perpetrators of armed robbery against ships.

35. The practical effect of that concurrent application of the two sets of international rules was that a pirate who escaped arrest on the high seas, or the perpetrator of armed robbery against ships who was not being prosecuted, might be subjected to compulsory prosecution or extradition if a State party to the SUA Convention asserted jurisdiction before another State party in whose territory the pirate or perpetrator is present and implements the "extradite or prosecute" clause.

2.2.3 *Shortcomings of the current UNCLOS piracy regime*

36. From the above assessment, Judge Jesus stated that it might be concluded that the international rules on piracy did had some shortcomings deserving of consideration. The main difficulties in that respect were the following:

[26] SUA Convention, Article 3 (1-a).

(a) They exclude the territorial sea, an important area of the ocean where piracy, designated armed robbery against ships, has today concentrated its activities;
(b) They do not impose a legal duty to cooperate in the eradication of piracy in the entire ocean area but only on the high seas as imposed by article 100 of UNCLOS, since this continues to be the only area in which piracy takes place, from a legal standpoint. This duty to cooperate in the combat against piracy ceases to exist the moment the pirates move into a State's territorial waters;
(c) They do not contain any mechanism for securing the prosecution and punishment of offenders, especially for acts of armed robbery against ships in coastal waters, since coastal States might not be willing or have the means to prosecute and punish offenders;
(d) They do not impose an obligation on States to introduce into their domestic legislation as crimes the acts that are considered piracy under international law.

3. Possible avenues for resolving the situation

37. Judge Jesus stated that the international rules on piracy at sea, as embodied in UNCLOS, were based on so-called "traditional wisdom". However, as useful as they might be, the rules on piracy at sea as embodied in the Convention were in the main a reflection of the piracy environment of days gone by, as experienced in the heyday of piracy in the seventeenth and eighteenth centuries. They reflected the old world which should keep pace with today's needs. Therefore, he observed that the piracy provisions embodied in the HSC and UNCLOS might need to be reviewed, in order to bring the international rules on maritime piracy into line with modern-day requirements and afford better legal protection to shipping.

4. Possible Solutions and the Role of the Tribunal

38. Judge Jesus observed that faced with the current spiral of violence at sea, the news media, State officials and shipowners had sought possible solutions in an attempt to curb the surge of piracy. Different views had been expressed lately in that regard and some of them concern the promotion of the idea of an international judicial body to try pirates.

39. The international legal regime for piracy, as codified in articles 100 to 107 of UNCLOS, was a jurisdictional regime and, as such, it only allowed States-any State-to arrest pirates and seize pirate ships and cargo and to proceed to bring them to trial under their own domestic judicial system. The legal regime of the Convention was not predicated on the existence of an international criminal substantive law nor does it contemplate any international judicial means or structure to try pirates and piracy.

40. As it stood now, there was no international court or tribunal that included in its jurisdiction a mandate to try pirates at international level.

41. Therefore the issue of how best to deal with the trial aspect of piracy appealed to a number of measures both in the short and in the long term.

4.1 **Long-term measures**

42. As regards long-term measures, Judge Jesus stated that some people believed that the current situation of piracy would last for many years to come and, as a result, they advocated the establishment of international judicial structures to deal with piracy on a permanent basis. In that context, ideas had been expressed as to the possibility of entrusting the trial of pirates to an international court of sorts, such as a chamber of the ITLOS or of the ICC, to be established for that purpose, or the establishment of a new international court for piracy. He opined that whatever the outcome of such ideas might be, the establishment of a judicial structure and the corresponding substantive international law provisions establishing the international crime of piracy would take quite some time to come into force. Therefore, that possibility could only be seen as a long-term approach to the problem. Meanwhile, the current situation had to be dealt with now. Irrespective of measures the effect of which might only be felt in the longer term, there was a need in the short term to try pirates and to deal with piracy.

4.2 **Short-term measures**

43. Since the current piracy regime was based not on international trial courts but on the trial of pirates by the domestic court system of the countries that had captured the alleged perpetrators, there were some measures that might make the current system more effective, such as:

(a) The enactment, at national level, of penal legislation establishing as a crime acts of piracy or acts of armed robbery to ensure that those who are caught committing such acts can be brought to trial. Most countries do not at this time include in their penal legislation a type of crime to cover acts of piracy or even acts of armed robbery at sea, since, until recently, piracy was not a prime security concern;
(b) On the other hand, to help answer some questions that the current surge of piracy has brought into the limelight, the Tribunal may be requested to deliver advisory opinions on the basis of an international agreement, clarifying some legal points, including the following:

    (i) Whether, in situations where a coastal State is not a functional State and as a result cannot control its land territory and cannot guarantee the safety of international navigation through its territorial waters, pirate ships and pirates may be seized or arrested inside the territorial waters of such States under certain circumstances to be agreed with the coastal State concerned;
    (ii) Whether, and under what conditions, a State other than the arresting State may legally try pirates transferred to it for that purpose by the arresting State.

4.3 The role of the Tribunal as regards Piracy

44. Judge Jesus observed that in that environment of a renewed spiral of violence at sea, it was no wonder that questions had frequently been addressed to the ITLOS by various quarters,

inquiring about its possible role on curbing acts of piracy. As yet there was no international court or tribunal that included in their jurisdiction a mandate to try pirates at international level. However, while it had no competence to try pirates, the Tribunal might play a positive role in some respects.

45. The role that the Tribunal might play in the international effort to curb piracy was rooted in its jurisdiction as contained in the Convention, its Statute and its Rules. The Tribunal had both contentious and advisory jurisdiction. In particular, it had jurisdiction over:

(a) any dispute concerning the interpretation or application of the provisions of the Convention which is submitted to it in accordance with Part XV.[27] It therefore has competence to deal with any dispute between States related to piracy, since piracy is a regime contained in the Convention. It does not, however, have jurisdiction to try pirates;
(b) the Tribunal, as a full court, "may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion".[28] As mentioned before, the Tribunal may be requested to clarify through advisory opinions the issues of the arrest of pirates in the territorial sea and of whether under international law a non-arresting State has the authority to try pirates caught by a third State.

46. The **Vice-President** thanked Judge Jesus for his elaborate presentation. He remarked that the offence of piracy was a serious crime, and at times it appeared it was fizzling out, however, it has resurfaced. He stated that there were a number of problems associated with the trial of pirates, particularly in relation to jurisdiction. The fact that there was discussion about establishing an international court to try pirates was an important one. Thereafter, he invited First Admiral Zulkifili Bin Abu Bakar of the Malaysian Maritime Enforcement Agency (MMEA) to make his presentation on the topic "Maritime Security in the Straits of Malacca". Introducing the panelist, the Vice-President informed that Admiral Zulkifili had joined the Malaysian Maritime Enforcement Agency (MMEA) in April 2005, and currently held the post of the Head of Enforcement, Northern Region based in the island of Langkawi. He holds a Bachelor of Law degree from Mara University of Technology and was admitted as an Advocate and Solicitor of the High Court of Malaya in 1996. Formerly, he was an officer in the Royal Malaysian Navy for 28 years and his last appointment before joining MMEA was as the Commanding Officer of a Missile Frigate KD JEBAT. He is also a graduate of the prestigious Naval War College, Newport, Rhode Island. His most current achievement was when he graduated with a Masters in Law (LLM) with distinction at the International Maritime Organization – International Maritime Law Institute, Malta. He was also awarded the Sasakawa

[27] See articles 288, paragraph 1, of the Convention and articles 21 and 22 of the Statute of the Tribunal.
[28] The advisory jurisdiction of the Tribunal is based on Rule 138 of the Convention. On the other hand, article 21 of the Statute of the Tribunal does confer on the Tribunal broad jurisdiction, which is also interpreted as providing an advisory function, by stating that "the jurisdiction of the Tribunal comprises all disputes and *all applications* submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". See article 138 of the Rules of the Tribunal and article 21 of the Tribunal.

Prize for the best Nippon Foundation scholar. As the Northern Region Head, he is responsible for law enforcement as well as search and rescue activities for the maritime zones of four states, namely, Perlis, Kedah, Penang and Perak, the four littoral states facing the northern entrance to the Straits of Malacca. His past appointments include the Director of Enforcement and Exercise and the Head of Investigations based at the Agency's Headquarters in Putrajaya. He was responsible for the setting up of the Maritime Criminal Investigations Department of the MMEA.

II. Presentation by First Admiral Zulkifili Bin Abu Bakar of the Malaysian Maritime Enforcement Agency on "Piracy in the Straits of Malacca"

47. At the outset the distinguished panelist clarified that he would be speaking more from the perspective of Malaysian Maritime Enforcement Agency rather than all the three organizations available in Malaysia, namely the Malaysian Armed Forces, Malaysian Police and the MMEA. In most cases of maritime security, however, Mr. Bakar emphasized there was consistency in the approach. Infact, there existed coordination agencies, both at the operational and practical levels between these agencies.

48. The Panelist informed that the Malaysian Maritime Enforcement Agency was the equivalent of a coastguard and was established in November 2005. In line with the Government's objectives, MMEA was now playing a greater role in maintaining the security of the straits of Malacca. The straits of Malacca had become one of the most important straits used for international navigation in the world. It formed a strategic waterway linking the Indian Ocean and the Pacific Ocean and was a major sea route for the transit of goods and services.

49. It was reported that the number of vessels plying through the straits of Malacca had been increasing over the years. Last year it was recorded that the number had gone up to more than 75,000 vessels, while the figures for 2009 showed that more than 23,000 ships passed through the straits from January to April.

50. Moving on further Admiral Bakar observed that the maintenance of safety and security of the straits of Malacca as a sea line of communication, therefore, could not be taken for granted or under-emphasized. Any disruption of the free flow of navigation in the straits would adversely affect the economy of all the trading nations which depended largely on seaborne trade including the littoral states of Indonesia, Singapore and Malaysia.

51. Alluding to the maritime threats in the straits of Malacca, the panelist focused on non-traditional security threats which included smuggling of drugs and weapons, pirates or sea robbers, human smuggling, illegal logging, illegal migration, movements of criminals across borders, accidental spills, illegal dumping and over fishing as well as illegal fishing. Among the maritime security threats mentioned above, the one that attracted international interest would be threats posed by pirates or sea robbers. That was particularly significant in light of the present piracy cases off the coast of Somalia.

52. The areas in the Straits of Malacca where most incidents of piracy or sea robbery had been recorded were in the north and south western part of the straits including the waters adjacent to Penang and South of Johor.

53. The number of piracy and sea robbery cases since the year 2000 to that date had reduced drastically from 40 in 2000 to 4 cases in 2008. That year, there were two cases that had been reported so far. The Panelist stated that the reduction in the number of piracy cases was due to effective security mechanisms that were put in place at the height of piracy incidents in the straits in 2006. He informed that in fact, in March that year, the European Commission held an International Workshop[29] that discussed and commended the success of the three littoral states in implementing cooperative security measures to combat piracy, among the mechanisms that drew praise were the eyes in the sky, the Malacca Straits Surface Patrol (MSSP) and the maritime cooperative mechanism which were jointly implemented by the three States, the establishment of the information sharing centre, RECAAP based in Singapore and the formation of the MMEA.

54. Referring to the MMEA Act, the Panelist informed that the agency had been tasked to perform enforcement functions under all Federal laws for ensuring the safety and security of the Malaysian maritime zone which was more than 600,000 Sq. km. The bases for MMEA were geographically located and the organisation was divided into regions, districts, bases, posts and air bases. As for the straits of Malacca, two regions were responsible for its security namely the northern and southern regions.

55. MMEA's Assets: Describing the MMEA's assets, the Panelist stated that it included surface vessels, rotary and fixed wing aircraft and radar sea surveillance systems.

56. The Panelist observed that law enforcement was generally conducted in two ways: Ships and aircraft were deployed to conduct patrols beyond the reach of smaller vessels, thus providing deterrence, whilst the smaller vessels, in particular boats will be used closer inshore and for intelligence led operations.

Radar Sea Surveillance Systems (RSSS)

57. After its formation, MMEA inherited 9 remote sensor sites radar sea surveillance systems (RSSS) situated along the coast facing the straits of Malacca. The radars served a dual function, firstly to provide radar picture for the safety of navigation under the vessel traffic services (VTS) operated by the marine department. Secondly, the radars were used for surveillance and security purposes by MMEA.

Functions and Capabilities of the RSSS

[29] Validation Workshop on Critical Maritime Routes from the Straits of Malacca to the Horn of Africa and the Gulf of Aden, Brussels 9-10 March 2009 organized by the European Commission.

58. The radars were integrated with the marine department's automatic identification systems and MMEA also maintained the Lloyd's register which provided data on ships captured by the radars. Besides providing information on vessel's identification, position, course and speed of any vessel, the radars were also equipped with optronics camera which provided visual footage and CCTV recordings. On a good day the camera was able to capture and provide visual identification at 6 to 8 miles. Normally a radar operator was guided by the following sequence of events, surveillance, detection, classification, identification and prosecution. Since the radars were equipped with the ability to provide threat assessment analysis, classification is achieved spontaneously.

59. If the contact fulfiled the suspicious criteria, MMEA would vector its assets to identify the contact. Sometimes identification was achieved even without sending the assets. That could be done by asking information from the nearest ship that was travelling closest to the unknown contact. During the day or when the visibility was good, the contact might be detected by camera. Since time was of essence, all those activities required well trained and disciplined personnel. The system also allowed all audio and video information be recorded at all times.

Cooperation with other maritime enforcement agencies

60. The Panelist mentioned that since its formation, MMEA had established several joint committees with other agencies to ensure the smooth running of its organization as well as to facilitate information sharing for effective enforcement. On the domestic front, these were: Royal Malaysian force- provision of assets and training in specialized areas such as human and trafficking; Royal Malaysia Navy – provision of assets, manpower and basic recruit training; Royal Malaysian Air Force – Provision of manpower and training of special tasks and rescue team; Marine department – provision of assets, manpower and effective operation of RSSS; Royal Malaysian customs – Provision of assets; Fisheries Department – provision of assets and manpower; and Department of Environment – joint working relations. The agencies listed and the natures of cooperation were not exhaustive.

61. At the regional level, MMEA had a close working relationship with the following organizations: Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (RECAAP) in Singapore; Singapore Police Coastguard; Maritime Port authority Singapore; Japan Coastguard; and the United States Coastguard.

The Way Ahead

62. The Panelist stated that through the working mechanisms of the heads of Asian coastguards and the ASEAN senior official meetings on transnational crimes (SOM TC), MMEA was also seeking to establish a multilateral cooperation with the coastguard agencies of several countries to facilitate information sharing in the fight against transnational crimes. Furthermore, under the ASEAN SOM TC, Malaysia was the lead shepherd for the crime of piracy.

63. He further observed that as it was, the existing law enforcement arrangements in combating piracy in the straits of Malacca were purely between the armed forces of the littoral States. Once MMEA was able to establish relationship with its direct partners, especially the coastguards of Indonesia and Singapore, perhaps the general law enforcement activities might be undertaken by the coastguards of the littoral States. That also applied to the situation in the Sulu Sulawesi areas.

64. The events in Somalia had attracted overwhelming international attention to the success stories of the littoral States in curbing piracy in the straits of Malacca. It had brought about opportunities for the littoral States to look back and improve on previous weaknesses. It had also strengthened regional cooperation among the littoral states as generally people realized that no one State would be able to tackle transnational crimes alone.

65. As for Malaysia, the Panelist emphasized one of the weaknesses identified was the absence of a national law to combat piracy. MMEA with the guidance of the National Security Council plans to propel the promulgation of an act of parliament to deal with this issue.

Conclusion

66. In conclusion, the Panelist observed that the Malaysian government's move to establish MMEA showed that the nation was willing to invest a substantial amount of money in pursuit of good governance towards maritime security. In this regard, MMEA was committed to ensuring that that aspiration be realized. With good intra and interagency cooperation as well as good regional cooperation, security in the straits of Malacca would be assured.

67. The **Vice-President** thanked First Admiral Bakar for his presentation. Thereafter, he invited Mr. Masataka Okano to make his presentation entitled "Piracy in the Gulf of Aden". Introducing the panelist, the Vice-President mentioned that Mr. Masataka Okano was serving as the Director for International Legal Affairs at the Japanese Ministry of Foreign Affairs since January 2008. He was in charge of a wide range of legal issues pertaining to Japan's relations with other countries, including those issues related to law of the sea and international criminal law. Mr. Okano joined Japan's Foreign Service in 1987. Immediately before his current assignment, Mr. Okano had served as political counselor at the Japanese Embassy in Washington, DC, following political affairs, particularly regarding Japan-US relations. He also had served as political counselor at the Japanese Embassy in Beijing and as principal Deputy Director for Russian Affairs and Legal Affairs at the Ministry of Foreign Affairs. As Rapporteur to the Preparatory Committee of the United Nations, he participated in the formulation of the Rome treaty creating the International Criminal Court. Other assignments included positions in the OECD division and the Korea division of the Ministry of Foreign Affairs. Mr. Okano had received a B.A. in law from the University of Tokyo and a post-graduate degree at Ecole nationale d'Administration of France.

III. Presentation by Mr. Masataka Okano, Director, International Legal Affairs, Ministry of Foreign Affairs, Japan on "Piracy in Gulf of Aden"

Introduction

68. Mr. Okano observed that the main subject of his presentation was: Is the existing legal framework of international law and national law solid enough to cope with the issues of piracy in the Gulf of Aden? If it is not sufficient, is the real issue a legal *lacuna* or lack of political will? In his presentation, he briefly mentioned about the specific characteristics of the piracy in the Gulf of Aden. Secondly, he discussed the current legal framework governing counter-piracy activities. Thirdly, he pointed out legal challenges that confronted legal advisers of each country. Lastly, he touched upon some outstanding issues for further consideration.

Characteristics of piracy activities off the coast of Somalia

69. In regard, to the characteristics of piracy activities off the coast of Somalia, he said that the following four points were of relevance:

- The geopolitical importance of the region.
- The vastness of the marine area of activities
- The high-level attack capabilities of the pirates.
- Lack of ability to carry out crackdowns.

Inadequacy of legal tools for crackdowns

70. Mr. Okano posed the question whether the current framework of international law was solid enough to combat piracy off the coast of Somalia or not. In this regard, he referred to the United Nations Convention on the Law of the Sea, and mentioned that Article 100 stipulated a general duty to cooperate in the repression of acts of piracy, but it did not set forth specific methods of cooperation that should be carried out by each country. Further, Article 105 stipulated that any country could arrest, prosecute, and punish pirates, but while it recognized the authority of contracting states to carry out crackdowns, it did not set forth an obligation to do so.

71. Another international convention, was SUA Convention, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation that dealt with hijacking at sea. Some countries had pointed out that the steady execution of that convention had been an effective measure against piracy, but it did not give contracting states on-site enforcement jurisdiction. He observed that the SUA Convention 2005 Protocol certainly stipulated that ships of contracting states were able to board and search the ships of other contracting states (Article 8-2), but that would require the authorization of a flag state.

72. Mr. Okano emphasized that the cases of those two conventions show that the current international agreements themselves were not sufficient to cope with piracy off the coast of Somalia.

Coordination of Jurisdiction

73. Moving on further, he stated that the second challenge with the current legal framework was how to coordinate jurisdiction of several countries. A single act of piracy involved many countries. Interests were held not only by the countries of the nationalities of the pirates and the countries of the nationalities of the victims, but also by:

- the coastal country,
- the flag country of the pirates' ship,
- the flag country of the victims' ship,
- the countries of the nationalities of the owners of the ships,
- the countries of the nationalities of the owners of the cargo,
- the countries of consignment for the cargo, and
- the countries of destination for the cargo.

74. In this regard, pertinent questions were: Which country had the priority to seize pirates? In the world of international law, a coordination mechanism had not been sufficiently developed. Rather it was safe to say that it was clearly established in international law that a country that had first apprehended pirates was able to exercise jurisdiction.

75. Nevertheless, there were only few examples of the country which apprehended the pirates attempting to exercise jurisdiction on its own. International practice had not been established for cases where the country arresting pirates did not exercise jurisdiction to adjudicate: which country would then exercise that jurisdiction, how coordination would be made if multiple countries claimed jurisdiction, and what should be done with the pirates if no country exercised jurisdiction. That was, he emphasized a nightmare in terms of coordination of jurisdiction.

Domestic law

76. At the level of domestic law as well, the legal systems in many countries had not sufficiently been developed. Mr. Okano stated that the piracy legislation of countries could be organized into the following three categories.

77. The first category was legislation in which acts of piracy were uniquely defined based on domestic law and such acts carried penalties as crimes under domestic law. The Anti-piracy Law of Japan corresponded to that category. The legislation of the Netherlands and Russia also falls within this group.

78. The second category was legislation which did not have provisions regarding the punishment of acts of piracy, but substantially ensured penalties for acts of piracy through application of different provisions under criminal laws. The legislation of the Republic of Korea corresponded to that category.

79. The third category was legislation which had provisions regarding the punishment of acts of piracy, but did not establish unique definitions for piracy based on domestic law. Many

common law countries fall into that category. In that category of legal systems, the elements of offense of a crime were not defined clearly enough to comply with the demands of the legality principle, and supplementation with case law was needed.

80. Even in cases in which acts of piracy were punishable directly or indirectly based on the national laws, they could not exercise enforcement jurisdiction, in other words actually carry out crackdowns at sea if jurisdiction was not established under their our own law. Furthermore, they could not seize ships if they did not had an authorization law to dispatch ships with necessary authority. They also could not prosecute pirates if they do not have a suitable criminal procedure that could be used for cases in distant international waters.

81. In that regard, Mr. Okano informed that Japan had recently enacted the Anti-piracy Law, which was one of the first comprehensive piracy legislation in the world after the entry into force of the UNCLOS. The law was significant in the sense that it embodied the national will of Japan to crack down on piracy. That law was also significant because they could seize pirates on the basis of universality jurisdiction. He hoped that that law would serve as a good precedent for the piracy legislation in Asia-Africa and beyond.

1. Legal Challenges Confronting legal advisers

82. Thereafter, Mr. Okano proceeded to discuss legal challenges confronting legal advisers of each country.

(1) To what extent shall we apprehend pirates?

83. Mr. Okano observed that in general international law, each country was entitled to exercise jurisdiction to seize and apprehend pirates on the high seas. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and might also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith." (Article 105)

84. Nevertheless, that only affirmed that countries have the right to seize and prosecute pirates, and it did not make it obligatory. In international law, the only thing that was made obligatory was general cooperation as was provided in Article 100 of the UNCLOS.

85. The seas were vast. To what degree were countries attempting to crack down on acts of piracy in very distant waters? In general, the coast guard authorities of countries had their hands full with surveillance and crackdowns in their own country's territorial waters, exclusive economic zone (EEZ), and continental shelf, and they did not had systems in place to be active in waters beyond 200 nautical miles.

86. Aside from cases in which the criminals or victims were a country's own citizens or the ships were a country's own, many countries did not had prescriptive jurisdiction regarding piracy off the coast of Somalia. .

87. Mr. Okano stated that basically all countries condemn acts of piracy, but countries that had the political will to apprehend, prosecute, and punish pirates on their own were limited. The United Nations Convention on the Law of the Sea leaves the extent to which crackdowns are actually carried out to the discretion of the countries.

(2) Who will apprehend the pirates?

88. Elaborating further on the theme of his presentation, he observed that International Law did not stipulate whether it was the navy or the coast guard authority that should crack down on piracy, and that was left up to the discretion of each country. In general, the warships of the navy were suited toward long-distance cruises and they had the advantage of being able to deal with pirates who possess advanced weapons.

89. Nevertheless, it was generally not the role of armed forces to apprehend and prosecute criminals and hand them over to judicial authorities. In case of Japan, according to the Anti Piracy Law, when a ship of the Maritime Self-Defense Force was dispatched, personnel of the Japan Coast Guard who were judicial police officials should be present on ships and they would carry out judicial proceedings such as the apprehension of criminals.

(3) What should be done with the apprehended pirates?

90. What should be done with the pirates who have been apprehended? It would be difficult to hand them over to Somalia where the judicial system was not functioning. It was thought that many of the ships which were attacked by pirates had Liberia and Panama as their flag states, but these countries did not seem to be proactive about prosecution.

91. Should a capturing country transfer pirates to its territory and prosecute them there? That was a focal point in discussions by the Working Group on within the Contact Group. Practitioners in the governments of many countries are grappling with issues such as:

- the cost of transferring Somali pirates to capturing countries
- the benefit of having pirates serving sentences in capturing countries, (for many Somali pirates, life in a prison in a developed country may be more comfortable than life in Somalia, and conversely, serving prison time in a culture that the person has absolutely no contact with before may be more oppressive than necessary.),
- how to ensure that the pirates return to their home after the sentences have been completed.

(a) Prosecuting and handing over pirates

92. Should the apprehended pirates be prosecuted in their own countries? Currently most of the countries were not able to prosecute the pirates based on their domestic laws, or if they were able to prosecute, avoid doing so as long as they were not directly associated with an incident. In

some cases countries released pirates at sea when it became clear that their ships and their citizens had not been involved in any incident.

93. On the other hand, many countries were handing over pirates so that they could be tried as much as possible in Somalia and other countries in the area. France had handed over pirates that it detained to the authorities of Puntland, a region in Somalia. Kenya graciously accepted Somali pirates by virtue of a memorandum of understanding with the UK, the EU, the US.

94. For the receiving country Kenya, prosecuting and imprisoning Somali pirates who had not directly violated its legally protected interests carried a large burden, and Kenya had pointed out to countries with which it had agreements and other countries its need for support in the development of laws and financial support. He said that in this context, it needs to be noted that the EU countries were requesting that Kenya carried out prosecution based on those agreements, but meanwhile they were also asking the country not to carry out the death penalty for pirates.

95. Another question that came with the handing over of pirates was its legal nature. These acts were mostly done based on bilateral agreements but the legal characterization in each country varied. Some countries considered them as acts of transfer without arrests because in their system once they arrested suspects, formal extradition procedures should be used. Other countries could arrest them and hand them over by using their administrative discretion to set them free. The practices in the international community are not consistent.

(b) Human rights of pirates

96. Another aspect, towards which Mr. Okano drew attention, was that the Legal Advisors should carefully consider human rights of pirates. If a country was to prosecute pirates in its own territory, it needed to transfer the pirates across long distances from the location where they were apprehended to its own territory. During that process, how to ensure the rights of the pirate suspects according to criminal proceedings was an issue. In the codes of criminal procedure of each country, criminal proceedings were set forth from the perspective of protecting the human rights of suspects. These included requiring prosecution and the transfer of custody to judicial authorities within 48 hours or 72 hours after detention.

97. The International Covenant on Civil and Political Rights (ICCPR) in Article 9 stipulated the liberty of persons and procedures for arrest and detainment and in Article 10 stipulated the handling of persons who had been deprived of their liberty.

(4) To which extent can we use weapons against pirates?

98. Piracy crackdowns were police activities, and the weapons might be used to seize pirate ships. The use of weapons stated here did not correspond to the threat of force or use of force in international relations, which was prohibited in Article 2-4 of the Charter of the United Nations. Any use of force, however, must be both necessary and proportionate.

99. In April 2009, United States Navy Seals shot and killed three pirates who were holding captive Captain Richard Phillips of the United States transport ship Maersk Alabama. The SEALs carried out the shooting based on the fact that one of the pirates was pointing a gun at Captain Phillips. Some said that this was a successful example of measures against piracy, and practically no one in the international community criticized the actions of the United States.

(5) Ransom money

100. The pirates of Somalia were less interested in seizing cargo and diverting ships than in obtaining large amounts of ransom money. The total amount of ransom money paid in 2008 was said to be over 30 million dollars. Ship-owners tend to settle the situation peacefully by paying ransom. In December 2008, the United Nations Office on Drug and Crimes (UNODC) called for shipping companies and insurance companies not to worsen the situation by paying ransom money.

101. Nevertheless, there were no conventions and so forth that call for payments of ransom money to be made illegal in the domestic laws of countries. In domestic legal systems as well, making payments of ransom money illegal in kidnapping crimes is not taking place in many countries. It will be difficult to legally obligate private shipping companies not to pay ransom money.

(6) Self defense measures by ships (including security by private security companies)

102. Discussions were taking place about arming some private ships so that they were no longer vulnerable to pirates. If private ships traveling international waters begin arming themselves, however, various problems will arise. These include:

- the probability of weapons being used in international waters rising;
- the vulnerability of unarmed ships standing out;
- the possibility that if the use of weapons is permitted, it will escalate in scale since the weapons of pirates such as the those off the coast of Somalia are advanced;
- the danger that acts of piracy will occur targeting the weapons equipped on private ships.

103. Ship-owners generally are wary about arming their ships. Free and safe navigation in international waters should be secured. While it may be inevitable that private ships equip themselves with non-lethal defense measures, we should be cautious about the installation of lethal weapons as it may disturb peace and order on the oceans.

Conclusion: Our Way forward

104. Finally, in conclusion, Mr. Okano expanded on the way forward on that issue and enumerated the following challenges, faced in that context:

105. First, the most important thing was to tackle the root cause of the issue: restoring

security, governance, and the rule of law in Somalia.

106. Second, introducing or revising domestic law will be important so that a State can effectively seize and prosecute pirates on the basis of universal jurisdiction.

107. Third, how to strengthen international legal framework. Is it advisable to obligate each State to crack down on piracy? My sense is that this would raise various problems.

108. Furthermore, there was need to strengthen the legal framework in another way by establishing a mechanism that would identify the most suitable country to prosecute and punish pirates in light of effective punishment and the prevention of crime. That was apparently a matter of coordination of jurisdiction, but in its essence, it was a matter of the sharing of responsibility between the mother country of the pirates, surrounding coastal countries, and the victim country. No country denied the need for international cooperation in order to crack down in piracy, but most countries were hesitant about taking on the burden themselves. As long as the countries of Europe, North America, and Asia continued to take a passive stance toward receiving pirate criminals, discussions in the future will focus on how the international community would build a balanced cooperative structure in order to lessen the burden on coastal countries.

B. Working Session on "Delimitation of Maritime Boundaries"

109. The **Vice President** introduced the first speaker Judge Shunji Yanai for the Working Session on "Delimitation of Maritime Boundaries". He informed that Judge Yanai was a judge from the ITLOS and his topic was "The Role of Tribunal in Maritime Delimitation Boundaries Dispute". He had been a Member of ITLOS since 2005. He read law at the University of Tokyo. He had an illustrious career in the diplomatic services of Japan. Among his exclusive list of professional services were: Associated with Ministry of Foreign Affairs (1961–2002): Director, International Conventions Division (1976–1977), Director, Legal Affairs Division (1977–1978), Director, Treaties Division (1978–1981), Counsellor-Minister, Japanese Embassy, Republic of Korea (1981–1984), Deputy Director-General, Asian Affairs Bureau (1984–1987), Deputy Director-General, Treaties Bureau (1987), Consul General of Japan, San Francisco (1987–1990), Director-General, Treaties Bureau (1990–1992), Executive Secretary, International Peace Cooperation Headquarters, Prime Minister's Office (1992–1993), Director-General, Foreign Policy Bureau (1993–1995), Deputy Minister for Foreign Affairs (1995–1997), Vice-Minister for Foreign Affairs (1997–1999), Ambassador Extraordinary and Plenipotentiary, Japanese Embassy, United States of America (1999–2001); Professor of International Law, Chuo University, Tokyo (2002–2007); Visiting Professor of International Law, Waseda University, Tokyo (2002–2007); Senior Advisor to the Rector, United Nations University (2003–present); Director, Mitsubishi Electric Corporation (2003–present); Professor, Waseda University, Tokyo (2007–present); Advisor, Japan Atomic Industrial Forum, Inc. (2008–present). He had been a part of the delegation of many international negotiations and Conferences which include: Vienna Conference on the Law of Treaties (1968–1969); UN Conference on Trade and Development (1972); Third UN Conference on the Law of the Sea (1973–1978); Drafting Committee of the

Law of the Territorial Sea (1977). He had authored numerous articles including, "Japan and the Emerging Order of the Sea: Two Maritime Laws of Japan", Japan's Legal Framework for Peace-keeping Operations and International Humanitarian Relief Operations", and more recently "Drastic Changes in Japan's Diplomacy".

I. Presentation by H. E. Judge Shuji Yanai of the International Tribunal of the Law of the Sea on "The Role of Tribunal in Maritime Delimitation Boundaries Dispute"

110. Judge Shunji Yanai, of the ITLOS stated that he was very honoured and delighted to make a presentation on the topic "The Role of Tribunal in Maritime Delimitation Boundaries Dispute" before all the distinguished participants. His presentation was divided into: i) Introduction, ii) Overview of the dispute Settlement Procedures, iii) Role of ITLOS, iv) Advantages of ITLOS, v). Some constraints of dispute settlement procedure, vi). Some other features of ITLOS and vii) Conclusion.

111. He stated that the disputes concerning delimitation of boundaries on the sea was among the most difficult and serious disputes because of the involvement of economic, political and emotional interests. For those reasons, he emphasized that there was a need for peaceful settlement, need for peaceful settlement by a third party an impartial body, particularly through procedures entailing binding decisions.

112. Judge Yanai gave a short overview of the dispute settlement procedures under United Nations Convention on the Law of the Sea (UNCLOS). It provided for obligations to settle disputes by peaceful means under Article 279. This provision was very similar to the Article 33 of the Charter of the United Nations. The procedures entailing non-binding decisions rather the procedures were very detailed for conciliation and as to compulsory procedures entailing binding decisions there were detailed provisions in Article 286 to Article 296. The most basic article was Article 287 which provided the choice of procedure. According to that article, a State could chose by a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the UNCLOS which included concerning the delimitation. It enumerated four different fora and they were: 1) International Tribunal for the Law of the Sea, 2). International Court of Justice, 3). An arbitral tribunal constituted in accordance with Annex VII of the Convention, and 4). A special arbitral tribunal according to Annex VIII for certain categories of disputes specified in the Annex. Those categories were the following: i). fisheries, ii) marine environment, iii) maritime scientific research and iv) navigation which include pollution from vessels and dumping. This was rather complicated procedure and there was a criticism against this mechanism saying that it was kind of proliferation of judicial bodies. He did not agree with that criticism that at the level of international enforcement, they needed to make bringing disputes to the third party binding decisions easier. So, that mechanism responded to the present day international law.

113. Judge Yanai informed that as there were four different procedures under the law of the sea Convention and how would it function. Article 287 provideed that a party to a dispute not covered by a declaration such a State party shall be deemed to have accepted arbitration in

accordance with Annex VII. When party to a dispute was not covered by any declaration, such a State party shall be deemed to have accepted arbitration in accordance with Annex VII. This was a kind of safety net provision, and secondly if the parties to a dispute had accepted the same procedure for the settlement of dispute. The dispute might be submitted only to that procedure (unless the parties otherwise agree). Concerning the declaration on the choice of procedure, he informed that till then 40 State parties, out of 159 countries made declarations. Among the 40 declarations, 24 declarations had accepted ITLOS as the preferred means of dispute settlement. Almost the same number of State parties had accepted the ICJ also. He invited more State Parties to have the declarations.

114. As to the jurisdiction to the procedure, Judge Yanai explained that the same Convention, in part XV, under Article 288, the Tribunal had the jurisdiction concerning the interpretation or application of Law of the Sea Convention which was submitted to it in accordance with the Convention. Secondly, the Court or Tribunal shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement relating to the purposes of Law of the Sea Convention, which was submitted to it in accordance with the agreement. So, the jurisdiction of the Court and Tribunal were likewise, it not only included Law of the Sea Convention but any other related agreements.

115. On the role of ITLOS in boundaries delimitation disputes, he stated that the concerned provisions of jurisdiction would naturally apply to the ITLOS. So the Tribunal had wide jurisdiction not only on the interpretation and application of Law of the Sea Convention also they could handle concerning the interpretation and application of any other agreements related to the purposes of the law of the Sea Convention.

116. At the Tribunal, there were two different fora to deal with delimitation disputes. First of all, the Tribunal had full court of 21 judges to deal with such cases. Secondly, the Tribunal had established a Chamber for handling the cases concerning delimitation i.e., the Delimitation Chamber which was established in 2007. It consisted of the President and 9 other Judges. The current composition was: 4 Asian, 3 Africa, 1 WEO, 1 East Europe and 1 Latin America and Caribbean States. As to the jurisprudence, unfortunately, they had not received any case so far. When compared to ICJ, the Tribunal was a young body. They were only 13 years old. The Tribunal had mostly cases related to prompt release of vessels and some were other disputes also. But, so far no case concerning the delimitation had been brought before it.

117. As regards the advantage of ITLOS, he mentioned that similar to the International Court of Justice (ICJ), the Tribunal was also a permanent judicial body and hence it was available to the parties to submit their dispute at any time. Secondly, as a permanent body, consistency of its jurisprudence was highly expected, thirdly, inexpensive procedure as compare to the arbitration. Fourth, the Tribunal had 21 judges which was more than ICJ's strength. Further, the judges were from all regions of the world representing major legal systems could bring well balanced decisions. All the judges were law of the sea experts and many of them even participated in the preparation of the Convention. The Tribunal was equipped with urgent procedures and could take prompt decisions.

118. Nevertheless, he said that there were some constraints. Firstly, only a limited number of declarations concerning the choice of procedure referred to in article 287 of the Convention. Second, in article 298, an optional clause concerning exceptions to applicability of Part XV, under this, a State Party could opt out certain disputes concerning sea boundary delimitations such as disputes concerning territorial waters, Exclusive Economic Zone and Continental Shelf. Till then there were 27 declarations. Among them there were 22 excluded concerning maritime disputes.

119. Judge Yanai briefly outlined some other features of ITLOS. He observed that first of all, the Tribunal could prescribe provisional measures pending the constitution of an arbitral tribunal. As they knew, constituting an arbitral tribunal took some time and therefore, pending the constitution of such arbitral tribunal, the ITLOS could prescribe provisional measures, so that dispute cannot go worse under Article 290 para.5. Another feature was the Advisory opinion. Judge Jesus touched upon in his presentation about that. The Tribunal may give an advisory opinion on a legal question, if an international agreement related to the purposes of the Law of the Sea Convention which specifically provided for the submission to the Tribunal of a request for such an opinion. This was a new system, it was provided in Rules of Tribunal Article 138 and Article 21 of Statute of ITLOS. In ICJ, the United Nations and its Specialized Agencies could render advisory opinion but not the States. In the case of ITLOS, the States could ask for an advisory opinion from the Tribunal.

120. In conclusion, Judge Yanai said that the absence of clear rules of delimitation in the provisions of Law of the Sea Convention concerning Exclusive Economic Zone and Continental Shelf gave rise to many delimitation boundaries disputes. He stated that in the case of territorial waters, Article 15 of the UNCLOS, there was a median line principle, but in the case of EEZ and Continental Shelf there was no such principle or rules. Therefore, he invited the States Parties that the above mentioned jurisdiction and features of ITLOS should be fully utilized for the peaceful settlement of disputes concerning boundary delimitations.

121**.** The **Vice-President** thanked Judge Yanai for his lucid presentation and introduced Mr. Robert G. Volterra from the law firm Latham and Watkins, United Kingdom. He informed that Mr. Volterra would provide a practitioner's perspective in handling maritime boundary limitation disputes. The panelist was a partner in the London office and headed the famous Public International Law Group that was consistently ranked in the top tier by both the Legal 500 and Chambers and Partners directories. He had advised and represented governments, international organizations and private clients on a wide range of contentious and non-contentious public international law, international dispute resolution issues, including international investment agreements, bilateral investment treaties, international arbitration and litigation, diplomatic and consular law boundaries and territorial integrities and so on and so forth. He was a visiting professor at the University College of London, Joint Secretary of the British branch of the International Law Association (ILA), member of the International Chamber of Commerce (ICC), Latin America Arbitration Committee, and was on the managing board of the British Institute of International and Comparative Law, Forum on International and Investment Law. He was also

on the Expert Panel of UNCTAD program, on dispute settlement in international trade. The Financial Times had ranked Mr. Volterra's practice in the first place in the legal expertise category of the Innovative Lawyer awards. Legal 500 IHC has ranked Mr. Volterra's practice in the top tier for the past ten years, and so on and so forth.

II. Presentation by Mr. Robert Valettra on "A Practitioner's Perspective in Handling Maritime Delimitation Boundaries Dipsute"

122. The Panelist observed that he wished to present a comprehensive guide book a very practical guide book for governments on how to deal with maritime boundary disputes on a practical basis. It was sort of a step by step guide about how to go about managing the process of managing maritime boundary disputes and hence he would refrain from discussing about the theory and the law. He underscored that the theory and the law would not win a maritime boundary case, and neither it would help in winning the maritime boundary negotiation.

123. The Panelist said that he would make a presentation on seven different things, first, introduction; second models for governments to establish management processes to deal with boundary management issues; third, the process management of dealing with maritime boundary de-limitation; fourth, negotiations and third party dispute settlement; fifth, binding third party dispute resolution procedures; sixth the relevance of substantive law; and lastly the conclusion.

124. The Panelist observed that as the topic of his presentation was "Practitioner's Perspective in Handling Maritime Boundary Limitation Disputes", his presentation would contain very precise references to international law dealing with maritime boundary delimitations, and thus it could also be relevant for land boundary disputes. It could also be a useful on how to deal with CLCS Continental shelf submissions. In fact, he said it could be practically a presentation dealing with how governments could deal with and manage any kind of complex international litigation. Although, his focus would at that instance be limited to maritime boundary limitations.

125. The Panelist said that territorial claims were very relevant, as it had to do with national jurisdiction, exercise of resources, and so on. Boundaries, limited in a practical way the extent of states jurisdiction in international law and in international relations and therefore they were important. There are three alternatives when faced with a boundary delimitation dispute. One was conflict. A country may be able to go to war. Two, there might be a stalemate and may do nothing about it. Three, one may take recourse to law and resolve the boundary delimitation issue, either through negotiation either through reference to law or through a third party dispute resolution procedure. Boundary disputes were factually, technically and legally, complex, and they could present almost overwhelming challenges to any government to deal with in a comprehensive and thorough way, to defend their national interests. There tended to be a very complex interrelationship between the facts and evidence and the law that required sophisticated litigation strategy and forensic case management skills. Whether one was negotiating a solution or litigating for a solution, it was a complex dispute like any other dispute was needed to be handled accordingly.

126. The Panelist mentioned that resolution of maritime boundaries throughout the ages had never been the result of an abstract academic theory. It was a very practical exercise whether it was accomplished through negotiation or third party dispute resolution such as arbitration or an international court or tribunal. In that regard, he pointed out that history of both maritime boundary negotiation, as well as more importantly maritime boundary arbitration, either before the International Court of Justice or other international courts and tribunals, inevitably, demonstrated that the winning side, the winning country, used a law firm that had public international law expertise. In this regard, he drew attention to the decisions in the cases of Qatar v Bahrain; Nigeria v Cameroon; Malaysia v Singapore; Barbados v Trinidad and Tobago; Costa Rica v Nicaragua; and The Abeyi Arbitration (Sudan v South Sudan). He said that in all these cases, the country that had hired a professional law firm won the case. And the country that perhaps used some academic advisers but did not had a professional law firm that undertook professional case management at the international level lost.

127. Proceeding further, the Panelist explained the kind of models of dispute management, issue management, project management, that could be used by the governments in dealing with boundary issues. He suggested for the models for establishing National Committees on Boundary Issues. Based upon his personal experience, the Panelist said that the countries that had set up national committees for dealing with boundary and sovereignty issues had an enormous advantage in terms of internal process management and external coordination of the dispute management procedure. However, it was essential to get the right model wrong, otherwise the results could be fatal. The Governments might make enormous flaws from the very initial stages on how they go about organizing themselves internally, and they would definitely want to avoid those mistakes. In terms, of process management for boundary disputes, there was a hierarchy of process as with any project management. These were

- Various agency competences and experiences
- Stakeholder input
- Data gathering and evidence processing
- Legal analysis
- Issue identification (legal, factual, political, diplomatic)
- Legitimisation of decisions
- Policy, positional and strategy formulation
- External expert selection
- Multidisciplinary dispute team management
- Consistency and coordination of responses
- Different phases of disputes
- Negotiation
- Litigation

128. The Panelist emphasized that each stage was required to be effected properly. One had to start to find out which were the various governmental agencies that had the requisite experience. One had to get the get stake holder input, to know which part wanted what, such as there might maritime area which holds importance for a national oil company or for fisheries. It was essential for the Government to find out what each stake holder in the dispute wanted and as a government

how could it effectively set out the goals for negotiation and outcome. Therefore, each of those stages had an essential element.

129. As regards, the types of government process management models, he had put up seven models.

Model 1 – multiple agencies; no coordination

- Multiple agencies
- Operate in isolation, at best, competition, at worst
- Pros: efficient decision-making, analysis and response times; continuity of personnel
- Cons: ineffective decision-making, analysis and response times; no coordination; competition; difficult to obtain and coordinate data input; questionable legitimisation of decisions; stakeholder alienation; limited competency in different subject-matter areas; limited experience dealing with various substantive issues; limited experience dealing with external expertise
- Issue: how can the State have a coherent policy and execution?

130. The Panelist said that the first model was rather unfortunate. It was the worst one, of course, that was where there were multiple agencies in the government with no coordination. The Ministry of Finance might be pursuing one path to resolution maybe because they were in charge of the oil company. Ministry of Foreign Affairs might be pursuing another; the Ministry of Justice might be of the view that it had competence because that was litigation. A situation of that kind, in his view would lead to absolute chaos, and therefore that was the worst model.

Model 2 – one agency; no coordination

- One single agency
- Operates in isolation
- Pros: efficient decision-making, analysis and response times; continuity of personnel
- Cons: possibly ineffective decision-making, analysis and response times; difficult to obtain and coordinate data input; questionable legitimisation of decisions; stakeholder alienation; limited competency in different subject-matter areas; limited experience dealing with various substantive issues; limited experience dealing with external expertise
- Issue: what happens if the agency is not competent for different phases of the dispute?

131. In the second model, one agency was in charge but there was no coordination with anyone else. The Foreign Ministry was of the view as it was an issue dealing with boundaries, it was their concern. They might do it on their own and deal with it, without taking into account the concerns of other agencies, or be getting stakeholder input. They thought they know what the best was and might lose the issue by operating in isolation. The Panelist said that in some instance, such an approach might work, but history demonstrated that it generally did not. He emphasized that not every, but most Foreign Ministries had little internal capacity to deal with litigation. Most governments dealt with that through the Ministries of Justice or Attorney-Generals Chambers. However, there were exceptions, for instance, the Canadian Ministry of

Foreign Affairs had around fifty lawyers to deal with international litigation. At any rate, at least there was only one agency in that model, hence there were no competing agencies.

Model 3 – one agency; ad hoc coordination

- One single agency
- Operates in isolation but coordinates data and inputs from other agencies in *ad hoc* manner
- Pros: improved coordination; improved efficient and effective decision-making, analysis and response times; continuity of personnel
- Cons: difficult to obtain data input; questionable legitimisation of decisions; stakeholder alienation; limited competency in different subject-matter areas; limited experience dealing with various substantive issues; limited experience dealing with external expertise; limits to pros (subject-matter competency and awareness of inputs)
- Issue: what happens when the agency is not competent for different phases of the dispute?

132. As regards, model three, the Panelist said again it had one agency, it might be Ministry of Justice, Ministry of Foreign Affairs, or Prime Minister's Office. In such a model there was some ad hoc coordination. They coordinate; they try and deal with other agencies and ministries inside the government. But it was on an ad hoc basis. There was more coordination, there was more input, and it was a cohesive model being followed. But there were difficulties, enormous difficulties in that model, as other agencies did not had formalized connections in that model, and hence they were not in a position to provide their formalized inputs. It relied on individuals from the one agency that was dealing with it, contacting on an ad hoc basis officials in other agencies.

Model 4 – lead agency; formal coordination

- One lead agency but formal participation of other agencies
- Lead agency operates in coordination with other agencies
- Pros: coordination; improved efficient and effective decision-making, analysis and response times; better data input; better legitimisation of decisions; improved competency in different subject-matter areas; improved experience dealing with various substantive issues; improved experience dealing with external expertise
- Cons: uncertain continuity of personnel; stakeholder alienation; limits to pros (subject-matter competency and awareness of inputs)
- Issue: what happens for different phases of the dispute?

133. In the fourth there was one lead agency and there was some formal coordination in that model and that led to improvement in efficiency and all sorts of improvements and experience. But as there was formal coordination but nothing more, there were cons to that model: an absence of continuity of personnel in an agency, stake holder alienation, if it was just one lead agency dealing at a coordinated fashion with others, it might reduce the incentive for other agencies to participate as stake holders. And there was also a lack of awareness. The panelist emphasized that there was need a to know history, as boundary disputes between countries lasted

for ages. There was the requirement of having an institutionalized memory in their government agencies and institutionalized coordination which could end up with a discoordinated and an inconsistent approach. In such type of cases, a government might appear before the International Court of Justice without realizing what other stakeholders in the government were doing in the past.

Model 5 – national committee; no lead agency

- Combined committee with institutionalised participation of relevant agencies and stakeholders
- No lead agency and *ad hoc* management
- Pros: data input; legitimisation of decisions; competency in different subject-matter areas; experience dealing with various substantive issues; experience dealing with external expertise
- Cons: conflict over management of process; inefficient and ineffective decision-making, analysis and response times; uncertain continuity of personnel; conflict over substantive competency
- Issue: how to manage the process?

134. Model 5, the Panelist stated was a step forward. There was a National Committee. There was recognition on the part of the government that they needed some kind of unified organ to deal with that problem. That issue touched upon many different facets of governance and the national polity. But in that model there was no lead agency. So again there was no advancement in terms of coordination, efficiency and so on. But there was no lead agency in that model five and the drawback of course was who was going to manage the process, who took the lead, at what point. It could lead to rather chaotic results. Better coordination, better data input, better process but less coordination when there was only one lead agency.

Model 6 – national committee; wrong lead agency

- Combined committee with institutionalised participation of relevant agencies
- One lead agency but not the appropriate one
- Pros: coordinated data input; legitimisation of decisions
- Cons: inefficient and ineffective decision-making, analysis and response times; uncertain continuity of personnel; incompetent in different subject-matter areas; inexperience dealing with various substantive issues; inexperience dealing with external expertise
- Issue: what happens for different phases of the dispute?

135. In Model six, there was a national committee but it was the wrong lead agency in charge. In such a model if there were boundary issue, governments would put together people from the Ministry of Finance, the Ministry of Energy, the Ministry of Justice, the Attorney-General's chamber, the Foreign Ministry. But as the Ministry of Finance had all the money, they may decide that they were going to run the thing. But they might not know about international litigation, or about international relations, diplomacy. They might not be and probably were not the right lead agency. This would lead us then to model seven, divided into model 7 A and model 7 B.

Model 7A – national committee; appropriate single lead agency

- Combined committee with institutionalised participation of relevant agencies
- One lead agency
- Pros: efficient and effective decision-making, analysis and response times; coordinated data input; legitimisation of decisions; competency in different subject-matter areas; experience dealing with various substantive issues; experience dealing with external expertise; continuity of personnel
- Issue: which is the appropriate lead agency?

Model 7B – national committee; varying lead agencies

- Combined committee with institutionalised participation of relevant agencies
- One lead agency that varies depending on the phase
- Pros: efficient and effective decision-making, analysis and response times; coordinated data input; legitimisation of decisions; competency in different subject-matter areas; experience dealing with various substantive issues; experience dealing with external expertise; efficient decision-making, analysis and response times; continuity of personnel
- Issue: who decides which agency is appropriate for which phase?

136. The Panelist said that model seven had a national committee with an appropriate single lead agency that ensured permanent participation in a national committee. This ensured that the source of data flow was backward and forwards between the lead agency, as well as had a coordinated approach, with stake holder input. The question was which one could be the lead agency? That led to the variation which was model 7B which was when there were varying lead agencies, that have been in situations where governments went, for example, up to including in negotiations, a Foreign Ministry had been in charge of the National Committee and the process, but once dispute resolution was triggered, then that was handed over to, for example, the Ministry of Justice because they were traditionally the people who knew how to deal with litigation and lawyers and courts and so on, at a national level. Therefore, he would certainly recommend the governments to adopt either model 7A or model 7B.

Model 7 committee modalities

- Authorised by a clear government mandate
- Led by a single lead agency (or one at a time)
- Managed by a dedicated, authorised lead individual within that agency (assisted, as required)
- Develops clear objectives, strategies and tactics based on the mandate
- Comprised of relevant agencies participating with specific, authorised representatives (who are agency conduits)
- Comprised of stakeholders participating with specific authorised representatives (who are stakeholder conduits)
- Draws on agency and stakeholder competencies, as required
- Establishes clear reporting lines from the committee upward, inward, outward

- Creates and supervises managed timelines and work-plans
- Schedules regular meetings and communications
- Has responsibility for all aspects of executing the mandate

137. As regards, the different modalities required for an effective national committee with a single lead agency, the Panelist was of the view that it was authorized by a clear government mandate. That would ensure that there were no doubt that that Committee was exclusively authorized to deal with the maritime boundary dispute or other disputes. It was led by a single agency, and this would prevent chaotic competition at the national level for different agencies. That sort of a committee would be managed by a dedicated authorized single lead individual. The holder of the office may change from time to time but confusion was required to be prevented to ensure that things moved forward. Similarly, individual responsibility in the other participating agencies was also required to be fixed in relation to the boundary dispute, such as in the Attorney-Generals Chamber, the Ministry of Energy to know for instance where oil deposits were. Responsible individuals were required to be identified in each of those agencies. Further, the committee should develop clear objectives, strategies and tactics on and it was not as simple as just saying the words, because just to do those you need to have all the data inputs. What was important for the country? Where were the resources at issue? What was the law that supported their objective? What was the law that did not? And so on. There was a need to have stake holder input, as well as draw on the internal competencies that existed in the government, as well as lay down clear reporting lines, up, down and internally within the committee. Further, time lines, work plans, schedule meetings, coordinative communications, in fact all responsibility for all aspects of executing the mandate including dealing with external experts as required were required to be set out. Model seven had consistently proved to be the best dispute settlement process in terms of process management in terms of boundary delimitation disputes, land boundary delimitation disputes, in fact for any kind of complex litigation involving a government. It just proved that time and again, along with hiring professional lawyers, a national structure was required to handle such matters. As these were long term projects that countries had to deal with, they could not be resolved in a few months, therefore there was need to have clear process management.

Process management for boundary disputes: complex disputes expertise

- Harness the various agency competences and experiences
- Facilitate stakeholder input
- Coordinate data gathering and evidence processing
- Conduct and feed in the legal analysis
- Produce issue identification (legal, factual, political, diplomatic)
- Formulate policy, position and strategy
- Ensure legitimisation of decisions taken
- Select external experts
- Manage a multidisciplinary disputes team
- Ensure consistency and coordination of responses
- Prepare for and conduct negotiations
- Prepare for and conduct litigation

138. Boundary disputes, were highly complex disputes and only very few governments in the world had experience in dealing with such complex disputes and complex international litigation. There were few countries that were regularly appearing before international courts and tribunals to a sufficient degree that they had build up a body of internal competence in any single ministry. It was a highly rarified work. The panelist called upon the delegates to ponder upon in their respective countries, How many times it had appeared before the ICJ or ITLOS or Annex VII Tribunal or WTO Panel or ICSID Arbitration? If their country had not consistently appeared before those kinds of courts and tribunals, on a regular and constant basis, then they were not going to have certain kinds of expertise in terms of dispute resolution management. It just made sense. It was not something one could can read about. It was something to do. Therefore for a dispute resolution process, he had set up some of the things that are required here.

Building and managing an external support team for the government

- A boundary or sovereignty claim cannot be made effectively in the abstract and based on the theoretical application of the law
- Evidence, its collection and its management are critical
- In order to be prosecuted effectively, legal arguments require technical and factual evidence to support them
- Forensic litigation case management brings results
- Evidence and its management are paramount (e.g., examples of cases lost through poor evidentiary analysis and management)
- The fundamental need for a sound technical proposal and approach: so much more is involved than mere legal theory

139. The Panelist emphasized that almost inevitably external support, external legal support, external process management support, external technical experts, was required to work with any experts that one might have in their own country. As in any kind of dispute resolution, whether negotiation or litigation, evidence would be the key driver to all outcomes, evidence and facts. Law helped, as it was the means to communicate their objective and explain the facts but that was not a theoretical academic exercise. It was a very practical exercise and facts and evidence and the management of facts and evidence and witnesses would always win and lose a case.

The need for a team

- What other areas of expert evidence may be required to sustain the legal arguments?
    - Historical
    - Diplomatic
    - Geological and geomorphologic
    - Other scientific
    - Language analysis
- Maritime delimitation negotiation and dispute settlement requires experts from a variety of disciplines

140. The building of a team was essential any kind of complex international litigation. Expertise of all sorts of people would be needed. Historic, diplomatic, geologic, scientific, linguistic exercisers etc. External lawyers would also be needed for building a team, the national committee or the government should identify the needs it had in terms of building a team early on. That was something that should be done years and years before a country decides to sit down with the other side to negotiate.

141. However, before proceeding to a court, in the very early stages, a government need to have an all round team. Of course, the governments should utilize their in-house knowledge, transfer of skill and knowledge base. But the Panelist stressed that he would hesitate to suggest that any government would want to use important boundary delimitation as a guinea pig to see how well they could do? Or how much their local people know about those various things. So one should be careful in building a team. Team management and coordination was extraordinarily important in any kind of project management, but in these sort of long term, highly complex litigations, it was of absolute critical importance. One needed coordinated team work, effective process management, to prosecute complex litigation, whether that complex litigation was in their local courts, or at the international level. Whenever they might engage in any kind of dispute resolution, boundary negotiation or litigation, one should keep in mind what the end result was.

142. The Panelist thereafter proceeded to his fourth point, i.e. Negotiation and third party dispute settlement. They had fundamentally common procedures and common features, the basis of which was the legal informing of an analysis and presentation of factual underpinnings, through evidence in order to achieve your objectives. That was the same via negotiations or litigations.

143. As regards, negotiated settlements, the governments, he said needed to prepare as careful for negotiation as for litigation, and in exactly the same way. But instead of writing written submissions or standing in front of a judge, they had a different discourse and that was directly with the opposite party and the preparation needed to be exactly the same. And lack of preparation was inevitably punished.

144. One was required to know what the legal rights and wrongs were, in an informed way. Until the facts were known, one could not know that until they have tried to manage the evidence and managed to sort it through. They could not do that unless they had got the stake holder inputs. All these were completely interrelated.

145. The Panelist, thereafter invited attention toward dispute resolution in terms of judicial and ad hoc arbitration. In this regard, a State had a number of options before it, such as the standing tribunal, the ICJ, UNCLOS ad hoc arbitration and so on. He emphasized that one must always give thought to the tactics of international litigation. When and how are you going to start litigation? If negotiations had broken of first, then one must have given enough time to negotiations to satisfy the requirements under international law, of good faith and negotiation. The obligation to negotiate was contained in the UNCLOS convention.

146. International litigation and arbitration was almost inevitably highly complex and required complex litigation, management skills. There was the interrelation, between the legal, technical and factual, aspects of a boundary delimitation disputes. It continued from the litigation phase in just the same way as it continued in the negotiation phase. In terms of the dispute resolution process, a State needed to be very careful about the Tribunal it chose. If they had setup an ad hoc arbitration, under what rules were they going to set it up, who were they going to appoint. What procedures would they use? All of these considerations were extraordinarily important and could have an enormous influence on the outcome of their case. A State might have a certain interest in going to the International Court of Justice, whereas the adversary might have an interest in going to the ITLOS tribunal. Not every tribunal was the same or operated in the same way, each of them operated differently and had different advantages as well as different disadvantages.

147. A State before going for international litigation ought to know whether it had legal case or it had more of an equitable case. Did it have more historical facts or whether modern evidence of activities was available? All of these would and should influence their choice of dispute resolution procedure. One needed to keep in mind jurisdictional and provisional measures. There was a distinction between the merits phase and jurisdictional phase. A State should always be prepared for the judgment and the award. They would also need to prepare for it in the political impact. As well as prepare the population various outcomes so they are not surprised.

148. The Panelist stated that the relevant public international law that applied to maritime boundary delimitation was the UN Convention of the Law of the Sea. But it was essential to remember, that it was not a theoretical legal exercise. It was an exercise in advocacy, identification of self interest and prosecution of a complex litigation process in order to achieve their objectives.

149. Each boundary delimitation revolved on its own facts, and facts as any litigator would tell would drive the law rather than the other way around. A State needed to prepare, internally very carefully, and needed to identify the expertise it might require externally. It should be doing this entirely well before it sits down to negotiate with the other side. There was a lot of home work to be done before embarking on the process. Attention was required to be paid to each of these things and chances were that if there was a maritime boundary delimitation dispute, or any kind of boundary dispute, the neighbor knew about it and chances were, the neighbor might be doing all of these things, whether you know about it or not. With all the years of work required to collect evidence, and witness statements and so on, untouched, they had to do it at the same time as they were preparing for a case. It was an enormous advantage. Conversely, he had been brought in situations where the other side had very clearly for years and years had been working with historians and geologists and law firms, and setting out their case completely without his clients even realizing it to the last minute. Therefore, the Panelist advised for planning well in advance because there was no second chance. There was only one chance and after that, the land, the sea, the territory belongs to the other side if one had not prepared and executed properly.

150. The **Vice President** thanked Mr. Volterra for his presentation. He stated that they had been made aware that those boundaries and delimitations were necessary for enforcing national jurisdictions. There were certain options open to them when it came up. Boundary disputes were rather complex and technical. There were forms of dispute management. There were models; he had taken us through, process management stages and all types of models to be followed and so on and so forth. He also recommended model seven A and seven B and said the facts and evidence to win or lose cases. The team management issue had to do with coordination, and when it comes to negotiations it was almost like, in all forms, like litigation.

151. The **Vice-President** introduced the next speaker was Mr. Philip Gautier. He had been the Registrar of ITLOS since 21st September, 2001. His professional experience included Administrator, Treaty Directorates (1984-1988), Law of the Sea, Antarctica office (1988 - 1991), Deputy director, Head of the law of the sea, Antarctica office (1991 - 95), Director, Head of the Treaties Division. He had also been a member of the following delegations, some of them were: Belgian delegation for Maritime Boundary Negotiation with France, United Kingdom and the Netherlands, Preparatory Commission for the Seabed Authority.

III. Presentation by Mr. Phillippe Gautier, Registrar, the International Tribunal for the Law of the Sea on "How to submit a case before the Tribunal?"

152. Mr. **Philippe Gautier, Registrar, ITLOS** thanked the President of the conference, as well as the Secretary-General of AALCO for having associated the Tribunal in the preparation of the Special Meeting devoted to law of the sea matters.

153. His presentation briefly touched upon the basic rules relating to the preparation and submission of a case to the Tribunal. As a way of an introduction, Phillip Gautier stated that it might be useful to all the delegates a more concrete picture of the place where the cases were handled. It was in Hamburg, Germany, the seat of the tribunal. He showed the pictures of the Tribunal by way of slides to the participants.

154. Mr. Gautier said that he would briefly address some of the issues of jurisdiction. But his task would be facilitated due to the intervention of Judge Yanai. The key provision in that respect was Article 21 of the Statute of the Tribunal. There were two distinctions which were made in that provision. First, there was a distinction between disputes. It means contentious proceedings and all application; all matters referred to advisory proceedings, the possibility for the tribunal to give legal opinion. The other distinction was between cases arising out of the convention, the UN Convention on the Law of the Sea, on the other hand, cases arising out of any other agreement. Multilateral agreement or bilateral agreements contained such a clause. The division between contentious proceedings and advisory proceedings for each side there was the possibility to act on the basis of the convention of an order agreed.

155. On the issues of procedure, he presented the perspective of the registry and made a distinction between three phases. i) Prior to the institution of the proceedings, ii) the proceedings were instituted and iii) the conduct of the case. He stated that the registry had played a role prior

to the institution of proceedings. But as it had been explained by Mr. Volterra, a case did not happen suddenly out of the blue, it was preceded by contacts, including with the registry. There were e-mails, phone calls, requests by lawyers or parties. A state when faced with the problem in sea, or exploitation of fisheries resource or delimitation, it would contact the registry to request some information for example, were the state parties to the dispute also parties to the convention. Upon information available through the United Nations Depositary of the Convention, the Division on the Law of the Sea, New York, would check whether it would be possible to inform a breach of the convention. At that instance, the registry does not give any legal opinion. However, the registry might draw the attention to provisions contained in the convention, to research articles published on the subject, the jurisprudence of the Tribunal, etc. For example, if the question was asked as to whether the Tribunal was competent to adjudicate a dispute involving island? The answer would be in affirmative in accordance with Article 121 of the convention that addresses that matter. Therefore there should be a basis for the jurisdiction of the tribunal. Apart from that the parties could always request the President of the Tribunal to consult with him if they want to see which means could be used to settle a dispute. That was done, for example, in the case between the European Community and Chile during the course of the constitution of the arbitral tribunal. There were arbitral proceedings instituted by Chile. Parties experienced difficulties and they consulted the then president, and after two meetings, they decided to transfer the dispute from the arbitral proceedings to the International Tribunal for the Law of the Sea. Another scenario concerned preparatory steps before the institution of proceedings. That related to a critical period of time because the state had the intention to file a case, but it needs some information concerning issues of procedure, and it may be important for the applicant to file a proper application, if it doesn't met formal requirements it may be sent back by the registrar to the applicant. Therefore it was very important to comply with formal requirements, for example, with respect to the application, for example, in the application, the name of the agent of the applicant party needs to be included. Article 54 had to be complied.

156. The other information that the tribunal provides would be with regard to procedural steps to be taken. Judge Yanai already referred about procedural measures pending the constitution of arbitral tribunals. In the implementation of that provision, there was a kind of technical engineering which each party had to be well known. In the cases of protection of environment such as MOX plant case between Ireland v. United Kingdom and in the case of Straits of Johor between Malaysia and Singapore, States may realize that this tool was used to quickly respond to protect the environment. It may also be helpful for the parties of delimitation disputes. For the respondent, it would be helpful to consult the registry of the tribunal.

157. The panelist then briefly mentioned about the institutional proceedings as stated in Article 24 of the Statute. There were two ways of filing the dispute. One was by way of notification of a special agreement and other was by way of written application addressed to the Registrar. The special agreement included written pleadings. These had been clearly explained in the model forms of the guide. The other kind of application was written application under article 287 of the Convention. The second one was the jurisdictional clauses on the basis of Article 27. The third option concern the compulsory jurisdiction of the Tribunal, The fourth one was prompt release under article 292 of the Convention, the Provisional Measures under article

290 para.5 of the Convention. Disputes concerning deep seabed area submitted to the disputes chamber under article 187 of the Convention.

158. In the third part of his presentation, the panelist narrated as to when should a case be instituted. The immediate step was to inform the respondent. Otherwise, the Registrar's job was to contact the Ministry of Foreign Affairs or the Embassy of the Respondent party through by all means. The first step was to contact the Agent. The panelist addressed as regards the consultations which happened between the agents of the party and the President of the Tribunal which was a very crucial step. Those consultations would generally taken place at Hamburg or through Video Conferencing method. During the course of consultations, matters related to written pleadings, memorial, counter-memorial and other related details would be discussed filed by the each party. All the minute details of the consultations would be recorded and sent to each parties of the case. After the closure of the written pleadings there was that step called initial deliberations between the judges of the tribunal not on the merits of the case but with regard to the documentation of the case.

159. The **President** thanked Mr. Phillip Gautier for briefing the delegates about the Rules and Procedures of the Registry of the Tribunal. He said that the Registry looks into the preparatory works of each case and proceedings, written pleadings and rules of the case. The President invited the delegate of the Republic of Indonesia to make his statement on the issue.

160. The **Delegate of the Republic of Indonesia** observed that the establishment of specialized tribunals to settle dispute of specific character had been an emerging trend in interstate relations. Their jurisdiction ranged from the classic dispute of sovereignty over an island to the protection of state's rights in performing consular services to its own nationals. Their mandate varied from trade-related disputes to disputes concerning the implementation of the law of the sea. As one study noted that in the 1990's alone nine international judicial tribunals and nine quasi-judicial bodies were created.

161. The Delegate emphasized that such development had certainly brought positive development. The proliferation of international judicial bodies might be beneficial for international law in general. They contribute also to the promotion of the rule of law in international relations for state now had wider access to international judicial bodies. The cumbersome process and heavy workload of the ICJ could be seen as obstacles to state parties bringing their disputes before the prime judicial organ of the UN.

162. Proliferation of international judicial bodies, however, posed challenge for international legal system in ensuring the same standard of law since each international tribunal was independent from one another. There was no guarantee, for instance that other tribunals would closely follow ICJ judgments. Conflicts concerning multiple jurisdictions might have arisen as result of the proliferation of international dispute mechanism. Where more than one international court is seized of dispute of similar nature conflict decisions can result; thus causing fragmentation of international law. As it was seen, the report of the International Law Commission (ILC) underscored that potential problem.

163. The Delegate stated that Indonesia placed high importance to the role of the International Tribunal on the Law of the Sea (ITLOS) as judicial organ of states party to the Convention to solve legal problems arising from the application or interpretation of the Convention. They were well aware of the great importance of the Tribunal as it had unique procedures for provisional measures under article 290 paragraph 5 of the Convention, prompt release vessels and crews detained for alleged violations of fisheries regulations or marine pollution to settle dispute for delimitation of seabed boundaries. Likewise, the Tribunal had also unique characteristic for as a full court, it has also jurisdiction to entertain requests for advisory opinions.

164. With 21 judges from all regions, the Tribunal constituted an important judicial institution which ensured an adequate regional representation, in particular of developing countries and taking into account different legal system. It was to meet that objective that the Asian and African groups in the United Nations proposing new composition of judges of ITLOS in 2005 so as to enable countries in the two regions to fill an extra seat being occupied by the WEOG. Only after intensive negotiations in the last three years were they finally able to reach a compromise solution on the matter, June 2009, during the SPLOS. That effort certainly reflected their shared commitment to ensure the faithful implementation of the Convention.

165. The delegate observed that being the constitution of ocean, the Convention provided legal framework for any activity with regard to the oceans and the utilization of marine resources therein and served as customary laws. The Convention, therefore, needed to be observed faithfully by states party. For it brought the benefit of certainty and predictability in state's practice with regard to the management of ocean affairs. And such efforts, they believed should be strengthened in the future as they now encountered emerging issues on the law the sea that need their common position.

166. The Delegate said that it was sensible to expect that states party and other appropriate entities to make benefit of the Tribunal for settlement of disputes which might arise between them in connection with activities concerning the control, management and use of the resources of the seas and oceans, and the protection and preservation of the marine environment. It may be that, in the early years of the Tribunal, there was some hesitation in accepting the jurisdiction of the Tribunal on an exclusive or preferential basis. Now that the Tribunal had established itself as an active and effective body in deciding law of the sea disputes, it would be opportune for States to consider the Tribunal as "forum of convenience" to settle dispute on the law of the sea issues. They were pleased that a Trust Fund had been established to assist developing countries to obtain financial assistance for expenses incurred in connection with cases submitted, or to be submitted, to the Tribunal, including its Seabed Disputes Chamber and any other Chambers.

167. Moving on further, the delegate stated that the Government of the Republic of Indonesia attached great importance on the ongoing discussion on piracy problem in the high seas adjacent to Somali's waters. They understood how important it was for the international community to stand together to fight *hostis hominis genesis* – menace to human community – for they affect the international navigation. The piracy problem in Somalia was particular, special case, as a result

of prolonged conflicts which led to insecurity of the socio-political situation in the terrestrial parts. Such insecurity extends to waters within Somali's jurisdiction and subsequently affects their adjacent high seas.

168. For that reason, Indonesia had been supportive to the request of the Somali's government to the Security Council for international assistance. And they were pleased to learn that authority to fight piracy in the high seas adjacent to Somali's waters as mandated by 1816 (2008) had been construed to apply to the specific case of Somalia based on their consent; thus it shall not be considered as establishing customary international law. Operative paragraph 9 resolution 1816 affirmed that parameter.

169. The Delegate observed that it was worth noting that the authority prescribed by subsequent resolutions of the UNSC had been expanded progressively. Whilst initial resolution gave mandate for countries operating in the Somali's water to use actions that were allowed in the high seas into territorial waters, subsequent resolutions went further by authorizing the use of force even into terrestrial dimension; the coastal areas along the coast of Somalia.

170. Thus, what might be seen from the UNSC responses was the combination measures of law enforcement and that of military. That was certainly new approach to address common criminal acts which happened at sea against vessels transiting in the high seas adjacent to Somali's waters.

171. Despite those stringent measures, they observed with great concern that incident of piracy in Somalia continued unabated. Because of that situation, some might also be tempted to establish linkage between piracy and terrorism. They believed that such hypothetical construction was erroneous since those two criminal acts were legally different.

172. The Delegate noted that Article 101 of the 1982 UNCLOS prescribed the substantive element of private ends for piracy whereby terrorism, in contrast, had no interest to gain economic benefit but spreading terror. Terrorism was an act of political motivation. Likewise, it was also dangerous to insinuate such linkage for it might create "*the Hollywood effect*", and eventually inspire a self-fulfilling prophecy. Being victims of terrorism, Indonesia was fully aware on the need to strengthen the international cooperation to fight this menace for international community. They would certainly not succumb to that coward act. And the international response against terrorist acts, they firmly believed should consistently be conducted in accordance with international law.

173. The Delegate said that new measure to address the piracy problem in Somalia through the establishment of international tribunal on piracy by the Security Council was being discussed. That proposal had been informally discussed since April 2009. The establishment of Tribunal for Rwanda and Tribunal for Yugoslavia, they believed had inspired the latest proposal because of the assumption of jurisdiction loopholes. Some countries, for instance, released the pirates who were already apprehended because of no jurisdiction as they claimed for two reasons: (i) no

genuine link (no nationals as victims or perpetrators); and (ii) concern on the human rights aspects in due process of law.

174. The delegate emphasized that there was a need to be critical to that new measure. Piracy was the oldest crime of universal character. Article 105 of the UNCLOS mandated every state to seize vessels committing piracy in the high seas and any other place outside of state's jurisdiction. And state that captured the alleged pirates shall bring the culprits into justice. They believed that it was an *erga ommes* obligation. It was the universal jurisdiction that inspired the establishment of the tribunals in Rwanda and Yugoslavia, and paved the way for the establishment of the ICC Rome in 1998 to prosecute perpetrators of genocide, crimes against humanity, war crime and crime of aggression.

175. It was interesting to see how the international community implemented the universal principle. In case of the human rights violation they rushed to bring the alleged perpetrator to trial as recently reflected in Pinochet case. Whilst in case of piracy in Somalia, they sent the captured pirates back to the sea. It was further bewildering to learn the alternative proposal. As they had seen, they sent captured pirates to the third country in the region for prosecution. There was no guarantee that the perpetrators were nationals of the latter or it had genuine interest. Likewise, they might raise question on the double standard on the application of human rights as it would raise the problem of rendition.

176. Thereafter, the delegate turned to the possible jurisdiction of the Tribunal. One question arose whether the tribunal would only adjudicate piracy incidents using the UNCLOS legal regime or would it be extended to include other illegal acts at sea using different legal instruments, such as SUA Convention or the Hostage Convention. On several occasions, to address piracy problems in Somalia, emphasis has been laid on the application of anti-terrorism conventions. In that regard their reply was straight forward since by definition, they were different and that international law treated each of them differently.

177. In that context, it was very important in the criminal proceeding since judges had obligation to prove, beyond reasonable doubt, that the substantive element of crime was verified. As *locus* of piracy occured in the high seas or outside the jurisdiction of any state, the incorporation of other crimes at sea into the tribunal on piracy will potentially modify international law. It was also relevant in that regard, that piracy *per-se* was not threat to international peace and security, but deteriorating factor to the socio-political situation in Somalia. Hence, the establishment of tribunal on piracy by the UNSC was in contradiction with the nature of piracy as an ordinary crime or criminal act which happens to occur in the high seas. They were doubtful that the establishment of Tribunal could solve the root causes of the problem in Somalia, i.e. prolonged internal conflicts. Equally, it would send a sense of injustice for the Somali's people. Whilst the jurisdiction of the Tribunal concerned only the interest of the international community, it tended to negate the interests of Somali's people to ensure that its waters were free from illegal fishing. It might be recalled in that regard, the statement made by the Somali's representative during the conference on piracy in Kuala Lumpur early that year; that fishermen-turn-pirate in the case of Somalia was encouraged by the rampant illegal fishing by

foreign vessels. They took the advantage of inability of the Somali's government to protect marine resources within its national waters.

178. The establishment of tribunal by the UNSC also created problems of administrative nature. Since resolution of the UNSC – taken under Chapter VII of the UN Charter - was legally binding upon all member states of the UN, it brought consequences that tribunal was an institution under the administration of UN. Hence, election of judges and the funding would be conducted through process of the United Nations. In light of that, it was relevant to mention the financial problem constantly faced by the Tribunal Rwanda and the Tribunal Yugoslavia to support their completion, and at that stage the UNSC had been strived to find workable exit strategy.

179. In conclusion, the delegate stressed that what transpired from that inconsistency was deficit of political will rather than the presupposition of legal loophole in international regime against piracy. That was an area whereby they needed to rectify rather than promoting new measures inconsistent with the international law.

180. The **Delegate of Arab Republic of Egypt** briefly mentioned about the Egypt's legal system which applied against the Piracy crimes. His focus was on three points and they were: i) Domestic law, ii) Jurisdiction, and iii) international cooperation. Considering the domestic law, the delegate pointed out that the Egypt's penal court criminalizes all kinds of piracy which was taken against the ships and vessels, detention and even against the crew or the robbery of ships. The second point he made was on the issue of Jurisdiction which his country considered it as a vital point in combating piracy. The Egyptian criminal procedure provided a wide jurisdiction concerning the fight against piracy. The Egyptian criminal jurisdiction was extended to the crimes which was committed abroad also. For example, if an Egyptian was involved in such crimes abroad, he could go before the Egyptian jurisdiction. As regards the international cooperation, he informed that his country shares the borders of the international community and with the other States. To combat the crime of piracy, an effective fruitful international cooperation which was based on the respect of sovereignty and territorial integrity was emphasized. Further the delegate informed that his country ratified the 1982 Convention. Also, they have in the Ministry of Justice a Department which was responsible for fostering and enhancing international cooperation. The Department also deals with legal assistance, it works 24x7 to receive and reply legal and judicial information with other States.

181. The **Delegate of Uganda** stated that the discussion during the meeting on the "Law of the Sea" was highly useful and they had the privilege to hear six powerful presentations. In view of the paucity of time, it was not possible for him to do justice to all those presentations. However, he would like to thank the presenters for their most informative and lengthy presentation.

182. As regards, piracy, the delegate stated that it was a big business, and therefore it was essential for the world that in future the cost of piracy was required to be made prohibitive for the pirates, their partners and their sympathizers.

183. The delegate observed that piracy was lawlessness writ large and he was very surprised to hear that now there was talk about human rights of pirates. The human rights of pirates to be brought before a tribunal in 24 or 48 hours and so on and so forth. What about the victims? However, the delegate stressed that there was sufficient political will amongst States to address piracy, however, in view of the lacunae in law, they could not do much about it. Therefore, in his view a Tribunal on Yugoslavia or Rwanda basis was going to work. As they were informed authoritatively during the course of presentation that the UN Convention on the Law of the Sea does not cover these gaps, therefore, he proposed for the elaboration at that point in time was the need for a full fledged UN Convention on Combating Piracy covering all that was identified and that Convention was developed on fast track basis. He hoped that the AALCO forum could be utilized for working on this important issue.

184. The **Delegate of the People's Republic of China** in his statement stated that piracy posed a serious challenge to maritime navigation and trade, in particular, piracy activities in the Indian Ocean off the coast of Somalia had attracted the broad attention of the international community. So, he called on all the States to strengthen cooperation to combat piracy on the basis of international law, in order to guarantee maritime security and safeguard overall interests of the international community. His country holds the view that the main aspects for combating piracy, armed robbery against the vessels through international cooperation had been provided in the current international legal regime. Those comprised the definition of piracy, armed robbery against vessels, the obligation of all the States to establish universal jurisdiction of piracy and obligation of administration assistance of judicial cooperation. The sovereignty of coastal States and freedom of navigation of flag States were the other relevant issues had been stipulated in balanced way.

185. As regards the issue of piracy in Somalia, he stated that the resolutions including United Nations Security Council resolution 1816 had authorized the UN Member States to enter into territorial waters of Somalia to fight against piracy and territorial robbery, but with the prior consent of the Transitional Federal Government and acting in a manner consistent with relevant international law. The authorization was an exceptional case and does not constitute law customary international law or precedent for other maritime area. Actions to prevent and repress piracy by the States should be in strict consistent with including the *United Nations Charter*, *the United Nations Convention on the Law of the Sea* to avoid the encroachment of the principle of sovereignty. His Government consistently holds that the judicial cooperation to combat piracy of Somalia should be strengthened under the framework of existing international law. As for as establishing an special international tribunal for trial of pirate suspects, his country believed to prudently consider specific issues as financing and appointment of judges were time consuming and also had certain difficulties. Alternatively, it would be more effective to promote the coastal States to receive pirated suspects for trial, especially through bilateral arrangement between the detaining States and receiving States.

186. On the role of International Tribunal for the Law of the Sea (ITLOS) on Piracy was concerned, his country holds the view that the Statute of the Tribunal does not specify jurisdiction over Piracy. If the international community was willing to consult on the issue, his

country holds an open attitude. As the basic ways of international cooperation on combating piracy, information sharing, and cooperation in early warning are directly effective and practical. *The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* stipulated the obligation of States Parties to promote exchange of information between the States Parties. The ReCAAP which came into force in 2004, also established the network of information sharing for States Parties through "information centre", which was of great importance of reference to such cooperation in other regions. His country supported the formulation of regional agreement on fighting piracy and establishing regional information centre. His Government hold the view that such information centre should communicate relevant information timely and effectively to facilitate the repression of piracy by States.

187. The Delegate stated his Government noted that piracy activities along the Melaka Straits seriously and supported the role of the ReCAAP in regional cooperation to combat piracy in this area. China was pleased to note that piracy there had been effectively contained, and the maount of incidents had been reduced gradually. Certain States outside the regional also expressed willingness to join the agreement. Those actions indicated the important role of the "information centre" which was well recognized by the other States. But considering the ReCAAP was a regional agreement to combat piracy, their priority of the work should be expansion of regional representation especially active participation of the coastal States of Melaka Straits.

188. On the issue of delimitation of maritime boundary, his country was a developing coastal State with a coastal line of 18,000 Kilometers and over 6,500 islands. China had ratified the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) in the year 1996 and announced the baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha Islands. In accordance with regulation of UNCLOS, his country had promulgated a number of laws including *law on Contiguous Zone and Territorial Sea*, the *law on the Exclusive Economic Zone and the Continental Shelf* in consistency with the UNCLOS. Under the foreign policy of "good neigbourly relationship and partnership", his Government under the principle of peaceful settlement, approach the issues of maritime dispute settlement through consultation. If the dispute could not be settled for the time being, if the parties might have self differences, the parties might seek for joint development. In accordance with those principles, his Government had been carrying out consultations and negotiations on matters concerning with the Law of the Sea and maritime delimitation with its neighbouring countries to promote maritime cooperation of mutual benefits on a legal footing. Some positive progress had been achieved in that regard. In December 2000, China and Vietnam entered an agreement on the delimitation of Beibu Gulf. This was one the first maritime boundary delimitated between China and neighbouring countries. His Government was still conducting consultations with other neighbouring countries on maritime delimitation and also for a joint development.

189. The delegate stated that the delimitation of Continental Shelf beyond 200 nautical miles was an important issue of their recent work in the field of law of the sea. Till then, the Commission of Continental Shelf had received 51 submissions and 43 copies of preliminary information. His Government holds the view that it was the rights of States Parties to UNCLOS

to submit submissions for delimitation of Continental Shelf beyond 200 nautical miles in accordance with the relevant stipulations of UNCLOS. At the same time, all the State Parties bore the responsibility to preserve the completeness and seriousness of UNCLOS in order to safeguard the International Seabed Area which was the Common Heritage of Mankind and keep it free from the encroachment.

190. The delegate observed that the successful experience of his country showed that as long as all parties continued their dialogue and consultations in accordance with rules and principles of international law, adopted a restrained attitude in case of conflicts, and seek to shelve disputes and strived for cooperation, joint development before final settlement of disputes, the region would surely be maintained in peace and stability.

191. The **Delegate of the Republic of Kenya**[30] thanked the Panelist for their valuable presentations. The Delegate observed that as considering the recent surge in piracy, particularly in the Indian Ocean off the coast of Somalia, Kenya joined the rest of the world in expressing concern on the increased instances of piracy. As a nation, it had felt the adverse effects of piracy especially since Kenya shared her maritime boundary with Somalia.

192. It was estimated that at any given time there were 50 ships of various types in the major shipping lanes off the Kenyan coast. Up to ten of these were likely to be oil tankers with displacements ranging from 50,000 to 250,000 tons. The Port of Mombasa played an important role in servicing the trade needs of the neighbouring countries of Uganda, Democratic Republic of Congo, Rwanda, Burundi and Southern Sudan. That transit traffic was commonly referred to as the "Northern Corridor." It was therefore critical for his country to ensure the safety and of her maritime waters.

193. The Delegate drew attention to fact that the waters off the coast of Somalia were rife with pirate activities despite increased measures by the international community and shipping companies to ward off attacks. Heavily armed pirates had been striking the busy Indian Ocean shipping lanes and the Gulf of Aden that connected the Red Sea to the Indian Ocean. In fact, the Gulf of Aden, off northern Somalia, was considered as bearing the highest risk of piracy in the world. Pirates had captured dozens of vessels and held hundreds of hostages, making off with millions of dollars in ransom. The lives of Kenyan crew aboard some of the hijacked ships as well as cargo on board had been endangered. Ramifications of those actions were felt on the economies of all states that were affected. In that regard, Kenya had been proactive in finding a solution to the piracy menace hence their co-operation with the international community in fighting this surge of piracy.

194. The Delegate emphasized that to that end, Kenya had agreed to prosecute any person suspected of acts of piracy and indeed, most of the pirates that had been captured by international

[30] In view of the paucity of time, the Delegate of Kenya made a short statement and handed over to the Secretariat the copies of its statement on the identified themes for inclusion in the Report of the Session.

naval forces in the Gulf of Aden had been taken to Mombasa and handed over to the Kenyan Authorities for prosecution.

195. The Delegate informed that Kenya was in the process of drafting anti piracy laws to enable countries with stakes in maritime safety and seaborne trade to arrest suspected pirates and bring them for speedy trial in Kenya. He also took the opportunity to commend the international forces which have availed a total of more than 30 ships and aircraft to patrol the high seas in order to help fight piracy.

196. In that regard, he emphasized that the commitment to ensure maritime security was not without its challenges. In the past, Somali insurgent groups had threatened to attack Kenyan interests for assisting the international community in the fight to rein in acts of piracy. Such threats could not be taken lightly as they touched on the security of Kenyan people but their Government remained committed to playing an active role in combating piracy.

197. The Delegate informed that Kenya had established the Mombasa Regional Maritime Rescue Coordination Centre (RMRCC) to facilitate the fight against piracy. The US$1.6 million Centre which was part funded by the UN International Maritime Organisation, had the satellite technology to detect distress signals and in turn mobilize help faster than existing systems. The centre would be very useful in detecting maritime disasters in Eastern Africa and in combating piracy along the coast of East Africa. He further informed that during a sub-regional meeting that was organized by the IMO in Dar es Salaam, Tanzania between 14-18 April 2008 on Piracy and Armed Robbery against ships in the Western Indian Ocean, Gulf of Aden and Red Sea, Kenya had proposed to host a Regional Operational Coordination and Information Centre that would assist in addressing threats to maritime safety and security. He used the opportunity to state in that forum that his Government was still interested in hosting such an institution.

198. The Delegate further stated that the Government of Kenya had taken additional measures in ensuring maritime safety and security. One such measure was the recent enactment of their Merchant Shipping Act, 2009 which gave Kenyan courts broad jurisdiction over non-nationals suspected of hijacking and robbery in the high seas. Effectively, the Act gave universal jurisdiction over piracy thereby supplementing their Penal Code. That new law went beyond Kenya's obligations under UNCLOS which only required capturing states the right to prosecute. However, that new Act was consistent with the common law norm that crimes defined by international law required domestic law to try or punish. That new Act would assist in ensuring maritime safety and security around their coastal waters and beyond.

199. The Delegate recalled that the 1982 UN Convention on the Law of the Sea (UNCLOS) that formed the basis of the modern legal framework for ocean governance came into effective operation in 1994. The Convention sets out principles and norms for the conduct of relations among States on maritime issues. It had contributed immensely to the maintenance of global peace and security. The achievements of the Convention were many for it had assisted in resolving a number of critical issues, some of which had eluded agreement for centuries. It further reflected a delicate balance between competing interests in the use of the ocean and its

resources by taking a functional approach to establishing the various maritime zones and the rights and duties of States in those zones including in the ocean space beyond national jurisdiction.

200. He informed that in that regard, Kenya had ratified the Convention on 2nd March 1989 and it had domesticated the Convention through the following legislations: The Territorial Waters Act, Maritime Zones Act, and The Continental Shelf Act. It had also made the Presidential Proclamation of 2005 in respect of the territorial Sea and the Exclusive Economic Zone. Through those instruments, Kenya had exercised its sovereignty and jurisdiction over her maritime zones.

201. In an effort to domesticate some of the provisions of UNCLOS, and further in order to foster peace and security in the Horn of Africa, the Government of Kenya had established her maritime zones through negotiations with its neighbouring coastal States of the United Republic of Tanzania in the south and the Transitional Federal Government of Somali Republic in the northeast. The negotiations resulted in a major milestone where the United Republic of Tanzania and the Republic of Kenya signed a maritime agreement using the parallel of latitude to their common maritime boundaries in respect of the Exclusive Economic Zone and the Outer Limits of their Continental Shelf beyond 200 nautical miles on the 23rd June 2009. The Transitional Federal Government of the Somali Republic has also signed a Memorandum of Understanding with Kenya.

202. The Delegate stated that those two agreements in effect, granted Kenya a "No Objection" with respect to her submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf. The two coastal States were fully aware that that action was without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts. However, the United Republic of Tanzania and The Transitional Federal Government of the Somali Republic were determined to work together with Kenya to safeguard and promote their common interests.

203. Referring to Article 74 of UNCLOS, the Delegate noted that it states that the delimitation of the Exclusive Economic Zone (EEZ) between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice for the purpose of achieving an equitable solution. Article 83 refers to the delimitation of the continental shelf between States with opposite or adjacent coasts and has similar interpretations to article 74. The Delegate stated that Kenya subscribed to those provisions and abided by them to the letter.

204. The Third United Nations Conference on the Law of the Sea considered the special characteristics of a coastal State's continental margin and recognised the inequity that would result to that State from the application of the delineation formulae contained in article 76 of the Convention to establish the outer edge of its continental margin. In that regard, Kenya had considered the provision of the Convention and realised that she would suffer an inequity if she relied on the formulae as prescribed in Article 76 and had therefore preferred to invoke the

Statement of Understanding Concerning Specific Method to be Used as contained in Establishing the Outer Edge of the Continental Margin as contained in Annex II of UNCLOS.

205. In that regard Kenya strongly believed that the intention of the formula contained therein was meant to address an inequity that would be occasioned by application of the formulae contained in Article 76. In that regard Kenya's understanding of the Statement was that it should be purely based on scientific special characteristics of a continental margin and not on geographical location of a coastal State.

206. The Delegate further observed that Kenya would like to raise a matter of grave concern to many countries but especially to those small and developing countries. The preparation of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, required commitment of enormous resources, both human and financial. That was quite demanding for developing countries and it was against that backdrop that Kenya would like to raise her concern about the timetable of the Commission. Having submitted their claim to the Commission that year, they were informed that the Sub-Commission to examine Kenya's submission would be set up in August 2021, and recommendations on Kenya's submission would be made in August 2022. With great respect to the Commission, they found that wait-period in consideration of submissions by States inordinately long and jeopardised a State's interests since it was unlikely that the same team of experts would be available to follow-up on complex scientific and technical data if consideration was made more than twelve years later. The burden of having to train other experts on that specialised field was too huge for the economies of the developing countries. Therefore, he would like to appeal to that forum to consider taking up this issue with the United Nations Commission on the Law of the Sea on behalf AALCO member states that were in a similar situation.

207. The **Delegate of Ghana** stated that on the issue of delimitation of maritime boundaries, Ghana delegation sharedthe same concerns as the Kenyan delegation. Ghana was in the process of delimiting her maritime boundaries with her neighbors. It had filed a claim to the Commission on the Limits of Continental Shelf (CLCS) to extend her maritime boundaries beyond 200 nautical miles. In that regard, Ghana keeping in view Article 33 of the UN Charter wished to pursue intense negotiations in a spirit of cooperation and good will as agreed among Economic Community of West African States at a meeting held in Accra, Ghana recently. However, should the necessity arise, Ghana would not hesitate to use the ITLOS.

208. The **Delegate of Thailand** took the opportunity to express my sincere appreciation to AALCO for organizing a half-day special meeting on the topic of "The Law of the Sea" focusing on "Maritime Security and Piracy. She truly believed that the contributions, views and experiences exchanges and shared among Member States on that occasion would be greatly valuable in helping to shape common ideas on this important issue.

209. The Delegate informed that Thailand had employed a coherent and comprehensive approach in fighting against terrorism in line with the UN Security Council's Resolution 1373

(2001) and the UN Global Counter-Terrorism Strategy. Thailand also shared its concern with the international terrorism and other threats to maritime security. For them, piracy and terrorism relating to crimes at sea had threatened the prosperity and security in this region. Acts of piracy, as well as other violent acts committed at sea have long been criminalized in Thailand as crimes with grave punishment. Thailand exercised universal jurisdiction over acts of piracy under the Thai Penal Code. In addition, since 1991 Thailand had specifically made an act of piracy a criminal offense under the Act on the Prevention and Suppression of Acts of Piracy, authorizing Thai Naval officers to stop and get on board any suspicious ship in order to examine its license and nationality and if necessary, make a search or preliminary inquiries in order to prevent and suppress such acts. In doing so, the Thai naval officers might arrest the suspected offenders and seize the ship and all proceeds and instruments of crime and hand over the suspected offenders to the competent investigation officers for further investigation and prosecution.

210. The Delegate further observed that albeit being said, was subject to the right of "hot pursuit" meaning that Thailand could pursue the fleeing ship only until it entered its national or a third state's territorial waters. Those limitations caused difficulty in the law enforcement particularly within the Southeast Asian region, where there were almost no high seas in the strict sense of word, fleeing ships hence can easily escaped into the territorial waters of another state and avoided capture and prosecution if no cooperation in extradition exists.

211. Therefore, in their view, they encouraged AALCO members to have relevant domestic laws in place to combat these crimes. International legal instruments in the areas of extradition and mutual legal assistance should be promoted, without which perpetrators could easily seek haven outside the country where crime is committed. So far, she informed that Thailand had many bilateral and multilateral treaties on extradition and mutual legal assistance and is prepared to cooperate with the international community in this regard.

212. On regional cooperation in this matter, Thailand has attached great importance to the Malacca Straits Patrol Joint Coordinating Committee (MSP JCC). Along with Indonesia, Malaysia and Singapore, Thailand had participated in the Malacca Straits Coordinated Patrols since September 2008. Moreover, they were now in the preparation for taking part in the "Eyes in the Sky" programme where law enforcement officials of one country would embark on patrol aircraft of other participants in order to effectively coordinate with its national authorities whenever the fleeing ships enter into its territorial water.

213. In addition, Thailand was also a member of Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP ISC), the first G-to-G regional organization that served as a forum for information sharing on piracy and armed robbery against ships. Such regional organization would foster better understanding of the situation in this region and provide capacity building needed for law enforcement officials.

214. The Delegate noted that although under international law, piracy and armed robbery at sea were crimes of grave concern and require cooperation among States, one must carefully

balance rights of flag State with sovereignty of the coastal State regarding its jurisdiction over the suspected ships, on the one hand, and the severity of measures imposed and the damages that might arise the consequences, on the other. While there was no perfect international legal instrument to deal with the problem of crimes at sea as well as other maritime security issues, Thailand would humbly suggest that all relevant international organizations should give attention to the establishment of common guidelines and rules of engagement whenever States needed to take action against suspected ships, taking into account the rights and authorities of States in each maritime regime under the UN Convention on the Law of the Sea, 1982. In their view, common guidelines and rules of engagement should be made known to the public for transparency purposes.

215. Lastly, Thailand would like to reiterate that the solution of the fight against crimes at sea, as well as other maritime security issues, lay within the willingness, firm commitment and determination of every State. Therefore, Thailand looked forward to working closely with all nations and international organizations to explore the way forward in developing an integrated approach to tackle the scourge of these crimes.

216. The **Delegate of Malaysia** stated that Malaysia was pleased to note that the United Nations Informal Consultative Process on Oceans and Law of the Sea (UNICPOLOS) had been extended by the General Assembly for another term until 2011. Despite the fact that it was only an open-ended informal consultative process, UNICPOLOS was the only avenue for States Parties to UNCLOS to discuss substantive matters pertaining to the management of ocean affairs. The fact that there was a General Assembly Resolution of 63/111 of 5 December 2008, which decided to continue UNICPOLOS for another two years to 2011 with a further review of its effectiveness and utility at the Sixty-Third session leads credence to its importance. The wide ranging matters discussed i.e. from maritime safety and security to marine environment and marine resources reaffirmed the commitment of the States Parties in strengthening the cooperation between States relating to the said matters. In relation to the joint Asian-African proposal regarding an allocation of seats on the CLCS and the equitable geographical distribution of members of ITLOS, Malaysia welcomed the decision approved by the 19th Meeting of States Parties to UNCLOS on 26 June 2009.

217. The Delegate observed that on the issue of maritime security and piracy, UNCLOS, under Article 100, further established that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. In that regard, it should also be noted that by virtue of Article 58 of UNCLOS, piracy provisions were also applicable to the exclusive economic zone as long as they were not incompatible with the provisions of the exclusive economic zone and were in compliance with the provisions of the laws and regulations adopted by the Coastal State.

218. Further, in that regard, the delegate said her country would like to bring to attention the UN Security Council Resolutions 1816 and 1838 which were adopted on 2 June 2008 and 7 October 2008, respectively. The said Resolutions had decided States cooperation with the

Transitional Federal Government of Somalia in the fight against piracy and armed robbery at sea off the coast of Somalia may:

(a) enter the territorial waters for Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant in international law; and
(b) use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

219. The Delegate stated that Malaysia noted further that the Resolutions reaffirmed that the above would apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member States under international law, including any rights or obligations under the Convention, with respect to any situation, and that it shall not be considered as establishing customary international law.

220. However, as much as Malaysia was appreciative of the efforts undertaken by the United Nations Security Council in addressing the situation in the Gulf of Aden. Malaysia was deeply concerned about the latitude of the imposition of the resolutions to the sovereignty and territorial integrity of a State. That was more so seeing that the Security Council while on one hand recognized the sovereignty and territorial integrity of Somalia, on the other justified the acts of entering into the territorial waters of Somalia for repressing the acts of piracy.

221. The Delegate stated that as piracy was a crime of universal jurisdiction any State that captured pirates may try them before her domestic courts. However, many States choose to only chase the pirates and disarm them instead of exercising legal means of universal jurisdiction. That could be due to unclear juridical, enforcement problems, or merely political or financial interests. Prosecution of pirates had also been left within powers of States under its own municipal laws because there was no international criminal tribunal to administer international criminal justice against private individuals.

222. Malaysia noted, however, ITLOS which was created as part of UNCLOS third party dispute settlement system unfortunately also had no power to hear cases of piracy. That was because ITLOS was also not a criminal court and could only decide cases of piracy if there were interstate cases.

223. The delegate said that there had been suggestions that another tribunal be established specifically to address cases of piracy. For instance, the Netherlands had submitted to the International Piracy Contact Group on Pirates off the Coast of Somalia (CGPCS) the creation of an international tribunal to try Somali pirates. The United Kingdom, Germany and Russia had also called for an anti-piracy tribunal. Apart from the above suggestions, there had also been a proposal that a Regional Piracy Tribunal be established for this purpose.

224. However, the delegate stressed that those suggestion were not without opposition. Malaysia took note that the Vice President of ITLOS for instance argued that such establishment of a new tribunal to deal with piracy cases would be very costly. Furthermore, there was argument that the ICC could be used as the platform to try piracy cases as it had the jurisdiction to hear cases on crimes against humanity in which acts of piracy might be categorized under that ambit.

225. States Parties to UNCLOS in delimiting their maritime zones were guided by the provisions of Articles 15, 74 and 83. It was well established from cases decided by the ICJ and arbitral tribunals that the starting point of delimitation, be it the territorial sea, EEZ or continental shelf, would be to draw a provisional median line which would then be adjusted to take into account special/relevant circumstances. The provisional median line would be a line where every point was equidistant from the nearest points on the baselines of either side. Where States fail to reach a solution in delimiting their maritime boundaries, they could resort to international dispute resolution. The States Parties to UNCLOS were bound by the dispute resolution provisions contained in the Convention. Under Article 287 of UNCLOS the possible means include ITLOS, ICJ and an arbitral tribunal constituted under Annex VII of the Convention.

226. Article 287 of UNCLOS gave parties the option in making a declaration at any time after signing, ratifying or acceding to the Convention in choosing the preferred means in settling disputes brought under Section 2 of Part XV of the Convention. The four possible means were ITLOS, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII (Arbitration) and a special arbitral tribunal constituted in accordance with Annex VIII (Special Arbitration) for disputes concerning fisheries, protection of the marine environment, marine scientific research and navigation.

227. ITLOS was an independent judicial body established by the Convention to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal was composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. Disputes relating to activities in the International Seabed Area are submitted to the Seabed Disputes Chamber of the Tribunal, consisting of 11 judges.

228. With regard to the Tribunal's competence in maritime delimitation cases UNCLOS provided a comprehensive system for the settlement of disputes comprising of both voluntary and compulsory procedures. The system established is applicable to the majority of the provisions of the Convention including provisions concerning sea boundary delimitation.

229. In that regard, the delegate stated that Malaysia also took note that the Tribunal had an advisory functions in issues concerning maritime delimitation cases. In general, the advisory functions of the Tribunal could be said to be two fold. Firstly, the Seabed Dispute Chamber had the jurisdiction to give an advisory opinion with regard to matters pertaining to Part XI on the UNCLOS 1982. The advisory opinions may be given by the Seabed Disputes Chambers at the request of the Assembly or the Council of the International Seabed Authority as provided under

paragraph 10 of article 159 and article 191 of UNCLOS 1982. Consecutively, advisory opinions may also be given. The second advisory function of the tribunal was to provide advisory opinions on the basis of international agreements. Article 21 of the Statute provided on the advisory function of the tribunal as follows: "…the jurisdiction of the tribunal comprises of all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the tribunal".

230. Accordingly, paragraph 1 of article 138 of its Rules provides that the tribunal may be requested to give an advisory opinion on a legal question provided that an international agreement related to the purposes of the Convention specifically provides for the submission of a request for such opinion.

231. The Delegate emphasized that nonetheless, it was important to bear in mind the fact the advisory opinions of the tribunal on a specific question was in the form of legal guidance from the Tribunal on a specific question and is not binding in nature. In view of that fact, it could be seen that the advisory functions of the Tribunal was a significant advancement in the international judicial system in regard of its role as an alternative to contentious proceedings.

232. It was noted that the advisory proceedings and its procedure had yet to be exercised. In respect of cases concerning maritime delimitation, it was viewed that the Tribunal's advisory proceeding might assist conflicting parties in reaching settlements and preventing disputes. Cases involving maritime delimitations might be referred to the Tribunal by the parties involved. The parties might seek the Tribunal's legal guidance on specific questions that required further clarification. The Tribunal might also be sought to deliberate on principles and rules of international law applicable to maritime delimitation. That could be seen as beneficial to the parties involved in the maritime delimitation as the advisory opinion delivered by the Tribunal might be referred to as an indication as to how the maritime boundary should be delimited and also as a basis for the maritime boundary to be delimited.

233. As one of the littoral States bordering the Straits of Malacca, the delegate stated that Malaysia would like to emphasize that it was fully committed in ensuring the maritime safety and security in the Straits of Malacca. Among the steps that had been taken thus far to maintain maritime safety in the Straits of Malacca included the implementation of the IMO's Traffic Separation Scheme in 1981, the introduction of STRATREP (Straits Reporting) which came into force on 1 December 1998, and the Marine Electronic Highway in 2005.

234. Furthermore, the recent establishment of the Cooperative Mechanism by Malaysia, Singapore and Indonesia brought to realization the cooperation envisaged under Article 43 of UNCLOS 1982 vis-à-vis the Straits of Malacca. Notwithstanding the above, the delegate reiterated Malaysia stance that the security of the Straits of Malacca lied with the three littoral States i.e., Malaysia, Indonesia and Singapore. In that respect, the sovereignty, sovereign rights, jurisdiction and territorial integrity as well as the principle of non-intervention of States bordering the Straits which included Malaysia must be fully respected by other States.

235. The **Observer Delegate of the League of Arab States** called for greater cooperation between the AALCO and the League on matters of mutual interest, particularly in relation to the law of the sea.

236. The **Observer Delegate from the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations**[31] stated that the Division for Ocean Affairs and the Law of the Sea of the Office for Legal Affairs of the United Nations, was grateful for the opportunity to contribute to the special meeting on the law of the sea.

Maritime Security and Piracy

237. The Delegate observed that as maritime security was a broad topic and considering the limited time available, as well as the focus of the panel presentations on piracy, the Division intended to limit its remarks to that particular criminal act. At the outset, she thanked the panellists for their excellent presentations.

238. The delegate observed that piracy continued to represent a significant threat to maritime security by endangering, in particular, the welfare of seafarers and the security of navigation and commerce. In the first six months of 2009 alone, the number of actual or attempted attacks of piracy and armed robbery against ships reported to the International Maritime Organization (IMO) totalled 238, nearly double the number than for the same period in 2008. The areas most affected were East Africa with 153 incidents, followed by the South China Sea (with 36 incidents), South America (with 22), West Africa (with 20) and the Indian Ocean (with 10 incidents).

239. The majority of the incidents had occurred off the coast of Somalia. According to the International Maritime Bureau, 148 occurred off the coast of Somalia during the first six months of 2009. Thirty vessels were hijacked, 495 seafarers taken hostage, six were injured, four killed and one remained missing during this period. While the majority of the attacks off the coast of Somalia continue to take place in the Gulf of Aden (86) and southern Red Sea (14) area, there have also been an increasing number of attacks off the eastern and southern coasts of Somalia (44). All types of vessels are being targeted, often by well-armed criminals with rocket-propelled grenades and automatic weapons.

240. The delegate mentioned that the legal framework for the repression of piracy under international law was well established. It was set out in articles 100 to 107 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which were based on articles 14 to 21 of the 1958 Geneva Convention on the High Seas and generally considered to reflect customary international law, applicable to all States.

[31] In view of paucity of time, the statement was deemed to be read. The Secretariat gratefully acknowledges and thanks the DOLAS for providing its inputs for the meeting.

241. UNCLOS sets out the definition of piracy and required all States to cooperate to the fullest possible extent in the repression of piracy (article 100). States were granted universal jurisdiction on the high seas to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board (article 105). The courts of the State that carried out the seizure may try those accused of piracy. UNCLOS also provided for the application of these provisions in the exclusive economic zone in so far as they were not incompatible with Part V of the Convention (article 58(2)).

242. By definition, piracy could not occur in the territorial sea or internal waters of a State. Those acts were termed "armed robbery against ships". Primary responsibility for enforcement in respect of such acts falls on coastal States.

243. Elaborating the theme further, the delegate stated that armed robbery against ships, as well as certain other acts against international shipping, including the seizure of ships and the endangering of safe navigation by the use of violence against persons on board or by damage to the ship, its cargo, or equipment, also constituted offences under the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). If the criminal act constituted an organized crime, the 2000 United Nations Convention against Transnational Organized Crime also applied.

244. Also relevant were the Recommendations to Governments, Guidance to ship owners and ship operators, shipmasters and crews, the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships developed by IMO and several IMO resolutions concerning piracy. IMO has recently strongly discouraged the carrying and use of firearms for personnel protection or the protection of a ship, but noted that the use of military or other law enforcement officers on board merchant ships was a matter for flag States to determine in consultation with ship owners and companies and ship operators.

245. The Delegate observed that at the regional level, several instruments or initiatives provided a framework for cooperation. Notable in the Asian region was the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia; and the ongoing cooperation among the States bordering the Straits of Malacca. Notable in Africa, was the Memorandum of Understanding on the Establishment of a Sub-regional Integrated Coast Guard Network in West and Central Africa, and the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, adopted on 26 January 2009.

246. International attention had focussed over the past two years on the surge in incidents of piracy off the coast of Somalia and resulted in an unprecedented level of international cooperation. Such cooperation has, inter alia, occurred pursuant to five Security Council resolutions adopted in 2008 specifically addressing the situation of piracy off the coast of Somalia,[32] as well as relevant General Assembly resolutions on oceans and the law of the sea. In

[32] See Security Council resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008).

addition, the shipping industry has also taken measures to address piracy and armed robbery against ships.

247. Under the framework of the Security Council resolutions, States were cooperating militarily in their patrols off the coast of Somalia; cooperating on legal and political questions through various fora, including IMO and the Contact Group on Piracy off the Coast of Somalia.

248. However, despite the efforts that had been made till date, the greatest challenge in addressing piracy and armed robbery off the coast of Somalia was that such acts were inextricably linked with the political and security situation in Somalia. The United Nations had taken some important steps over the past year to address the situation in Somalia, but clearly more must be done.

249. The delegate emphasized that another important challenge, was how to ensure accountability for suspected pirates and armed robbers through prosecution. While UNCLOS provided universal jurisdiction to prosecute pirates under international law, in many national legal systems, such prosecutions must be based on a provision of national law. However, many States did not had legislation on piracy, or had outdated legislation that did not allow them to take full advantage of the authority afforded to them under UNCLOS. While some States had recently reviewed and undertaken to update their piracy legislation, many States had not yet done so.

250. The Delegate emphasized that it was important that all States adopted national legislation to combat piracy and armed robbery against ships and thus be in position to meet the obligation in article 100 of UNCLOS to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. As the Secretariat of UNCLOS, the Division for Ocean Affairs and the Law of the Sea could provide information and advice to States and intergovernmental organizations in the uniform and consistent application of the provisions of UNCLOS, including those relevant to the repression of piracy.

251. The Delegate further said that the prosecution of suspected pirates and armed robbers was important to deter future attacks. A number of prosecutions of suspected pirates had begun or were expected to begin in the near future, including in France, Kenya, the Netherlands and the United States. Kenya, in particular, had taken over 100 suspected criminals for prosecution, including through its transfer arrangements with the European Union, the United Kingdom and the United States. However, practical issues as well as legal issues relating to national law requirements and evidentiary requirements had made prosecution difficult in some cases, leading to the release of suspected pirates. Some States, for practical, political and legal reasons, were not willing or able to prosecute suspects in their own courts.

252. The Delegate informed that the Contact Group on Piracy off the Coast of Somalia, through its Working Group 2 on Legal Issues, was engaged in identifying the impediments to prosecution faced by States and to devise practical solutions which would ensure that there was a forum for every suspect to be tried. States need to have not only the capacity to try pirates, in

accordance with international fair trial standards, but also the capacity to detain them pending trial and imprison them if they were convicted. The Netherlands hosted an informal workshop in July of that year to explore the possibility of establishing an international judicial mechanism to prosecute suspected pirates.

253. A number of United Nations entities and other organizations were already providing assistance to States in the repression of piracy off the coast of Somalia. For example, IMO had begun a broad-based capacity-building effort in the region to assist States in the implementation of the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden. The United Nations Office for Drugs and Crime (UNODC) was implementing a joint European Union/UNODC programme to provide targeted support to Kenyan prosecution, police, judicial and prison services, which inter alia, aims to support the conduct of piracy trials in conformity with international standards. The core elements of that programme included legislative review, prosecutorial support, provision of logistical support and information technology, and the development and sharing of regional expertise. UNODC was seeking to extend those capacity-building measures to other countries in the region willing to undertake piracy prosecutions, and would also provide technical support to Somalia. The United Nations Development Programme and the Department of Political Affairs (through the United Nations Political Office in Somalia) had been involved in more general security sector capacity-building as well as capacity-building to ensure that alternative livelihoods were also available to potential pirates.

254. The Delegate mentioned that the AALCO meeting provided an opportunity for exploring next steps. In that regard, she wished to assure the Governments and the AALCO Secretariat of the cooperation and support of the Division for Ocean Affairs and the Law of the Sea.

Maritime Boundary Delimitation

255. The Delegate stated that the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) dealing with maritime boundary delimitation (articles 15, 74 and, in particular 83) required States to conclude agreements in order to delimit their maritime zones. Pending such agreements, they were obligated to "make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final delimitation".

256. The delimitation of maritime boundaries was usually a politically sensitive, legally and technically complex process as it determined the extent of the sovereignty of coastal States or their sovereign rights over natural resources and jurisdiction over sea-related activities. In that regard, it was likely that the process of the delineation of the outer limits of the continental shelf beyond 200 nautical miles and the need to address, in the context of the submissions to the Commission on the Limits of the Continental Shelf, the limits of maritime zones as well as any relevant disputes, would generate a renewed interest in the delimitation of maritime boundaries.

257. Among the overall benefits of maritime boundary delimitation were a clear and recognized definition of the extension of the maritime zones over which States had sovereignty or where they exercised sovereign rights or jurisdiction; solutions for overlapping claims; economic gains from fishing and exploitation of mineral and hydrocarbon resources, as well as benefits from other uses of the sea.

258. The Delegate noted that there was a distinction between delimitation effected by States through negotiations and delimitation by judicial settlement: delimitation by agreement between States may involve political, economical, geographic or any other kind of consideration. Delimitation by judicial settlement was based mostly on considerations of law. Delimitation by negotiated agreements was above all a political process. In that context, it might be useful to recall the Preamble of UNCLOS, in which States parties expressed their determination to settle, "*in a spirit of mutual understanding and cooperation*," all issues relating to the law of the sea. Thus the requirement to cooperate was more than a non-binding recommendation or encouragement; it constituted a mandatory rule. However, whereas the Convention established an obligation to negotiate a cooperative outcome, it did not prescribe the form that such cooperation may take.

259. One of the benefits of maritime boundary delimitation by negotiated agreement was that the process was usually a demonstration of a spirit of understanding and cooperation and provided a basis for further development of friendly and good-neighbourly relations. Furthermore, in a negotiating process, States had wide latitude and flexibility in using factors - geographical, historical, political, economic, security or other - as they deemed appropriate for the construction of the line or lines they considered equitable and satisfactory. Conclusion of an agreement on maritime boundary delimitation might be complemented by resource-sharing provisions or conclusion of other agreements, such as resource-sharing agreements.

260. The Delegate further observed that in a number of cases, difficulties relating to the delimitation of maritime boundaries could be bridged through resource-deposit clauses, unitization clauses, or joint development schemes. In those cases, the parties provided for cooperative arrangements for the exploitation of a particular sea area usually defined by geographical coordinates of points. Such solutions might be used in different contexts. For example, joint exploitation areas may be adopted in conjunction with a delimitation line (Iceland-Norway - 1981), or as a solution for the lack of agreement between the parties on the course of a delimitation line (e.g. Timor Sea Agreement between Australia and Timor-Leste - 2002). The latter is a good example of a provisional arrangement of a practical nature.

261. The establishment of a joint development area was only one of the possible forms that cooperation may take. Should States elect the option of a joint development area, they usually negotiate an agreement that established the scope and structure of the regime of joint development, taking into account various factors and circumstances relevant to their negotiations of maritime boundary delimitation, position and size of the deposits, as well as the specific purposes of the area intended by the States involved.

262. Establishing maritime joint development areas had proven useful where the issues of shared petroleum resources and maritime boundary delimitation intersect. Given that such arrangements provided a management tool in situations that might otherwise lead to disputes and confrontation, the use of joint development areas was something that States might wish to consider when identifying solutions for their maritime boundary disputes.

263. In cases, when coastal States failed to establish their maritime boundaries through negotiations and if no delimitation agreement was reached within a reasonable time, the coastal States concerned had an obligation to resort to the settlement of dispute procedures. States Parties to UNCLOS were bound to refer to the mechanism provided for by its Part XV.

264. The Delegate stated that the Division of Ocean Affairs and the Law of the Sea had been providing assistance to States with regard to maritime boundary delimitation, through for example, the publication in 2000 of a comprehensive Handbook on the Delimitation of Maritime Boundaries, prepared with the assistance of a group of renowned international experts. Another useful publication was a Digest of International Cases on the Law of the Sea - a compilation of selected summaries of cases dealing with law of the sea issues from the late nineteenth century to the present time. The cases selected had been deemed useful in understanding the evolution of jurisprudence concerning the law of the sea. Other material, which was also available on the website of the Division, includes the Law of the Sea Bulletins and a complete database of national legislation and delimitation treaties, accompanied by, in some cases, illustrative maps. National legislation and treaties were available at: http://www.un.org/Depts/los/ LEGISLATIONANDTREATIES/index.htm.

The meeting was thereafter adjourned.