I. INAUGURAL SESSION OF THE "LEGAL EXPERTS MEETING TO COMMEMORATE THE 30TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA" HELD ON TUESDAY, 5TH MARCH 2013 AT 9.30 AM

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

A Very Good Morning to you all.

Mr. B. Sen, one of the founding fathers of AALCO and the first Secretary-General;

Mr. Pinak Ranjan Chakravarty, Secretary (ER), Ministry of External Affairs, Government of India; and the Chief Guest;

Mr. Stephen Mathias, Assistant Secretary-General for Legal Affairs, United Nations;

Dr. Neeru Chadha, Joint Secretary, Legal and Treaties Division, Ministry of External Affairs, Government of India,

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

It is indeed a matter of great honour and privilege to have amongst us today **Mr. Pinak Ranjan Chakravarty, Secretary (ER), Ministry of External Affairs, Government of India,** who despite his very busy work schedule and onerous responsibilities, has spared his valuable time and has very kindly consented to address this august gathering. He has served both at the Ministry of External Affairs, New Delhi, and Indian Missions abroad, including in Cairo, Jeddah, and London[1]. On behalf of the Organizers and on my own behalf, I thank you Sir, for your presence at this meeting and we are confident that your address would set the tone for productive deliberations during the course of the meeting.

I also take this opportunity to thank our co-organizers, the Legal and Treaties Division, Ministry of External Affairs, Government of India, in particular **Dr. Neeru Chadha, Joint Secretary**, for readily accepting AALCO's proposal to jointly host this meeting of Legal Experts to commemorate the 30th Anniversary of the historic 1982 United Nations Convention on the Law of the Sea. The support that we have received from the Government of India is noteworthy and praiseworthy.

[1] (He was Consul General of India in Karachi in 1994-1995, Minister at the Indian Embassy in Tel Aviv from July 1995 to January 1999, and later served as Deputy High Commissioner of India in Dhaka from 1999 to 2002. At Headquarters he has served as Deputy Chief of Protocol, Director at Americas desk and also as Director, SAARC Summit Secretariat in New Delhi. He was the Chief of Protocol in New Delhi from October 2002 to December 2006, prior to his arrival in Bangladesh in January 2007.)

Needless to say that I stay indebted to my predecessor **Mr. B. Sen**, who has come to his home, to give us an insight into his real life experiences of having negotiated the tough and arduous process of the UNCLOS.

The presence of **Mr. Stephen Mathias,** Assistant Secretary-General for Legal Affairs, United Nations, here today testifies the fact that AALCO as the voice of Asia and Africa, holds a special and unique place within the United Nations system,

I must admit that the response that I have received from the United Nations, the UNODC, as well as the galaxy of legal experts, some of whom have travelled long distances to be here today, is commendable and reaffirms our notion, that even after 30 years of its establishment the United Nations Convention on the Law of the Sea remains significant, despite new and upcoming challenges, that have to be dealt with by the international community.

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

It needs to be recalled that the creation of AALCO in 1956 coincided with the general awareness of the importance of the changing nature of international law of the sea. Coastal states began to extend their maritime jurisdiction further and further into the oceans at the expense of the ever-receding high seas following President Truman's Proclamation of US jurisdiction over the submarine areas adjacent to the West-Coast, as well as the decision of the International Court of Justice in the Anglo-Norwegian Fisheries Case between United Kingdom and Norway, which recognized the necessity and validity of Norwegian straight base lines and four miles limits of Norwegian territorial sea. In the meantime, Indonesia was poised in 1957 to claim its archipelagic seas. At the First Session of AALCO in New Delhi, Sri Lanka and India took the initiative to refer to AALCO the Question relating to the Regime of High Seas including questions relating to the rights to seabed and subsoil in open sea.

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

The product of a long-drawn process, which started in December 1973 and lasted until December 1982, the birth of the Convention on the Law of the Sea has been described as one of the most ambitious and original negotiating process ever undertaken within the United Nations.

Today's meeting, as we all are aware, has been mandated and organized to commemorate the 30th Anniversary of the United Nations Convention on the Law of the Sea, an event that was widely celebrated the world over last year and culminated with a Special Session of the United Nations General Assembly on 10 and 11 December 2012, and the adoption of an initiative by the United Nations Secretary-General entitled, "The Oceans Compact - Healthy Oceans For

Prosperity". Thus, the 30th Anniversary gives us an opportunity to review the achievements and take stock of the shortcomings of the UNCLOS.

On its part AALCO had organized a Special Half-Day Meeting in conjunction with the 51st Annual Session of AALCO, held in Abuja, in June last year on the theme "Responses to Piracy: International Legal Challenges" as well as during the AALCO Legal Advisers Meeting held in New York on 5th November 2012, Ms. Patricia O' Brien had addressed the Legal Advisers on this subject.

I am sure the presentations today will look into the achievements of UNCLOS and also look at the new challenges. However, in view of some of the significant developments that have taken place within the ITLOS and ICJ last year, I would like to remind you all that AALCO believes in discussing all matters within a spirit of consensus and thus we would like to refrain from focusing on any specific bilateral issues.

With these words I now invite the Chief Guest for this meeting Mr. Pinak Ranjan Chakravarty, Secretary (ER), Ministry of External Affairs, Government of India for his address .

Thank you all.

2. Address by Chief Guest, Shri. Pinak Ranjan Chakravarthy, Secretary (ER), Ministry of External Affairs, Government of India

Mr. Chairman, Excellencies, Distinguished Panelists, Delegates, Colleagues, Friends, Ladies and Gentlemen,

My felicitations to the Secretariat of the Asian-African Legal Consultative Organization for taking this initiative for, organizing the Legal Experts Meeting to commemorate the 30th Anniversary of the United Nations Convention on The Law of The Sea (UNCLOS). I also take this opportunity to record my appreciation for the efforts of the Legal & Treaties Division in supporting this meeting and I thank the organizers for inviting me to this event.

The adoption of the United Nations Convention on Law of the Sea, UNCLOS, was clearly a seminal law making event of the United Nations that codified and provided a universal legal framework for all human activities relating to the oceans. UNCLOS governs all aspects of ocean governance, including entitlements of coastal states in different maritime zones, rights of navigation, maritime security, marine scientific research, marine environment, delimitation of maritime boundaries and settlement of international disputes. With 164 States Parties the Convention is reaching near universality, a testament to the significance of the Convention as an important contribution to the maintenance of peace, justice and progress for all of us who inhabit our planet.

Oceans contain a wide range of mineral, energy and food resources. UNCLOS created multiple zones to balance the rights of coastal states to the resources and jurisdiction of the sea, against the interests of other states for equitable access to those resources and protection of navigational freedoms. It broke important new ground in several areas. It promulgated the crucial Exclusive Economic Zone (E.E.Z.) regime which reflected the interests of coastal States for jurisdiction over resources in the maritime areas off their coasts. AALCO's contribution to development of the concept of Exclusive Economic Zone (EEZ) has been considerable and universally recognized.

The provisions in the Convention on transit passage through Straits used for International Navigation, as well as archipelagic sea lanes passage, reflect the interests of the international community that rights of navigation remain unimpeded. In the present era of interdependence, the security and economic prosperity of nations is vitally linked to safety and security of sea-lanes of communication. States will need to work together to address common threats to maritime security. Piracy remains a serious concern, which threatens security of these sea-lanes. The security of these lanes is also challenged by other threats such as trafficking in arms, drugs and human beings and linkages with transnational criminal syndicates. India remains committed to help safeguard the vital sea-lanes of the Indo-Pacific and has cooperated in various regional initiatives to combat piracy and transnational organized crimes.

Anthropogenic activities in coastal regions are already having a serious impact on the marine environment. With a large population concentrated in coastal areas, pollution of the oceans happens in several ways through discharge of industrial and urban wastes, harbour activities, oil

exploration, oil slicks, land run-off etc. Toxic metals reach the oceans through industrial discharges. The time has come for co-ordinated efforts to protect coastal areas and monitor the health of the oceans. In this context, it is pertinent to note that the outcome document of the United Nations Conference on Sustainable Development (Rio+20) has recognized the importance of the United Nations Convention on the Law of the Sea in advancing sustainable development.

The mineral resources of the seabed beyond national jurisdiction are a common heritage of mankind as provided in Part XI of UNCLOS which lays down the regime for the exploitation of the resources of the Deep Sea Bed. India is one of "pioneer investors" for seabed mining. Pursuant to the "pioneer investor" status, the International Seabed Authority allotted to India a 150,000 square kilometer mine site in the Central Indian Ocean for the seabed mining of polymetallic nodules. India is making efforts to claim other seabed areas that are potential sites for minerals like hydrothermal sulphides and cobalt-rich crusts.

I hope UNCLOS will continue to develop its normative effect in the international law of the 21st century. In future it will be important to see how UNCLOS will handle the new challenges by reconciling the new maritime security initiatives with traditional navigational rights and freedoms, strengthen legal regimes to arrest the decline in the health of marine ecosystems and regulate ocean space in the Arctic regions as global warming opens up new possibilities for resource exploitation. Here, I would also like to underline the role of technology in creating demand for legal frameworks both nationally and globally. A case in point is the domain of cyberspace.

The important aspect of capacity building is crucial to these efforts. Many Asian-African countries have vast maritime zones and marine resources and have to be equipped with the expertise to exploit the same. These states require availability of economic, legal, navigational, scientific and technical skills for full and effective implementation of the provisions of UNCLOS, as well as sustainable development of oceans and seas nationally. I believe AALCO, with its extensive experience in matters related to law of the sea, has an important role to play in helping to build such capacity and disseminate information.

May I again congratulate AALCO and wish you a successful and productive Conference.

Thank you

3. Introductory Remarks by Dr. Neeru Chadha, Joint Secretary and the Legal Adviser, Ministry of External Affairs, Government of India

Excellencies, Distinguished Panelists, Delegates, Ladies and Gentlemen,

At the outset I would like to thank the Asian-African Legal Consultative Organization for organizing this important meeting on the Law of the Sea. We, at the Legal and Treaties Division of MEA, are honoured to be associated with this meeting, which will definitely enhance the knowledge of all the Member States of AALCO in addressing the challenges associated with the Law of the Sea.

Today, we are gathered here to commemorate thirty years of adoption of the United Nations Convention on the Law of the Sea, which was opened for signature on 10 December 1982 at Montego Bay, Jamaica. The Convention, one of the most important instruments adopted in the twentieth century and referred to as the "Constitution of the Oceans and Seas", lays down a comprehensive regime and establishes rules governing all uses of the oceans and their resources.

Though the Convention addresses and governs all aspects of ocean space, from delimitation of maritime boundaries, environmental regulations, scientific research, commerce and the settlement of international disputes involving maritime issues, which other experts will allude to during the day, the focus of my remarks is on the diverse threats to the health of the oceans in areas beyond national jurisdiction.

The resources and uses of oceans are fundamental to human well being and development. The long term sustainability of oceans is therefore critical and any change that alters the state of oceans can have serious socio-economic consequences. Therefore there is an urgent and continuing need to address the conservation and sustainable use of oceans in areas within national jurisdictions as well as in areas beyond national jurisdiction.

Over-fishing, destructive fishing practices and IUU fishing continue to be grave threats to the conservation, management and sustainable use of biodiversity on the high seas. To combat IUU fishing it is essential to give priority to compliance and enforcement measures, including effective port State measures, listing of vessels, and developing and implementing integrated monitoring, control and surveillance packages.

The Agreement on Port State Measures adopted by FAO to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA, or Agreement) provides a set of highly effective tools to be used by port States to combat IUU fishing. The application of the measures set out in the Agreement is expected to contribute to harmonized port State measures, enhanced regional and international cooperation and block the flow of IUU-caught fish into national and international markets.

Further, in a landmark step United Nations General Assembly prohibited bottom fishing in high seas unless environmental impact assessments are conducted and regulations are put into place beforehand to prevent the destruction of deep-sea biodiversity. Though there has been some progress in identifying and protecting some vulnerable marine ecosystems, measures taken till

date by States and Regional Fishing Management Organizations are still far from comprehensive.

It needs to be emphasized that the continuing contribution of fisheries to sustainable development depends on the health of functioning, productive ecosystems and on their optimal utilization. It is important thus to sustainably manage fish stocks and protect vulnerable marine ecosystems and thus to find a balance between sustainable use and conservation.

The management and governance of high seas areas presents a formidable challenge for the international community as development of an effective regime for the protection of biodiversity in areas beyond national jurisdiction is seen to be circumscribing some of the traditional high seas freedoms. The challenges of protecting, conserving and ensuring sustainable management of marine biodiversity beyond national jurisdiction are thus enormous.

Marine Protected Areas (MPAs) are seen to be an important marine ecosystem management tool for securing protection from threats to marine biological diversity. The developing literature on MPAs reveals the potential benefits that they could offer not only to the resilience of vulnerable marine ecosystems, but also to the productivity of fisheries. However, in respect of MPAs in areas beyond national jurisdiction, information on governance aspects and costs and benefits is still very sparse and it is not possible to apply area based management tools consistently across all oceans. This is an area where more information on both scientific and economic aspects would be useful and helpful.

It is essential therefore to continue to develop and facilitate the use of additional approaches and tools for conserving and managing vulnerable marine biodiversity in areas beyond national jurisdiction. The Regulations on Prospecting and Exploration in the 'Area' for Poly-metallic Nodules, Poly-metallic Sulphides and Cobalt-rich Ferromanganese Crusts adopted by the International Seabed Authority are an important input with regard to the protection and preservation of the marine environment and the biodiversity of the 'Area'.

New threats to biodiversity in areas beyond national jurisdiction are emerging from bio-prospecting and geo engineering activities like open ocean iron fertilization/ (as a climate change mitigation technique). Bio-prospecting, i.e. the search for, and commercial development of, valuable natural compounds, is one such new use. Deep sea organisms having the ability to adapt to extreme environments have been the subject of considerable investigation for their biotechnology potential. [We understand that in this regard research and product development has centered mainly on the development of novel enzymes for use in a range of industrial and manufacturing processes. A number of commercially viable enzymes have already been developed from hydrothermal vent microbes and are already available on the market]. The growing commercial interest in deep seabed research and the use of the unique genetic resources that this research has discovered raises some very important questions. To put it briefly some of the issues that need attention are

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- who owns these resources, are they common heritage of mankind;
- how should they be used, as several scientific studies have raised concern regarding uncontrolled collection and exploitation of genetic resources from the deep seabed; and,

- how should the benefits of this research be distributed.

A combination of measures, including monitoring, scientific investigation, and improved governance are required to prevent or reduce harmful impacts of such activities on biological diversity. There are no international rules and standards on such new uses and modern conservation principles such as the ecosystem approach and precautionary approach are not consistently incorporated. The Outcome Document of the Rio + 20 Summit in this regard called on the UNGA to take a decision in two years on the development of an Implementing Agreement under the UN Convention on the Law of the Sea (UNCLOS) regarding marine biodiversity in areas beyond national jurisdiction, which is expected to address inter-alia the above mentioned concerns.

At Rio + 20, there was also a move forward on many other issues dealing with oceans including: ocean fertilization, acidification, marine debris, illegal fishing and reaffirming of the World Summit for Sustainable Development [WSSD] target for restoring fish stocks.

The Secretary General of the United Nations has launched the Oceans Compact which sets out a strategic vision for the UN System to deliver more coherently and effectively on its oceans-related mandates, consistent with the Rio+20 outcome. The Compact, is expected to provide a platform to help countries protect the ocean's natural resources, restore their full food production to help people whose livelihoods depend on the sea, and increase awareness and knowledge about the management of the oceans.

To conclude, it needs to be emphasized that deep seabed research is still largely the domain of select developed countries, therefore it is imperative that there be an increased flow of scientific data and information and transfer of knowledge to developing countries so as to improve their understanding and knowledge of oceans and deep seas and its uses and also the extent and vulnerability of deep sea biodiversity and ecosystems. The Oceans Compact it is hoped would contribute in this regard to the knowledge of developing countries and help them in using the resources of the ocean in a sustainable manner.

Thank you

4. Keynote Address by Mr. B. Sen, the former Secretary-General of the Asian-African Legal Consultative Organization

Your Excellency, the Attorney General of Nigeria, Dr. Rahmat Mohamad, Secretary General of the AALCO, Mr. Chakravarty, Dr. Chadha, Mr. Mathias, Excellencies, Ladies and Gentlemen,

I deem it a great privilege to be asked to speak on the occasion of the 30th Anniversary of the conclusion of the United Nations Convention of the Law of the Sea which is often described as the Constitution for the Oceans. The Convention together with four Resolutions forming an integral part of a package was adopted at the 11th Session of the Conference in New York on 30th April 1982. The Conference held its final session at Montego Bay in Jamaica from 6 to 10 December 1982 for adoption of the final Act. The Convention as adopted contains 320 articles grouped under 17 parts together with nine Annexes which include the regime of the territorial Sea, the high Seas, international Seabed area, marine environment, scientific research and settlement of disputes.

AALCO's contribution in the emergence of this Convention could be said to be three-fold; namely, to assist the developing countries of the Asian African region to participate effectively in the negotiations; secondly in helping to build a consensus among the Asian African States on several issues and to bring about an understanding with the Latin American States on several issues and finally in helping in developing of some of the concepts which ultimately found acceptance of the world community. I mean, in particular the concept of the exclusive economic zone, the archipelagic States as well as the regime for the Straits used for international navigation which eventually helped in the emergence of an acceptable package to settle the question of the breadth of the territorial sea.

It might not be out of place to refer at the outset the historical background which dates back to the years immediately following the First World War and establishment of the League of Nations. The Colonial powers mainly Britain and France dominated the scene. The German colonies in Africa had changed hands. The Ottoman Empire had disintegrated and most of its territories had come under the League of Nations' mandate. In so far as the Oceans are concerned, the three basic principles, namely a three mile territorial sea, the freedom of the oceans and Piracy, a crime against all nations continued to prevail. Nevertheless, some thoughts had begun to surface as to whether the breadth of the territorial sea, which was fixed as three miles, should not be reviewed. This was because the gun range of the naval ships had proved to be much wider than three miles and further the fishing interests of many nations especially in Latin America sought a wider belt within which they could exercise economic rights. These issues were to be examined by the Committee of jurists within the League of Nations, which could have been perhaps the first attempt at codification of the law of oceans. The League, however, could not make any progress due to disagreement among its members and other pre-occupations and finally due to the outbreak of the Second World War. During the war years some other important developments took place; the advancement of scientific knowledge, the need for finding new resources including petroleum, led some nations particularly in Latin America to lay claims to larger areas for their territorial seas.

The discovery of petroleum in the sea bed in the gulf of Padua in 1942 followed by the Truman Declaration of 1944 laying claims to the areas of seabed adjacent to their coast led the way to similar declaration by other countries. With the end of Second World War and the establishment of the United Nations, there was again almost a unanimous clamour for re-examination of all aspects of the Law of the Oceans. That was why the International Law Commission was established in 1948 and the law of the sea was taken up as one of its priority items. The Commission examined a whole range of issues and came up with its recommendations by way of preparation of draft articles to serve as preparatory material for negotiations of a multi-lateral treaty in 1956.

Thereafter the United Nations proceeded to convene the first Conference of Plenipotentiaries on the Law of the Sea to work out a unified regime for the Oceans, which met in 1958 for a period of around 10 weeks. The Conference succeeded in drawing up four Conventions, including one relating to the Territorial Sea and the Contiguous Zone, the regime of the High Seas and the Continental shelf. The Conference, however, failed to resolve the issue of the breadth of the territorial sea due to acute difference of opinion. Many of the issues which found themselves codified in the four Conventions were new, such as the concept of a contiguous zone for the purpose of sanitation and customs regulations, the concept of the continental shelf adjoining the coastal waters which had earlier found expression in the various declarations unilaterally made during war years. The Conference made relatively speedy progress and the achievements were not negligible by any standards. This was because the Conference had a meticulously prepared draft before it drawn up by the International Law Commission and the States represented were fewer in number. In addition to the maritime nations, the main participation of the third world was from Latin America since the States in Asia had emerged as independent nations only a few years earlier and the African continent, barring a few territories, was still under colonial rule.

Recognizing the urgency of settling the issue of the breadth of the territorial sea left open by the 1958 Conference, the United Nations convened a second Conference which met in early part of 1960. The difficulty in tackling the issue was that on the one hand maritime nations, as well as States with distant water fishing fleets continued to adhere to the traditional three mile limit for the territorial sea in the interest of freedom of navigation; on the other hand the newly independent States in Asia such as Indonesia and Egypt as well as many Latin American countries clamoured for a much larger belt for the territorial waters. Ultimately a solution seemed to be in sight when a compromise was struck for a 6 mile territorial sea along with a 6-mile contiguous zone at the initiative of Canada, but it failed to get the required 2/3rd majority by just one vote.

The failure of the second United Nations Conference gradually gave rise to a chaotic situation with many of the newly independent countries and several Latin American States began to unilaterally proclaim the limits of their territorial waters, varying from 12 miles to 200 miles leading to uncertainties and impediment to navigation, trade and commerce. Another fresh development took place when President Nixon of the United States proclaimed that their remained areas of sea bed and sub soil beyond national jurisdictions which could be exploited for the benefit of all nations. The United Nations promptly proclaimed the area to be a common heritage of mankind and established a Committee to work out appropriate regime for the

purpose. Whilst the Sea Bed Committee was in progress, a large number of States suggested convening another Sea law conference to settle the outstanding issues.

Acceding to this call, the General Assembly of the United National decided in 1969 to convene a third United Nations Conference. The problem then arose what issues the Conference was going to tackle. The maritime nations and quite a few others which had participated in the earlier conferences suggested that the proposed Conference should only tackle the unresolved issues of the breadth of the territorial sea and certain limited other issues together with all matters relating to the international sea bed area which lay beyond the national jurisdictions. The other view, which prevailed, was that many newly independent countries, especially in Africa had no opportunity to participate in the two earlier conferences either due to the fact that they were not independent at that time or that they had not adequate opportunity of preparation so soon after their independence. The decision being taken to reopen and re-examine all issues including those which found place in the four Geneva Conventions of 1958, a question arose as to which body was to prepare the preliminary text for negotiations. This task was then entrusted to the Sea Bed Committee with an extended membership and four sub-committees.

It was at this stage that the question arose as to how the newly independent countries of Asia and Africa were going to prepare themselves to participate in the debate and the preparatory work of the Sea Bed Committee. One option for a number of countries was to take guidance from their former colonial rulers which many of them did. But then there were others who wanted to take an independent view and examine for themselves, the issues involved with the resources at their command.

The Asian African Legal Consultative Committee, which had only a membership of 12 countries at that time, was called upon to assist in the process. The ALCC, now renamed AALCO had one great advantage in that it had Japan, a maritime nation and a developed country amongst its most active members. It had countries like India, Indonesia, Egypt, Sri Lanka and a few others, which already had among its personnel those who were highly trained in Western Universities. The collective expertise expressed in the Committee Sessions, sub-Committee meetings and working groups helped in the formulation of ideas and preparatory material. The result of this collective exercise was made available for the common use of the member States and was also made available to any non-member Asian –African country, which requested for it.

This was very widely made use of and as a matter of fact even countries outside the region often referred to the material prepared by us. The Sea Bed Committee, in due course succeeded in preparing a negotiating text in 1975 and revised in 1976, on the basis of various proposals discussed at various forums including AALCC sessions. The negotiating texts were then analyzed by the Committee's Secretariat and at times alternate solutions were suggested which emerged out of various meetings arranged by the AALCC. These were then distributed widely for use of members and non-member countries and as a matter of fact the Committee's sessions were so widely attended by observers from countries outside the Asian African region that the AALCC sessions virtually became a mini negotiating forum for various ideas and proposals.

One of the proposals which emerged out of the discussions in the AALCC and found wide acceptance among the entire world community was an economic zone beyond the territorial sea.

The idea came up during one of the sub Committee meetings of the AALCC which was being held in Geneva at the same time as the UN Seabed Committee. The idea of an economic zone had its origin in the concept of the contiguous zone, which had found acceptance in the Geneva Convention of 1958. In essence, it was really an extension of the concept of the contiguous zone mooted to find a compromise solution between the demands of wider belt of the territorial sea on the one hand and the interest of navigation on the other. The concept of contiguous zone was intended to be widened in the proposal of the economic zone so as to include exploitation of the resources of that zone exclusively for the purpose of coastal States. In the initial stages no one seemed to be clear as to what would be the breadth of the territorial waters, or what kind of jurisdiction the coastal States would exercise within that zone or what rights the other States would enjoy with a view to making the proposal readily acceptable to the maritime nations. At the outset, there was strong resistance, quite understandably, from the maritime nations which strictly adhered to the concept of freedom of oceans but gradually they were reconciled to the acceptance of the idea once they were assured that the freedom of the navigation would not be affected and in fact many of the maritime nations later came to welcome the idea once they realized that they would be benefited by the exclusive utilization of the resources of the sea adjoining their coast. A formula was worked out to provide that the coastal States will have all sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and the sub-soil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone. All States, however, would enjoy freedom of navigation and over-flight as also freedom to lay sub-marine cables and pipelines and other lawful uses of the sea.

Then another problem arose as to what would be the breadth of the economic zone. Some delegations suggested 50 miles, some 100 miles but the Latin Americans stuck to the demand for a 200 mile limit, which to some extent satisfied their desire for a 200 mile territorial sea, which was unilaterally proclaimed by some of those countries. The Conference reached a compromise by giving in to the demand of the Latin American countries of the 200 mile limit for the exclusive economic zone. In return, the Latin Americans accepted the 12 mile territorial sea. Another concept which arose out of the deliberations in the AALCC was that of the archipelagic States.

I remember Minister Mendoza of the Philippines explaining to one of the sessions of the AALCC as to why they needed the sea surrounded by the group of islands forming integral part of the territories of the State to be regarded as their internal water. This he said was necessitated in the interest of Security, defense and communication with different parts of the territories. Indonesia, which also basically agreed with this idea but initially claimed a somewhat different type of regime. However, as these ideas were discussed and developed within the forum of the Asian African Committee; Indonesia and Philippines were persuaded to unify their stand as to the applicable regime and present a common front for negotiations with the world powers.

Initially, these claims looked to be exaggerated and were totally opposed by the maritime powers and many others having navigational interests because it would lock up the entire segments of the oceans from access to navigation and in any event would enormously increase the costs of carriage of goods by sea as the ships would need to take a circuitous route to travel from one continent to another.

Finally a solution was reached by the time the negotiating texts were drawn up by the Seabed Committee in 1975 and that was the archipelagic State is to enjoy sovereign rights over the archipelagic waters encompassed within the base lines connecting. Ships of all nations are accorded right of passage through sea lanes designated by the archipelagic States.

There was another part of a package which AALCC was able to broker through promoting acceptance of the special regime of passage through Straits used for international navigation. This came as a proposal from maritime nations in return for acceptance of 12 mile territorial sea which was the basic concern of the most of the developing nations. The provisions concerning straits used for international navigation guarantee that all ships and aircrafts enjoy the right of what is termed as transit passage through straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas.

The provision for a regime of transit passage represented a compromise between the concept of innocent passage exercisable in relation to the territorial sea and the concept of free passage over the high seas. This had to be worked out by reason of the fact that a large number of straits numbering over 100, used for international navigation which had formed part of the high seas with a three mile limit for the territorial sea would be encompassed within the territorial waters of the States bordering the straits if a 12 mile limit was to be adopted as the breadth of the territorial sea. Maritime powers had insisted that their acceptance of a 12 mile limit for the territorial sea would be dependent upon an appropriate regime being worked out for unimpeded passage of ships through the straits.

Another area where AALCC pioneered the work was the interest of the land locked countries since most of these (14 out of 20?) were found to be located within Asia and Africa. The land locked States which were not given even a hearing during the 1958 Conference, were able to bargain special regimes for themselves which included right of access to the sea and freedom of transit through its neighbouring/transit States by all means of transport. The developing countries in Asia and Africa originally showed little interest in working out of the regime for the international seabed area because it seemed that the area would be out of reach for exploitation by themselves, as they would not have the necessary technology or the monetary resources at their command. They were satisfied with what was contained in the single negotiating text issued by the Seabed Committee in 1975 which had by and large reflected the thinking in the developing countries namely that all activities in the area shall be conducted by or in association with the International Seabed Authority to be established under the proposed Convention. However, the position radically changed when in the revised negotiating text it was contemplated that the access to the area should be available to the International Seabed Authority as also to the States, Parties and entities sponsored by them in the manner provided for in the negotiating text known as the parallel system. Group of 77 were initially opposed to the acceptance of this system but after protracted negotiations, the Group showed its readiness to work on the basis of parallel system for a period of 20 years by way of a compromise solution.

The developing nations also began to actively participate in the negotiations on this topic after the introduction of the revised negotiating text and since then, the AALCC Sessions began to be

utilized for formulating, examining, modifying and improving the various suggestions put forward by various interest groups.

Another area which was of concern to the developing nations was that of Scientific Research which many countries rightly or wrongly thought was in the interest of their security. But again, many misunderstandings could be removed through the good offices of the AALCC Sessions and finally Conference came to an end in April 1982 with adoption of 4 resolutions.

Thank you.

5. Inaugural address by Mr. Stephen Mathias, Assistant Secretary-General for Legal Affairs, United Nations

Excellencies, Distinguished Delegates, Ladies and Gentlemen,

Let me open my remarks by conveying to you the greetings of the Legal Counsel of the United Nations, Ms. Patricia O'Brien. She was most honoured to be invited to deliver the Inaugural Address of this Legal Experts Meeting. It is only because of the extremely urgent nature of the matters she is currently dealing with at Headquarters that she cannot be here today. She asked me to join you in her stead and to extend her best wishes for a successful meeting. She is looking forward to being appraised about the deliberations and outcomes of this Meeting.

It is indeed a pleasure to be here to commemorate the 30th anniversary of the United Nations Convention on the Law of the Sea (UNCLOS), which is often referred to as a "Constitution for the Oceans".

2012 saw a flurry of activities to mark this important milestone at United Nations Headquarters and around the world. They included, a panel discussion on World Oceans Day (8 June 2012), a commemoration held and a declaration adopted at the twenty-second Meeting of States Parties to UNCLOS, as well as full day of plenary meetings devoted to the Convention by the General Assembly on the very day of the anniversary, 10 December 2012, as well as many other outreach activities.

Role of AALCO in the development of Law of the Sea and of UNCLOS

I would like to start by recalling the historically proactive role played by the Asian African Legal Consultative Organization (AALCO) and its member States with regard to UNCLOS.

Notably, the item "Law of the Sea" has been on AALCO's agenda since its establishment in 1956. In addition, since the adoption of the Convention in 1982, AALCO has assisted its member States in becoming Parties to the UNCLOS, by providing a forum for discussion of relevant law of the sea issues.

Being surrounded by eminent experts in international law and the law of the sea, I don't need to recall here how the development of the law of the sea is inextricably connected to that of modern international law. However, this Meeting provides an important opportunity to reflect on how the content of the Convention was shaped by the growing influence of African and Asian nations in the post-colonial period.

The Third United Nations Conference on the Law of the Sea, which began in 1973, provided many of the newly independent African and Asian countries with their first opportunity to shape the development of the law of the sea.

During the Conference, African and Asian diplomats made fundamental contributions to the development of such legal concepts as the Exclusive Economic Zone (EEZ), Archipelagic States as well as the Rights of Land Locked and Geographically Disadvantaged States, which were later

reflected in the Convention. They also pushed hard in support of the inclusion of the concept of the common heritage of mankind. Thus, by the time the Convention was adopted, on 10 December 1982, the international community and the law of the sea, as well as multilateral diplomacy, looked much different than in 1973.

In recognition of that influence, two eminent diplomats, Hamilton Shirley Amerasinghe of Sri Lanka and Tommy Koh of Singapore, presided over the Third Conference. Later, Minister Joseph Sinde Warioba of United Republic of Tanzania and then Ambassador Jose Luis Jesus of Cape Verde chaired the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea.

Moreover, that influence remains strong today, as reflected in the leadership of the three bodies established by the Convention, the Seabed Authority headed by H.E. Nii Odunton of Ghana, the Tribunal presided by Judge Shunji Yanai of Japan and the Commission on the Limits of the Continental Shelf chaired by Mr. Lawrence Awosika of Nigeria.

Ladies and gentlemen,

Let me now move to some substantive aspects of the law of the sea which are at the center of this meeting's agenda, namely piracy and armed robbery at sea, biodiversity and sustainable fisheries. Thereafter, I would like to briefly highlight some other important challenges to focus on as the Convention embarks on its fourth decade.

Piracy

Ladies and Gentlemen,

The Convention, as recognized by the Security Council and the General Assembly, sets out the international legal framework for addressing one of the principal challenges to maritime security faced by States in both Africa and Asia today, namely, piracy and armed robbery at sea. Piracy represents a significant threat to the freedom of navigation on the high seas, whilst armed robbery at sea poses security risks to shipping within the territorial seas of coastal States.

As you are very well aware, Articles 100 to 107 and 110 of the Convention set out the specific legal regime for the repression of the crime of piracy. These provisions require all States to cooperate to the greatest possible extent in the repression of piracy. They also codify the customary rule of international law that States may exercise universal jurisdiction over acts of piracy. On the other hand, the Convention provides jurisdiction over armed robbery at sea to the coastal State in whose territorial sea the crime has been committed, as well as flag State jurisdiction to the flag State of the ship on which the crime is committed.

The regime contained in the Convention is complemented by other important international instruments, and with regard to the situation off the coast of Somalia, a number of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

International Cooperation on Piracy

I am pleased to note that in recent years there has been considerable progress in the implementation of this regime. In particular, at the regional level in Asia and in Africa, States have taken important steps to implement the requirement to cooperate in the repression of piracy.

In this connection, I would like to recall the conclusion of a number of regional cooperation agreements. These include the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the 2009 Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, and the 2008 Maritime Organization of West and Central Africa (MOWCA) Memorandum of Understanding on the Establishment of a Sub-regional Integrated Coast Guard Network in West and Central Africa.

There has also been broader international cooperation in combating piracy off the coast of Somalia, amongst both States within the region and States outside the region. Undoubtedly, the Contact Group on Piracy off the Coast of Somalia has played an important role in this regard. Also important, in my opinion, have been the various Memoranda of Understanding that have allowed suspected pirates to be transferred to States in the region for prosecution and, in some cases, back to Somalia for imprisonment after conviction.

Both off the coast of Somalia and in the Gulf of Guinea, international cooperation has also taken the form of increased capacity-building initiatives aimed at strengthening the ability of coastal States to address these heinous crimes.

However, in view of the continued high number of attacks and their impacts on seafarers, international trade and freedom of navigation, greater efforts are clearly needed.

For example, despite the importance of bringing perpetrators of piracy attacks to justice through prosecution, many States still do not have domestic legislation on piracy which fully reflects the provisions of the Convention. The Security Council in a number of resolutions has expressed its concern over this situation and has called upon all States to criminalize piracy under their domestic law.

United Nations entities, in particular the United Nations Office on Drugs and Crime, the IMO and the Division for Ocean Affairs and the Law of the Sea (DOALOS) of the Office of Legal Affairs, have taken steps to assist States in this regard. For example, DOALOS maintains a collection of national legislation on piracy on its website and has developed guidance on elements of national legislation on piracy based on the provisions of the Convention.

Moreover, it will be important, over the medium and long-term, to continue international efforts to address the root causes of piracy and armed robbery at sea on land.

Biodiversity

Ladies and Gentlemen,

Marine ecosystems and biodiversity play a critical role in sustainable development. They underpin a wide range of ecosystem goods and services and provide a source of livelihood for billions of people around the world, in particular in Asia and Africa.

However, the individual and cumulative impacts of various human activities in the oceans are increasingly putting at risk the very basis upon which the economies of many countries depend.

The loss in marine biodiversity and productivity of marine ecosystems will hamper efforts to meet development goals, especially those related to poverty eradication, food security and health. This was recognized in the outcome of the United Nations Conference on Sustainable Development which took place in Rio last June.

While not immediately accessible, marine biodiversity in areas beyond national jurisdiction is particularly vulnerable to an increase in human activity in those areas which has resulted from the degradation of coastal areas and the depletion of their resources. Difficulties in monitoring the activities taking place in those areas and assessing their impacts at the global level pose additional difficulties. Coordination for those areas also presents a challenge as a result of the current sector-based approach for the management of human activities in the oceans.

Ladies and Gentlemen,

The urgency of addressing these challenges is very clear. The basis for doing so is found in UNCLOS, whose importance for advancing sustainable development was recognized by the Rio+20 Conference. Part XII of the Convention sets out the framework for the protection and preservation of the marine environment and includes the general obligation of States to protect and preserve the marine environment (article 192) and the obligation to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species or other forms of marine life. It also includes the obligation to cooperate on a global or regional basis, and to conduct monitoring and impact assessments. Part XIII is critical to advance knowledge of marine biodiversity and ecosystems functions as well as of the pressures that negatively impact the marine environment, as it provides detailed measures for marine scientific research, including cooperation in that regard. Part XIV promotes cooperation for the transfer of marine technology.

Yet, in spite of the comprehensive and visionary framework set out in UNCLOS, as complemented by a number of global and regional instruments, the loss of marine biodiversity continues unabated and new sources of marine pollution and degradation of marine ecosystems compound the difficulties of striving coastal communities and economies.

The General Assembly, in its resolutions 66/288 entitled "The future we want" and 67/78 entitled "Oceans and the law of the sea", endorsed the outcome of the United Nations Conference on Sustainable Development and called upon States to strengthen, in a manner consistent with international law, in particular UNCLOS, the conservation and management of marine biodiversity and ecosystems.

Member States have been discussing critical issues and possible solutions in this regard. After long deliberations which started in 2006, United Nations Member States agreed, in 2011, on significant steps, including on the initiation of a process aimed at ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues. To that end, such a process will identify gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS.

Let me remind you that two workshops will be held at United Nations Headquarters in May to improve understanding of the issues and clarifying key questions as an input to the work of the General Assembly Working Group established to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. These workshops will focus on marine genetic resources and on conservation and management tools, including area-based management and environmental impact assessments. The workshops will also consider issues related to international cooperation and coordination, as well as capacity-building and the transfer of marine technology.

In accordance with the outcome of the Rio+20 Conference, building on the work of the Working Group and before the end of the sixty-ninth session of the General Assembly, Member States must take a decision on the development of an international instrument under UNCLOS.

Sustainable Fisheries

The Convention also sets out the legal regime for the conservation and management of living marine resources, both in areas under national jurisdiction and on the high seas. The provisions relating to straddling fish stocks and highly migratory fish stocks have been further implemented in the 1995 United Nations Fish Stocks Agreement. States Parties to the Agreement have met in the context of the Review Conference (2006 and 2010) to adopt recommendations to strengthen the implementation of the Agreement. Preparations for the second resumption of the Review Conference will begin in 2014.

While the General Assembly has emphasized the importance of sustainable fisheries for food security and sustainable development, considerable challenges remain in global efforts to conserve and sustainably use these resources. Unsustainable fishing practices, such as overfishing, overcapacity and illegal unreported and unregulated fishing (IUU), continue to erode the resource base, often exacerbated by cross-sectoral factors that threaten marine ecosystems, including climate change, pollution and habitat degradation.

In light of these concerns, renewed commitments were made at the 2012 United Nations Conference on Sustainable Development in relation to achieving sustainable fisheries.

Member States in Africa and Asia have made particular progress in this regard. New regional fisheries management agreements or arrangements are being established in the South Pacific and in the South Indian Ocean. A new instrument for the conservation and management of high seas fisheries resources has been adopted for the North Pacific Ocean. In 2012, the Western and Central Pacific Fisheries Commission also conducted a performance review to improve its functioning.

These regions have supported efforts to address the impacts of bottom fishing and have actively participated in the process for the development of the FAO international guidelines for securing sustainable small-scale fisheries, which aim to enhance the contribution of small-scale fisheries to poverty alleviation, food and nutrition security and economic growth.

Regular Process

Ladies and gentlemen,

Another important recent development has been the establishment by the General Assembly of the regular process for global reporting and assessment of the state of the marine environment, including socio-economic aspects (the "Regular Process"), pursuant to a recommendation of the 2002 World Summit on Sustainable Development.

The task of the first cycle of the Regular Process (2010 to 2014) will be to produce the First Global Integrated Marine Assessment of the world's oceans and seas by 2014.

To this end, the General Assembly has created an Ad Hoc Working Group of the Whole, to oversee and guide the Regular Process, and a Group of Experts to carry out the assessments within the framework of the Regular Process. The Group of Experts currently includes five members from Africa and four members from Asia.

In addition, a pool of experts has been created to assist the Group of Experts in conducting the assessments and to provide effective peer-review to ensure the high quality of the outputs. Thus far, only 295 of the approximately 1500 required individual experts have been appointed.

Of these, ninety-two (92) experts have been nominated from Asia-Pacific States and only seven (7) experts have been nominated from Africa. I would like, therefore, to take this opportunity to encourage African and Asian States to strongly consider making further appointments, through their regional groups, without delay.

Workshops in support of the Regular Process are a key mechanism by which the First Global Integrated Marine Assessment will be accomplished and States can enhance their assessment capacity. To date, six Workshops have been held, including in China (2012) and Mozambique (2012). A seventh Workshop has been proposed to be held in the first half of 2013 in Cote d'Ivoire. Workshops are still needed for the North Pacific, the Northern Indian Ocean and Southern Indian

Ocean. States in these three regions willing to host them are invited to contact DOALOS as soon as possible.

Oceans compact

A further initiative that I would like to highlight is "The Oceans Compact: Healthy Oceans for Prosperity" launched by the Secretary-General on 12 August 2012, in Yeosu, Republic of Korea.

The Compact sets out a strategic vision for the UN system to deliver on its ocean-related mandates, consistent with the Rio+20 outcome document "The Future We Want", in a more coherent and effective manner. It aims to provide a platform for all stakeholders to collaborate and accelerate progress in the achievement of the common goal of healthy oceans.

The Compact will assist Member States to implement UNCLOS, and other relevant global and regional conventions and instruments, and promote participation in those instruments.

The Compact has three inter-related objectives to advance this goal: (i) protecting people and improving the health of the oceans; (ii) protecting, recovering and sustaining the environment and natural resources of the oceans and restoring their full food production and livelihood services; and (iii) strengthening ocean knowledge and the management of oceans. Preparations about its implementation are ongoing for consultations with Member States in accordance with their request in paragraph 266 of General Assembly resolution 67/78.

Capacity-building

Ladies and gentlemen,

It is often recognized that a key to improving the implementation of the Convention is to strengthen the capacity of States to deal with many of its highly technical requirements.

To address this need, the Division for Ocean Affairs and the Law of the Sea carries out numerous capacity-building activities in the field of the law of the sea and ocean affairs.

For instance, two fellowship programmes, the United Nations-Nippon Foundation Fellowship Programme and the Hamilton Shirley Amerasinghe Memorial Fellowship, provide research and training opportunities in the field of ocean affairs and the law of the sea to mid-level Government officials and other professionals from developing States.

To date, the United Nations-Nippon Foundation Fellowship Programme has provided training opportunities for 37 professionals from members States of the Asian African Legal Consultative Organization, while the Hamilton Shirley Amerasinghe Memorial Fellowship sponsored 12.

The Division also manages a number of Trust Funds aimed at (i) facilitating the participation of representatives and experts from developing States in a number of important law of the sea meetings and processes, (ii) facilitating access to the dispute settlement mechanisms offered by the

International Tribunal for the Law of the Sea and (iii) implementing the technically complex provisions concerning the delineation of the outer limits of the continental shelf.

Lastly, I would like to recall the six training courses organized by the Division to assist African and Asian States in fulfilling their obligations under article 76 of the Convention on the delimitation of the outer limits of the continental shelf. As a result, more than 260 experts from 34 African and Asian States received training. The majority of them also received trust fund assistance.

Conclusion

Excellencies, Distinguished Delegates, Ladies and Gentlemen,

As both the Secretary-General and the Legal Counsel have remarked "a thirtieth anniversary is traditionally called a 'pearl anniversary', an anniversary that is celebrated through a gift from the oceans, that has come to symbolize something unique, delicate and precious as our marine ecosystem." It will be up to us to ensure that this pearl can be passed on to future generations, so that they can benefit from it as we have.

I started my statement today recalling the important role that African and Asian States, and AALCO as an Organization, played in the successful development of the Convention. I am confident that AALCO member States will continue to play such a positive and constructive role in ensuring the continued success of the Convention over the next thirty years.

It is certain that there will be numerous challenges to face going forward, to ensure the conservation and sustainable use of the oceans and their resources, so that their benefits may be shared by the current and future generations of all States. However, I am hopeful that, as a constitution for the oceans, the Convention will continue to provide the basis for addressing these challenges.

Thank you very much.

II. SESSION ONE OF THE LEGAL EXPERTS MEETING TO COMMEMORATE THE 30TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA HELD ON TUESDAY, 5TH MARCH 2013 AT 11.30 AM

SESSION I: DISPUTE SETTLEMENT UNDER UNCLOS

1. Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO in the Chair.

Chair: A good morning to all of you. We have the pleasure this morning to have with us the experts of the Law of the Sea, and I am very happy with the participation of Member and Non-Member states. I must say that we have a full house this morning and I do hope we can sustain that participation until the end of the sessions this afternoon.

I say we are privileged because I have here with me on this podium H.E. Gudmundur Eiriksson, the Ambassador of Iceland to India**.** He received a Bachelor of Arts degree and a Bachelor of Science degree in Civil Engineering from Rutgers College in 1970, an LL.B. (Honours) degree from King's College, University of London in 1973 (Jelf Memorial Medalist) and an LL.M. degree from Columbia University in 1974.

Ambassador Eiriksson served as a Law of the Sea Officer in the Office of the Secretary-General of the United Nations for the Law of the Sea from 1974 to 1976 and as a Special Consultant at the Third UN Conference on the Law of the Sea in 1977. He was a Judge at the International Tribunal for the Law of the Sea from 1996 to 2002 (President, Chamber for Fisheries Disputes 1999-2002).

He is the author of *The International Tribunal for the Law of the Sea* (Martinus Nijhoff Publishers, 2000) and numerous articles on the law of the sea, legal education, international criminal law, international organizations, international relations, disarmament and human rights, including annual surveys of the work of the International Law Commission in the *Nordic Journal of International Law* for the period during which he was a member of the Commission. He is a Knight Commander of the Icelandic Order of the Falcon.

H.E. Mr. Gudmundur Eiriksson, Ambassador of Iceland to India: Thank you very much Dr Rahmat Mohamad. Of course it's a great honour for me to be here once again under your Chairmanship. I was thinking that on the occasion of this 30th Anniversary I reminded myself that I am one of the only people who was in all three branches of this process. I ended up in the Judicial Branch and was before that in the Legislative Branch representing my country and before that working in the first Secretariat and working very closely with Dr Hayashi with whom I had the great pleasure of spending long nights in Geneva and New York.

I am very grateful to be able to be here with you on this occasion and for the cooperation of our colleagues in the Legal and Treaties Division of the Ministry of External Affairs. I do have to add that Dr Rahmat Mohamad is not only leading his Organization but is one of the leading

lights of the international law community in Delhi and this is only one of the many initiatives that he has taken with his very able staff. We are all grateful for that.

Personally, I have had great opportunities to follow the activities of AALCO, from the time it was AALCC including the times when it made crucial contributions to the law of the sea such as exclusive economic zones and archipelagos. And we have other graduates of AALCO here so it's a great occasion to remember the contribution of the organization on the 30th Anniversary.

I have elsewhere emphasized that I think that precisely in the Law of the Sea negotiations, the third world and specifically African and Asian scholars, diplomats and negotiators began to play a role. And I think that it was only with the success of those negotiations beginning in the '60s that the third-world became confident in the field of international law. I would add to the mention of these giants in the field who were mentioned by Mr. B. Sen earlier today. Hamilton Shirley Amerasinghe was one of my models in life and an amazing person. He was not legally trained but we all know some anecdotes of his. I remember one time we were talking about the definition of the Exclusive Economic Zone he said "Sovereign rights? Jurisdiction? What is all this? Who cares about these things?", which we had been belaboring for four or five years. He had that type of approach to international affairs in which international law found a place, and not the other way around. He was succeeded upon his untimely death by Tommy Koh from Singapore who was another great leader. I'll come back to him and his contribution later. With all these great names, I have to mention that my nearest neighbours in these negotiations were my colleagues from India and Zambia. So for hours and hours I was sitting with my dear colleagues from India so even though I'd never been to India before when I came here three years ago I knew quite a bit about the country.

I think that when I talk about the contribution and success of that effort, it's most prominent in the field of settlement disputes. I want to deal with that before I come to the more specific comments on the recent work of ITLOS. In the '70s the ICJ had virtually no cases and as we know the change has been dramatic. Recently President Tomka, of the ICJ, pointed out that in the last 22 years the Court has rendered more judgments than in the first 44 years; 60 as opposed to 52. Now at the Law of the Sea Conference I was not part of the negotiations dealing with settlement of disputes was undertaken. Those negotiations were led by a Professor Louis B. Sohn of the United States and it was a relatively private exercise in the first stages. He had brought together likeminded international scholars from all delegations including from the Asian African states and produced a kind of forum outside the forum structure of the conference; a structure for the settlement of disputes. Now it has to be said that his thinking and the thinking of his colleagues was somewhat idealistic. However, I think we can explain this by the fact that he and the older members of that group were the most charter generation. They knew what the Charter was meant to achieve and had a great belief in the universality of International law and the role of settlement of disputes within that regime. Inevitably, Professor Sohn who was, I believe, a member of the US delegation, wasn't always being endorsed in the activities he was carrying

out. It was condoned, but not necessarily pushed to do this. It was an effort as a scholar which continued for the rest of his life.

Understandably, when this idealistic product was brought back to the conference, many people were rather aghast at what was going on here. And so the product we have today has been ameliorated with a whole bunch of limitations and exceptions which we have to live with today, and I'll return to that a little later. In order to understand professor Sohn's achievement and that of his colleagues, remember that in the seventies the very idea of third-party dispute settlement was out of favour in virtually all corners of the world for various reasons. So, from that stage it was not possible to really assess at the time of the adoption of the Convention how successful this regime would be. It would of course depend on how States use the process and how many exceptions and limitations they avail themselves of when the time came. So this is the theme of my talk today, and I think it's a rather personal reflection.

Here I am dealing specifically with the recent decision adopted by the ITLOS in its judgment last march in the dispute concerning Bangladesh and Myanmar in the Bay of Bengal. But before I go into that I want to recall my own role and my own trajectory. I was on the first bench of the Tribunal and we had no cases of course. The Secretary referred to the Corfu Channel case which was the first case of the ICJ, and that took five years, so we did not expect cases right away. But, at the time I took pains to lecture about the tribunal because we had no paperwork and no record, so I took great pains to acquaint people with this new court. I lecture in 50 or 60 places over the course of the first 3 years.

I took pains to assure political participants in the regime, and what I mean by that is potential parties to cases before the Tribunal that we would not be departing significantly from established jurisprudence, whatever that meant at the time, and we would not be as some uncharitably called us, a "maverick court". And this has repercussions in the so-called "fragmentation" debate caused by the so-called proliferation of international courts. This was something faced by not only ITLOS but by all the emerging courts. This was mostly between the ICJ and the Former Yugoslav courts and not so much between the ITLOS and the ICJ. I recall that some of the judges in the other courts were very uncharitable to us that we were not to be trusted and I always pointed out that we are exactly the same people who had gone through the same processes as the judges there so why should we be any different.

When I was pointing out the advantages of the court, it was not that we were going to be a modern court as we had several senior judges. I was the youngest and I was 48, so it was not as if we were new blood. One of the advantages of most of the judges in that tribunal had served in the negotiations in the conference so they could be expected to not have to do a lot of research to deal with topics that came forward. Secondly, I pointed out that we had learned from the experiences of the ICJ and some efforts had to be taken to make the trial process more "user-friendly". So when we developed the rules of procedure we skipped a few of the process which in time was beginning to show that the ICJ should depart from and in fact they have taken some

of the steps we had taken in terms of procedure. So basically we said that we would be able to work more expeditiously and of course one factor there was that we had no cases so it wasn't like the court was being overloaded.

And then just as a footnote, many of my colleagues used to say that it would be cheaper to come to our court than to go to arbitration I guess because you wouldn't have to pay the judges. I never liked saying that because in fact the judges were being paid, they were just not being paid by the parties, but by the world community. So I never liked to say that people would be getting a free ride by coming to us. And of course there are a lot of benefits in going to a standing court rather than arbitration.

As I said I will be using the Bay of Bengal case as a centre-point for my thoughts today. In this presentation I will be making just six points before setting out my conclusion that that judgment and the scholarly reception and the reception by the parties bode well for the tribunals future and the future.

Well the first and most important point is that this was the first decision by the Tribunal on merits. The Court's first case, the *MV Saiga* case was also on merits but it ended up being decided on a very narrow point of law so I'm not sure that we made much of a contribution to the substance of jurisprudence of the law of the sea by that case and I can reveal here among friends that I would have gone further myself at the expense of not having as large a majority on the case. We understand that there's always a pressure to have a larger majority and this is something that is shared by all leaders of committees and conferences and judges present in courts. But it seemed to me a pity that the advocate for our client, who was not a professional in international law but was practicing lawyer in London, heard about our court and called up the registrar. We had just finished our rules of procedure and sent them to him and he liked the idea and brought the case. But he brought the case and sought the answer to a particular question and yet two years later did not get the answer to that question. We answered something irrelevant to him so he was not really a satisfied client even though he won the case. Anyway, I don't know what effect that had on me in the future, but my prejudice is to solve something on the basis of the overriding principle rather than the narrow principle and if you ever asked me to do that again I would continue that.

So I mentioned before that this was the first real case on merits so the Tribunal had actually gone from 1996 to 2009 without a true test of the factors that I was mentioning before about the benefits of the international convention mechanism. And this of course was very discouraging for us. I mean, me in particular, I had left an active job to be in a court without serious cases. But on the other hand, we all recognized the reluctance of states to give us serious questions and departing from the tried and true practice in which they had vast experience, either in the ICJ or arbitration. In arbitration there was the feeling that the parties had more control over the process and in particular over the choice of judges. And as I mentioned, before the international BAR there was a small group of lawyers leading the discussion and they were quite frankly very

confident in the Hague environment or the tribunals established through the Permanent Court of Arbitration. Anyway, we can fully understand that and you cannot really ask them at that stage to take a first step in a new tribunal.

My second point is, I want to make it quite clear that even though we had not dealt with cases on the merits, we did take the opportunity to make contributions to the substance of the law of the sea, at least to the extent we could. Of course, most specifically it's in the field of prompt release of vessels which opens up a large array of legal questions which I think have influence outside the narrow topic. But also in the field of environmental law; we all know how there is a real dearth of decisions in environmental law, so I was glad to be able to participate in the case to the development or reaffirmation of the principle of the obligation of states to consult on possible trans-boundary environmental harm. This may be lost otherwise in the footnotes of history but I think a careful look at that will show it to be a good example of international law even on that very political process.

Well my third point is that the Bay of Bengal case was a case on delimitation and that says a lot in itself because that is the bread-and-butter of international law and the law of the sea before tribunals for a lot of reasons which I don't have to go into here. This falls upon the two-dozen or so cases which have been decided either in the ICJ or other tribunals on delimitation. Many of these cases had been brought after the Tribunal had been established, so it was a specific choice not to choose the Tribunal. So therefore it is very important to be able to test that theory that I was promulgating before on the substance of the decision also, and therefore place the Tribunal in the greater context of dispute settlement in law of the sea. I shared a panel recently with Judge Xue of the ICJ, and I was very pleased to note that she, like me, does not consider the proliferation of international tribunals to be a problem, but rather an opportunity to enhance the role of international law in international relations. We both agreed that in a world which is so complex the more opportunities to settle disputes peacefully there are the better. There could be some overlap and fragmentation, but I think that's a price that one should pay if it leads to more use of the process.

Turning back to the Bay of Bengal case, now this general relationship with the jurisprudence of other courts including the ICJ, I think you can fairly say that as far as the decision on the delimitation of the Exclusive Economic Zone and continental shelf within 200 miles, the Tribunal did not depart at all from recent trends. They have adhered to recent trends in the relation between equidistance, equity, proportionality etc. This is evidenced by the extensive citations to the previous cases in the ICJ.

More specifically, if I come to the more detailed presentation for the students here, in citing the ICJ case of the Black Sea, the Tribunal adopted a so-called equidistance/circumstances method following a three-stage approach. The first stage is they constructed a provisional equidistance line based on the geography of the parties' coasts and pure mathematical calculations. Then they determined that there were relevant circumstances requiring adjustment of the line to produce an

equitable solution. Then finally, they tested whether this adjusted line resulted in a significant disproportionality between the ratio of the States' coast lengths and the ratio of the maritime area to be delimited.

So this was the approach they took and as in all these cases, the application of the steps, the application of the citations that they were making, cannot easily be challenged. They all require a certain amount of balancing of the various circumstances and the Tribunal was not always very detailed. But in doing so and not being so specific on the balancing, other parties from other courts like the ICJ and other tribunals. Even those professionals in the field will recall Judge Oda's comments on the process, in which he held the view that it was becoming a non-legal process. I think that was always unfair. We know the restrictions under which the Court is working and there are so many ways to balance these characteristics and as I said, from the outside not easy to challenge them.

My fourth point, I think adding vastly to the noteworthiness of the case is that this is the first case dealing substantively with the continental shelf beyond 200 miles. As you know the question has arisen in two or three other cases and in each of those cases the court said it was either not relevant or chose not to deal with it. This time the Tribunal decided to deal with it.

And here again I come back to the general context. We can see how important it was then that the negotiators chose those wordings to develop and implement the rules set out in the law of the sea convention. We had this discussion of what was expected in the future with my colleagues and how the challenges are being met by the existing dispute resolution mechanisms. It was not enough to put these rules on paper. It was recognized that problems would arise and challenges would have to be met and some kind of mechanism would have to be set up. In relation to the Bay of Bengal case, particularly significant is the role of the Commission on the Limits of the Continental Shelf. The judgment of the Tribunal dealt extensively with the relationship between dispute settlement and the work of that body. I think the court was very successful in skirting the problems, identifying that if these problems were not addressed head-on a legal lacking would result. Those of you who are following the Continental Shelf Commission know that they were very aware of the problems established by the conference.

Again, the judgment was very fact-specific like in all cases of this nature, and I don't like to speculate now whether in other geo-physical circumstances the task would have been as readily addressed by the Tribunal. For the moment it can be said that a partial solution has been worked out. Remember that there is another arbitration going on to fill-in what the Tribunal has started vis-à-vis Myanmar and Bangladesh.

As I mentioned before, the Tribunal followed existing practice and established jurisprudence with respect to the continental shelf within 200 nautical miles and then necessarily breaking new ground with respect to the continental shelf beyond 200 nautical miles. They nonetheless chose to follow the tendency of tribunals dealing not necessarily exactly on the merits, but the nature of

the continental shelf to downplay the role of natural prolongation and in general geo-physical and geo-morphological factors in this judgment. It's fair enough to disregard geo-morphology within 200 nautical miles, given the nature of the exclusive economic zone but I don't think it's quite necessary in the area beyond 200 nautical miles. I'll be writing on this later and you can read my works on it in a few months.

My sixth point, and I think is particularly relevant to AALCO, is that this is the first delimitation case in Asia. I had the pleasure of listening the other day to Amb. Tommy Koh, former president of the UNCLOS, speaking in a forum dealing in the Asian context. He was speaking about the very good relations existing between most States and I was sorely tempted to ask him whether this new ITLOS case would inspire contesting states to take disputes in the South China Sea to third-party dispute settlement. But, before I got up the courage to ask him someone else asked him the question, and the answer he gave was so typical of him as those of us who know him from the time that he took over the task of the Conference at a time when basically even other states' administrations had rejected the work that had gone on a few years before. His positive and optimistic attitude carried the day then and I think that Amb. Koh's remarks in answer to this more political question from the floor made me hopeful that even some of the more difficult questions in the South China Sea might make their way into the court for settlement, specifically to ITLOS.

I can thus return to my old habit of suggesting that ITLOS is a very viable format for this kind of issue. Now there are more cases on merits being brought to the Tribunal and I can only hope that this is the final stage in the development of the dispute settlement mechanism and that the Tribunal has come of age and is fully able to meet the expectations of the architects of the dispute settlement mechanism of UNCLOS.

Thank you very much.

Prof. Dr. Rahmat Mohamad: Thank you for the excellent presentation and I'm sure we have questions from the floor, but I must tell you that we have extended our session. We were supposed to end this session at 12:00 P.M.; however, I think we can have a few questions from the floor or any intervention.

Mr. Mustafa Hussain, South Asian University: Sir, the first thing is, why did the States feel that they needed a body like ITLOS whereas the ICJ was successful in cases like the North Sea Continental Shelf Case? Was there anything lacking on the part of the ICJ which led states to feel the need for another body, like ITLOS? Even in the absence of the ICJ there were other courts like the Permanent Court of Arbitration and other tribunals, thus, why was ITLOS required?

Secondly, coming to the maritime delimitation case of Bangladesh, if we look at the judgment, the Court has given importance to the geography of each state, and the geography of each situation must be reflected. Now in the North Sea Continental Shelf case, in the ICJ, Germany

stated that the geography of East Pakistan, which is now Bangladesh, has a distinctive geographical character and on that basis the ICJ accepted the issue and thereafter the concavity effect was applied in the North Sea Continental Shelf case. But when this same issue was presented by Bangladesh before ITLOS and that Bangladesh's coast is similarly concave. The court accepted this but still applied the equidistance method. Why didn't the Court apply the concavity effect and apply the equidistance method instead?

One more thing, sir; if we look at the separate opinion in the judgment we find that Bangladeshi fishermen and naval officers followed a practice since the 1970s regarding delimitation in the Bay of Bengal which is a kind of implied practice. When Bangladesh presented this issue before ITLOS and Myanmar didn't oppose it, the Court also rejected that issue. Can you please clarify these questions?

H.E. Amb. Gudmundur Eiriksson: The first one is slightly easier. As for the second, I cannot speak for the judges in the court. But certainly I have to challenge you in a sense for saying that people were satisfied with the ICJ. Remember that at this time the ICJ had come from a rather disastrous decision in the *Namibia* case. I have to say that there was a great lack of confidence among third-world countries in the ICJ. Look at the ICJ; it has the same constitution as the Security Council. So there was definitely a moment for having something else other than the ICJ.

Now there are other matters also. It was clear at this time there would be other parties and states appearing, dealing with the International Seabed Authority. We could never imagine the ICJ to be amended and take over other bodies. Then there was also the issue of non-state bodies, so there was a definite need, substantively and politically, to have a new court.

I don't think there was anyone who would have expected a pure equidistance line. It's a textbook example. So the only question is how the combination of principles was used to establish to delimit the maritime area. The various factors that you mentioned about the fishermen, I don't really way to go into that, but I will say that I am firmly convinced that they did follow the type of thought processes in cases where pure equidistance would not be possible.

Mr. V.K. Jambolkar: Thank you Ambassador. You made a passing reference to South China Sea problems which I think you're not supposed to mention about. However, I would like to ask you, the settlement between Bangladesh and Myanmar is a political question. Does it have any implications for India's case vis-à-vis Bangladesh?

Secondly, if you can, in layman's language, explain to me the Chinese view of the South China Sea. What does it indicate?

H.E. Amb. Gudmundur Eiriksson: I'll answer only the first question. I can speak as a former judge and judges are human, most of us, and there's no doubt in my mind that when they saw the judges in the arbitral tribunal they have to see the judgment and study the reactions to it. That's the judge's point of view, but I know for a fact that the advocates also have to be able to address

that as a most recent precedent and extremely relevant to the questions. There are other examples of courts who think that the ICJ were very circumspect not to deal with a lot of third-parties' issues, but in fact there is no way that this Tribunal could have avoided that. They had to touch on this somehow. It may have created a bit of a problem for the judges but they're all very capable people and I'm sure that they'll find a way to deal with that.

I think that if you mention about the political aspect of it, I think it's been a great that we've reached this stage. From the point of view of international law, and the point of view of myself, I think it's a great step that countries are settling dispute through third-party settlements and I think it will be a benefit for everybody.

Prof. Dr. Rahmat Mohamad: Thank you very much Your Excellency Ambassador Eiriksson for the excellent presentation and I think now we would like to end this session. We will definitely invite you again for another session as you have been a very regular contributor to this organization.

Thank you so much.

III. SESSION TWO OF THE LEGAL EXPERTS MEETING TO COMMEMORATE THE 30TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA HELD ON TUESDAY, 5TH MARCH 2013 AT 12.00 PM

SESSION II: PRESERVATION AND PROTECTION OF MARINE ENVIRONMENT: CURRENT CHALLENGES

1. Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO in the Chair.

Prof. Dr. Rahmat Mohamad: I welcome you to the second session of today's Legal Experts meeting. Our speakers for this session will be the eminent Dr. Moritaka Hayashi, who will make a presentation about the "**Conservation and Sustainable Use of Biodiversity in Areas Beyond National Jurisdiction**".

Thereafter, Dr. Luther Rangreji will make a presentation on the topic of "**Issues for Developing Countries under the Nagoya Protocol**". I would also like to draw your attention that the Secretariat has circulated a paper entitled "**Genetic Resources and Developing Countries: Access and Benefit Sharing under the Nagoya Protocol".** This has been sent by Dr. Roy S. Lee, who is AALCO's Permanent Observer to the United Nations and is based at New York.

Before I give the floor to Dr. Moritaka Hayashi I would like to briefly introduce him. Dr. Hayashi is an international lawyer, scholar and author, who is widely considered a leading expert on the impact of human activity on the world's oceans. Over a period of nearly 40 years, he has published extensively on issues involving the law of the sea, including overfishing, maritime shipping and maritime security. In 2008, he served on an international commission that generated controversy by calling for the immediate suspension of bluefin tuna fishing in the Eastern Atlantic Ocean and Mediterranean Sea. He has also served as an official at the United Nations and as a diplomat for the Permanent Mission of Japan to the United Nations.

Dr. Hayashi began his international legal career in 1971 as an officer at the United Nations. Starting in 1980, he worked as a diplomat at the Permanent Mission of Japan to the United Nations rising to the position of Minister. In 1989, he returned to the United Nations to serve as Principal Officer, and subsequently as Director of its Division for Ocean Affairs and the Law of the Sea. In 1996, Dr. Hayashi began serving as the Head of the Fisheries Department within the United Nations' Food and Agriculture Organization. In 1999, he joined Waseda University in Tokyo, Japan to teach various courses including international law of the sea and international environmental law. He has served on the International Commission on Shipping and an independent panel appointed by the International Commission for the Conservation of Atlantic Tunas. He lectures and actively participates in legal conferences worldwide such as the International Conference on Joint Development and the South China Sea held by the National University of Singapore's Centre for International Law in June 2011 and a Law of the Sea Institute Conference at the University of Wollongong, Australia in November and December 2011. Dr. Hayashi has a number of publications to his credit.

Dr. Moritaka Hayashi, international lawyer, scholar and author: Excellencies, ladies and gentlemen, I would like to thank the Legal and Treaties Division of the Ministry of External Affairs and the Asian-African Legal Consultative Organization for organizing this meeting on this the 30th Anniversary of the United Nations Convention on the Law of the Sea, and for giving me the opportunity to speak before you. I would also like to thank the Secretary-General for introducing me to this gathering.

In the course of discussions at the working group, divergent views have been expressed on the legal issues relating to the topics. Here in my short presentation, I will try to highlight the new trends on such deals in what I would say are the key legal issues; the legal status of marine genetic resources, and the implementation of marine protected areas, and environmental impact assessment.

First, on the legal status of marine and genetic resources, positions of governments are sharply divided between those who consider that they are regulated by Part VII of UNCLOS relating to the High Seas, and those who contend that they are governed by Part XI relating to "the Area", namely the deep-seabed beyond areas of national jurisdiction. The former view is based essentially on the literal interpretation of UNCLOS provisions. According to this view, marine resources in areas beyond national jurisdiction are living resources, and thus fall under the region of the high seas. Part XI of the regime applies only to resources in the Area, which is explicitly defined in Article 133 as mineral resources and thus excludes living resources. The activities relating to genetic resources are therefore governed by the freedom of the high seas

Against that view, the latter group stresses that the genetic resources in question are located in the Area, and UNCLOS declares the Area itself to be the common heritage of mankind. In support of this view it was argued that General Assembly resolution 2749 of 1970 declared the area as well as its resources, without defining resources, to be the common heritage of mankind, and that is now part of customary international law.

It was also argued that the regulation of activities in the oceans and use of their resources depend on the maritime zones in which they are conducted. The seabed resources in areas beyond national jurisdiction, including the living resources are therefore resources of the Area and the principles in Part XI are applicable also to marine genetic resources.

In an attempt to get out of this deadlocked debate between the two groups of states, a third approach was suggested to focus on practical measures to enhance the conservation and sustainable use of marine genetic resources, such as options for facilitating access to their collected samples and for sharing the benefits in a fair and equitable manner. As a reference point they mentioned the International Treaty on Plant and Genetic Resources for Food and Agriculture, which has established a multilateral system. This system includes a selection of dozens of plant genetic resources that are considered most important for world food security. Material in the multilateral system is put into the public domain and can easily be accessed

provided that the recipient of material complies with the conditions for the fair and equitable sharing of benefits.

Regarding such view however, concern was expressed that a new legal regime for benefit sharing regarding marine genetic resources would impede research and development. It was stressed that the greatest benefits from these resources would come from the availability of the products that are made and the contributions of these products to public health, food security and science.

The second key issue is the so-called area-based management tools, particularly marine protected areas. Area-based management tools are considered effective tools in the conservation and sustainable use of marine biodiversity in areas not only under national jurisdiction but also beyond. Among such tools, the focus of recent UN debate has almost exclusively been on MPAs.

MPA is, according to the CBD Secretariat:

> "a defined area within or adjacent to the marine environment, together with its overlaying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including customs, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings."

MPAs are considered to be important particularly in the implementation of ecosystem and precautionary approaches to ocean management and in addressing threats to marine ecosystems in a holistic manner.

With regard to the legal basis for MPAs in areas beyond national jurisdiction, no specific reference is made to MPA in UNCLOS. The Convention nevertheless imposes a general obligation on all States to protect and preserve the marine environment. It further requires States specifically to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. These provisions, as well as subsequent developments in the environmental law principles of ocean governance such as the precautionary principle and ecosystem management have provided the legal bases for those States which advocate the need of establishing high seas MPAs.

Against such view, some delegations noted that there is no multilaterally agreed legal regime for the establishment of MPAs in areas beyond national jurisdiction. And that MPAs could not be established unilaterally or by a group of States only. They therefore expressed reservations concerning the legitimacy and legality of the establishment of MPAs in areas beyond national jurisdiction by some regional organizations, as well as the compatibility of these initiatives within the framework of UNCLOS.

With respect to environmental impact assessment, UNCLOS in Article 204 imposes on States a general obligation to regularly monitor, evaluate and report the risks or effects of pollution of the marine environment, and it requires States to "keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment." Article 205 then requires States to publish reports of the results obtained from such surveillance.

Then, Article 206 sets forth the duty to undertake environmental impact assessment, providing that when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.

Since this provision applies to activities under a State's jurisdiction or control, it applies also to activities in areas beyond national jurisdiction as far as the activities concerned are under the control of that State.

In the Working Group, speakers highlighted the importance of environment impact assessment, which they considered a significant and integral part of conservation and sustainable use of biodiversity beyond areas of national jurisdiction. Environmental impact assessment was pointed out to be of particular importance for the implementation of precautionary and ecosystem approaches. Some of them called for further development of effective environmental impact assessment as a tool for improving ocean management. Those delegations were of the view that there was a governance gap regarding environmental impact assessment in areas beyond national jurisdiction since Article 206 provided a general framework only.

Other delegations were against such views. More generally it was emphasized that scientific or exploratory activities that do not cause significant adverse impact should be permitted. Caution was voiced that prior impact assessments need to be carefully balanced with the need to promote scientific research.

With regard to the future course of action that the General Assembly should take, divergent views were expressed on this point as well. A group of delegations consider that an agreement supplementing UNCLOS for the implementation of its provisions is the most effective way to establish an integrated regime and address the variety of issues being discussed. Those delegations suggest that such an instrument is also useful to fill the current governance and regulatory gaps. It is suggested that such agreement should provide for management measures or tools such as the MPAs and the environmental impact assessments, mechanisms for access to and sharing of benefits arising out of the utilization of the marine genetic resources as well as the capacity-building and the transfer of technology. Furthermore, such agreement could set out

general principles of conservation and sustainable use of marine biodiversity that have been widely accepted in recent years.

Other delegations do not share the need for an implementing agreement. They expressed the view that activities in areas beyond national jurisdiction are either appropriately regulated under existing institutions or could be better regulated through the existing instruments and institutions and by strengthening cross-sectoral coordination and cooperation. These delegations emphasize that efforts should be focused on implementing and complying with existing instruments, strengthening existing tools and mechanisms, improving cooperation and coordination and strengthening the capacity of developing States.

It appears that before completing its mandate, the Working Group has a formidable task of narrowing the views and reaching consensus on the key issues before it. In the Future We Want adopted at Rio in June last year, UN Members have committed to expedite the Working Group process, including by taking a decision on the development of an international instrument on the subject before the end of the 69th session of the General Assembly, which is September 2015. If I may be allowed to add a personal view in this regard, it is recalled that, the Secretary-General's consultation process, which produced the text of the Part XI implementation agreement, started without discussing the form which its outcome should take, and the decision on the form was made only after the negotiations on the key issues of substance had reached the final stage. In order to ensure that marine biodiversity issues are governed by a truly effective global framework, it would be advisable that the Working Group draw a lesson from this precedent and work on all issues of substance until negotiations to reach consensus are completed before it takes its decision on a possible international instrument.

Thank you.

Prof. Dr. Rahmat Mohamad: Thank you Dr. Hayashi. I would now like to invite Dr. Luther Rangreji who will talk about "Issues for Developing Countries under the Nagoya Protocol on ABS". Dr. Luther is on deputation to the Faculty of Legal Studies, South Asian University from the Legal and Treaties Division, Ministry of External Affairs, Government of India. He has an LL.M from Pune University, M.Phil and Ph.D in International Law from the Centre for International Legal Studies, JNU, New Delhi. Earlier, he worked as a Legal Officer at the Secretariat of the Asian-African Consultative Organization. Dr. Rangreji is a visiting faculty at the Indian Society of International Law, Symbiosis International University, Pune and other law schools and universities. He has some publications to his credit.

Dr. Luther Rangreji, Assistant Professor, Faculty of Legal Studies, South Asian University: Thank you Secretary-General. Dr. Hayashi; Distinguished guests; ladies and gentlemen;

The topic given to me is "Issues for Developing Countries under the Nagoya Protocol". The topic is within the broader section of the protection of marine environment and preservation and current challenges. I am going to deal with the Nagoya Protocol largely as falling within the protection and preservation of marine environment. Otherwise there are a number of instruments which developing countries have drafted while the Nagoya Protocol was being negotiated. Having worked with the Ministry of External Affairs I had been a part of this process.

Now just to recap the main elements of the Nagoya Protocol; in case you're familiar with the negotiation of this treaty you'd know that in October 2010 the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety as well as Nagoya Protocol on Access and Benefit Sharing were adopted. It was a historic moment whereby COP adopted two important treaties.

The second treaty, which is the ABS treaty, was in many senses a compromised treaty because, with all due respect to Dr. Hayashi, the Japanese government brought a huge amount of pressure that the treaty should be the Nagoya Protocol and not the New Delhi one, where the next COP was going to be held. There were a number of outstanding issues and some of these issues were very important to developing countries. Issues regarding genetic resources that are stored all over the world, the relationship of Nagoya Protocol to other existing national instruments were all present. Most of these outstanding issues were settled in one sitting. There were still a lot of challenges which the countries are coming to grips with. India, which has the present COP of the CBD, is undertaking a number of measures to disseminate knowledge and understanding as to how countries, especially developing countries in Asia and Africa, would have their domestic instruments in place, not only to ratify the Nagoya Protocol but also to understand how this protocol needs to be implemented at the domestic level.

Now, Dr. Hayashi has addressed a number of issues which I am not going to deal with. But I am going to touch upon the main elements of what this protocol is. One is how the scope of the relationship of this protocol with other international instruments and processes has, academically speaking, in some way reduced the strength and effectiveness of this protocol that was intended in the first place.

As the name of the Nagoya Protocol suggests, the protocol deals with genetic resources and access and benefit sharing of genetic resources. These are the key issues for which the signatory countries felt that there should be stronger benefit-sharing provisions. From first day of the negotiations in 2006 until the treaty was adopted, the only discussion was on benefit sharing and a large number of developed countries were disturbed that developing countries wanted stronger access provisions.

The mandate of the Convention on Biological Diversity is laid down in Article 14, which deals with access to genetic resources. The word is only 'access' to genetic resources and not 'access and benefit-sharing' of genetic resources. The benefit sharing has been mentioned in a number of

provisions of the CBD. So, the superstructure of this ABS had to be related to what article 15 of the CBD says.

If you see the definition and the scope, it speaks about utilization of genetic resources. Utilization brought in a new term, which is known as modern applications of biotechnology, which looks at many of the benefits that flow from genetic material, not genetic resources seen as natural or biological resources. And then you had to further limit these to issues of animal, plant or microbial resources. So the scope was a restricted one. There were a large number of countries especially from the European Union and other places that did not want to touch upon the CBD collections of genetic resources.

The third issue was the geographical scope, which relates to the law of the sea. The geographical scope was clearly areas within national jurisdiction. If you have to say areas within national jurisdiction, the Nagoya Protocol will deal with sovereign rights within territorial waters, contiguous zone and exclusive economic zone.

These issues are the gist of a number of treaty processes which impacted, in my academic understanding, on how the treaty was being negotiated. The first one was, as Dr. Hayashi mentioned, the International Treaty on Plant and Genetic Resources for Food and Agriculture. This clearly deals with only plant genetic resources and the conservation and sustainable use of plant genetic resources. The second one is what is known as Convention for the Protection of New Varieties of Plants. This also deals with the aim to provide a more effective system of plant-related protection, largely a system for plant breeder's rights. The third one was the Law of the Sea Convention. Then we have what is known as the Antarctic Treaty System. The Antarctic has its own set of treaties and Article 6 of the Antarctic Treaty provides protection for marine genetic resources in areas south of 60 degrees South latitude.

Apart from this we have WHO work on pathogens. Pathogens were greatly debated when the protocol was being negotiated. A number of countries wanted that in emergency situations, access to genetic resources would not have to go by the traditional understanding of prior consent and mutually agreed terms. In 2011, the WHO also adopted what was known as the Pandemic Influenza Preparedness Framework for sharing of access to influenza vaccines and other benefits. They basically created a framework for multilateral benefit sharing and making easily available vaccines.

So having these ongoing treaty processes largely impacted on the scope as well as relationships of the Nagoya Protocol. If you look at Article 4 of the Treaty, there are at least 4 clear thoughts that have been brought into the relationship of the Nagoya Protocol with other international treaties. I'll just describe them in short:

> "1. The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."

Now this is a standard clause and I don't think anyone should have a problem with it saying that rights and obligations under other treaties are not affected in any sense of the term. In most treaties this provisional clause is in the preamble. However, this is not in the preamble. This is a substantive provision which very clearly says that the Nagoya Protocol will not affect rights and obligations under other treaties.

The second aspect of Article 4 is that there would be no hierarchy of international instruments. The EU wanted to not give anything more to the Nagoya Protocol than what existing treaties already provided. So they wanted to clearly mention it as a substantive provision that there would be no hierarchy of treaties created.

Article 4, in the relationship clause, says that there will be scope for adoption of new specialized ABS (access to benefit-sharing) regimes. It says:

> "Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol."

The wording "mutually supportive manner" or "mutually supportive interpretation" is something which is largely taken in the field of trade and environment. If you have an environmental treaty, it will largely say you should be mutually supportive of treaties which are related to the international trade-law field. Now here is a provision which clearly says that this treaty will not tie the hands of countries to have new specialized areas on ABS. If you speak of this somewhere else it would be in a different sense, but when you're elucidating international treaties, where a very large number of countries say that they have new specialized international regimes, it was something that the developing countries felt that would take away what the CBD has provided.

You must remember that this is one of the few treaties where the developing countries were not at the receiving end. Out of the ten 'mega-diverse' countries, nine are in Latin-America, Africa and Asia. So the biological resources are with the developing countries and they are the ones that really provide genetic resources. They felt that this was one of the reasons why the treaty's strength was being continuously weakened by saying that we can have other treaties or international regimes or a 'regional ABS regime', which is what the EU has recently done. The EU has got a very strong access-oriented ABS regime.

The next issue is that they are also clear in their understanding that this particular ABS protocol would only be an instrument of implementation for access and benefit-sharing provisions of the Convention. It is very clear that the function of the Nagoya protocol is related to the function that has been provided under the parent treaty, the Convention on Biological Diversity. Now if you look at the general scenario, you have the Plant Genetic Varieties treaty, which deals with plant genetic resources; you have the Convention for the Protection of New Varieties of Plants which deals with breeder's rights; you have the entire treaty regime of a State's territorial claims, and

justifiably they are making the claim that this is a fragile different environment so they want a different ABS regime. You also have the WHO dealing with pathogens and viruses. Technically speaking they are genetic material

This is clearly reflective of countries' preference to have sectoral regimes in different fields. Having said this, the question then becomes about what states can do under the UNCLOS. Will it be only the marine genetic resources that are found within the three zones, starting from the territorial waters to the EEZ?

One of the problems is that the treaty is too general. It is also a strength of the treaty, that it is not only general but also flexible. But it is so flexible that it doesn't mention or define what marine genetic resources are. Now when the treaty doesn't say what marine genetic resources are, then I'm sure that countries feel that they require more legal certainty with respect to entering into contractual agreements. You also have this huge biotechnology industry that is driving the process many a times more than the states themselves. They're bound to look for more specialized treaty regimes. This is one of the challenges which countries have to look at.

The second is, because of this lack of defining marine genetic resources there have been a number of issues raised. While you regulate genetic resources within your resource jurisdiction, there are different treaties in areas beyond national jurisdiction, which is again a different legal regime. Here you have the 'common heritage of mankind' concept, which is very clearly a public-trust doctrine concept and no clear proprietary interest for exploitation and bio-prospecting. So, what challenges are being placed and how we are going to harmoniously look at the regulatory mechanisms you have within national jurisdiction with what are outside.

Another area that needs to be looked at, and this is more to speak of the advantages of the Nagoya Protocol, is that it is a protocol which for the first time has created for all countries a large amount of legal certainty. There are two main issues that India and other countries are fighting for. There is not only access and benefit-sharing, but also protection of what is known as 'traditional knowledge' as well 'associated knowledge'. Not only is this issue important for developing countries, but there is a large amount of potential with the number of mega-diverse hotspots in India, South Africa and other countries, where you have a large amount of flora and fauna. This can be exploited and countries did not even know on what terms this exploitation has to be.

The Nagoya Protocol has put in place a system where prior informed consent has to be taken from not only the state, but also from the local and indigenous communities involved in cases where the Constitution or their laws provide for involvement of such people.

The first advantage, not only for developing countries but for others, is that the protocol creates what is known as legal certainty as regards access and benefit-sharing. A clear advantage for developing countries regards the issue of bio-piracy of genetic resources. Bio-piracy is largely dealt with in two clear provisions, which the Protocol has on what is called mandatory provisions

on disclosure, on where you got the genetic resource. Moreover there is a large and strengthened compliance mechanism. The Nagoya Protocol speaks of various checkpoints where countries can really look at and monitor compliance. These checkpoints can be patent-officers or airports or various posts where these resources are physically entering or leaving the country.

The third important advantage or gain for developing countries is, that the Protocol provides wide latitude to have your own national laws. With a certain international standard being applied by an international treaty, the European Union has a very strong law which has now gone before the European Parliament for ratification. Countries can now have their own strong national laws on the subject.

As spoken about by Mr. Mathias, a strong ABS protocol guarantees food poverty eradication, food protection, and a great benefit for biotechnology as well as the health industry to produce more affordable vaccines.

Speaking for AALCO, this is an area that AALCO can take up as an agenda item and study, as to how really to look at the ABS protocol not only for areas within national jurisdiction, but also areas under other international treaty regimes and processes, on what the ABS provides as well as how you can build the capacity of various Asian-African countries.

Thank you so much.

Prof. Dr. Rahmat Mohamad: That brings us to the end of the session, but before we end the session. Lunch will be served outside on the lawn. Please come back for Session 3: "Issues Relating to Piracy and Maritime Security". Mr. Narinder Singh, Secretary-General of the Indian Society of International Law, will chair that session. Please have your lunch. Thank you.

Genetic Resources and Developing Countries: Access and Benefit Sharing under the Nagoya Protocol: Dr. Roy S. Lee[2] (This paper was disseminated to the participants during the meeting)

The increased threat to species and ecosystems and the alarming rate of species extinction have led to the establishment of a series of international instruments to conserve and develop biological diversity.

The main instrument is the 1992 Convention on Biological Diversity (CBS) which is designed to achieve three specific objectives: to conserve biodiversity, to sustain the use of the components of biodiversity and to share fairly and equitably the benefits derived from the use of genetic resources. The Convention has received universal acceptance, with 193 States Parties. It addresses all threats to biodiversity and ecosystems through scientific assessments, proposes measures for the development of tools, incentives and processes, and deals with the transfer of technologies and good practices. States Parties are also encouraged to involve the full and active

[2] Professor, Yale University School of Forestry and Environmental Studies.

participation of all stakeholders (including indigenous and local communities, youth, NGOs, women and the business community) in managing genetic resources.

The 2002 Cartagena Protocol on Biosafety is a subsidiary agreement to the Convention. It seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology. 163 States and the European Union have ratified the Protocol.

The third instrument, which will be my focus today, is the 2010 Nagoya Protocol.[3] The purpose of this Protocol is to address the main issues and concerns associated with the access to genetic resources and the sharing of benefits arising from the utilization of genetic resources. The practical problems have been that few countries have a transparent access system to encourage research and utilization of genetic components or a fair and equitable system for sharing the benefits resulting there from. The lack of standards in this regard has led to mistrust between providers and users and obstacles to biodiversity research and valuable uses. To meet these concerns, the Protocol requires (i) provider States to introduce legislation and policies to provide legal certainty and ease and clarity in regulations for the user companies, and (ii) the governments of user companies to ensure that companies under their jurisdiction comply with such laws and regulations of the provider States when a specific genetic resource is used. The goal is, therefore, to create a transparent, legal framework to bring users and providers of genetic resources and associated traditional knowledge together to gain access and to share benefits. The Protocol is not yet in force. Fifty ratifications are required to bring it into effect. To date, 15 States have ratified the Protocol. Most of them are developing countries.

The purpose of this paper is to address those issues which genetic–rich provider developing countries should consider if they are interested in participating in the Protocol.

1. Will the Nagoya Protocol be useful in your country's Management of Access to Genetic Resources and Sharing of Benefits There from?

The first issue to be considered is whether the Nagoya Protocol would be useful to your country. In joining the Protocol and implementing the relevant provisions, your country will be in a position to create a regime of international standards for dealing with access to genetic resources and for sharing benefits resulting there from. This legal framework would spell out conditions of access and modalities of benefit sharing, and respect the value of traditional knowledge associated with genetic resources. Local and indigenous communities may receive benefits through such a framework. The government would be able to issue permits for genetic resources. Such permits would be recognized by and respected in other contracting parties. Such a regime would provide legal certainty and transparency. Both internal and external researchers and users would, I believe, welcome this new prospect. It seems that such a regime would be useful to developing countries known for their genetic resources.

Many difficult implementation issues will, however, be encountered. Effective ways and means should be introduced to tackle those difficulties so as to create a credible domestic system to deal

[3] The full tile is the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization (ABS) to the Convention on Biological Diversity (CBS).

with genetic resources. To illustrate those difficulties, only some of the basic issues are discussed here: raising awareness, addressing capacity and enacting implementation policies, laws and regulations.

2. Raising Awareness and Maximizing the Usefulness of the Protocol

One of the first issues is the need to build a network of the interested communities to enable them to take part in the management of genetic resources. Genetic resources represent specialization and advanced scientific research which is largely the domain of the academic and research institutions. Such researchers are more familiar with using genetic resources from plants, animals and microrganisms to develop specialty enzymes, enhanced genes or small molecules. They are knowledgeable about using these for crop protection, drug development, producing specialized chemicals or in industrial processing. So, the participation of academic and research institutions cannot be overemphasized. They must be brought into the scheme from the beginning.

Today's genetic research of bio-prospecting and bio-discovery focuses on laboratory work and experiments and is different from the traditional labor-intensive methods of mass sample collection and field studies. This means that we cannot approach the subject in the same way that we deal with raw commodities. We need to raise awareness of these new developments and to provide a sound basis for building the access and benefit-sharing regime.[4] Briefings, trainings and consultations on various subjects would need to be organized involving the participation of the academic and research community, indigenous people, industries, and local governments.

It is equally important to recognize at the same time that local and indigenous communities in the remote rural areas have plenty to say about traditional knowledge, medicines and indigenous remedies. Both the learned scientists and the indigenous peoples must all be involved both in the identification of interests and the search for genetic resources. Experience shows that it was through their active participation and enterprise that most genetic resources were discovered and commercialized. Here are some best known examples: the "Hoodia" plant found in southern Africa for use as an appetite suppressant; the "Calanolides" found in the Malaysian rainforest for treating HIV and certain types of cancer; the "Mona Lavender" found in South Africa as an ornamental plant and the 'Sathan Kalanja" to reduce fatigue. To promote the development and use of genetic resources and knowledge, the indigenous people and scientists must come together to achieve any tangible results. Joining the Protocol would provide a basis for bringing together all the different communities and interests for the development of genetic resources. But steps must first be taken at the domestic level.

3. Preparing Policies, Rules and Regulations for Different Uses of Genetic Resources

We now turn to the more difficult issues of policies, rules and regulations so as to give effect to the various requirements under the Protocol. Again, some of the important ones will be highlighted.

[4] The Secretariat of the CBD and UNEP has prepared a series of useful notes and guidelines on the subject. Please see: for instance, UNEP/CBD/ICNP/1/5; UNEP/CBD/ICNP/2/11;and UNEP/CBD/ICNP/2/INF/6.

a. Rules and regulations must be issued to govern the access to genetic resources and associated traditional knowledge, the conditions for acquiring such resources, and the issuance of permits. The access rules must reflect consent of the provider and the agreed terms for transaction. These rules and regulations must be readily available, provide for legal certainty, and be clear and transparent. Standards are provided in the Protocol to guide implementation of these requirements.
b. The subject areas for the rules and regulations to cover are immense, including food, marine species, beverage, agriculture and pharmaceutical products. Governments must establish priorities and focus on topics identified on the basis of known or potential genetic resources, economic needs and consultations with the interested communities.
c. Each participating state must designate publically a "competent national authority" to administer these laws and regulations. One of the key tasks of the authority is to make decisions on access to genetic resources and associated traditional knowledge in the territory of the country. When all conditions have been met, the authority will issue a written permit in writing and within a reasonable time to serve as evidence of having met the access rules.
d. One or more "Protocol checkpoints" must also be established to gather information on the source of the genetic resources, the establishment of mutually agreed terms and the use of the genetic resources. Users will need to demonstrate at Protocol checkpoints that the genetic resources they use are legally acquired and that permits issued meet the required standards.
e. An International Access and Benefit-Sharing Clearing House will be established. Once a permit is registered with the Clearing House, it becomes an internationally recognized certificate. Thus the Clearing House serves to confirm and confer legal certainty on the whole processes of access granting and benefit sharing.

4. Conclusion

The Nagoya Protocol provides a workable system for the granting of access to genetic resources and associated traditional knowledge, and for a benefit sharing scheme. But the basic requisite is the country's capacity to incorporate the Protocol framework into its system as an integral whole. Such necessary capacity cannot be acquired overnight. The important thing is to begin at the beginning and take the first step. As it is worthwhile doing, it should be done well.

Thank you.

IV. SESSION THREE OF THE LEGAL EXPERTS MEETING TO COMMEMORATE THE 30TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA HELD ON TUESDAY, 5TH MARCH 2013 AT 2.30 PM

SESSION III: ISSUES RELATING TO PIRACY AND MARITIME SECURITY

1. Mr. Narinder Singh, Secretary-General of Indian Society of International Law (ISIL), in the Chair:

Mr. Narinder Singh, Secretary-General, ISIL: Your Excellencies, ladies and gentlemen, welcome to third session on 'Issues Relating to Piracy and Maritime Security'. Let me introduce the panel to you very briefly. Ms. Ticy Thomas, from the National University of Singapore. She studied law in Kerala and then at Jawaharlal Nehru University in Delhi and received her Master's in Law from National University Singapore. She's presently based in Singapore as a Research Associate at the Centre for Maritime Studies in the National University of Singapore. She has also worked as a legal associate at the National Maritime Foundation in New Delhi.

Second, we have Dato Zulkifli Adnan from the Ministry of Foreign Affairs of Malaysia and he has served the Ministry for over thirty years. He is currently the Director-General of the Maritime Affairs department. He has also served in various posts. He has served as Ambassador to Bosnia-Herzegovina. Previously he had been assigned to New York and The Hague. He was a member of Malaysia's delegation to the United Nations General Assembly and also a member of the delegation to the Hague in the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia) before the International Court of Justice. Also, in the ICJ's opinion on the construction of the wall Palestinian occupied territory. He has also been appointed Assistant Chairman of the Eminent Persons Group of the ASEAN Charter.

Next there's Dr. Sunil Agarwal who is currently working at the National Security Council's Secretariat. He has a PhD in International Law from the Jawaharlal Nehru University. He has been an associate fellow at the National Maritime Foundation. He is also one of the recipients of the Nippon fellowship, which he spent at ITLOS Capacity Building and Training Programme on Dispute Settlement. He has been at The Hague Academy of International Law, and also attended the Rhodes Academy of Ocean and Policy.

The last speaker we have is Mr. Rajiv Walia who is presently the Regional Programme Coordinator of the UN Office on Drugs and Crime (UNODC) in New Delhi. Mr. Walia has been a member of the Indian Administrative Service. He joined the service in 1975 and worked in various capacities, including as District Collector, Joint Secretary in the Ministry of Finance, Transport etc. He was in the Cabinet Secretariat and also a senior advisor to the UN Peacekeeping force in Sri Lanka. He has been with the UNODC for the last six years. He

coordinates the drug crime-related programme of the UNODC in South Asia, in the areas of drug trafficking, organized crime and counter-terrorism.

I would request all the panelists to complete their presentations within 15 minutes so that we could have some time left over for questions and interventions from the floor as well.

The topic which we have for our session which is a very important one that affects the safety of shipping, security of international trade, and most of all it affects the lives and security of seafarers, especially the crew of merchant vessels. In his address this morning Mr Stephen Mathias has dealt in great detail with the provisions of the UN Convention on Cooperation between Member States in the face of Piracy. He has also highlighted the various initiatives at the global and also at the regional level.

Having said that I request Mr. Rajiv Walia to make his presentation.

Mr. Rajiv Walia, Regional Programme Coordinator of the UN Office on Drugs and Crime (UNODC) in New Delhi: Thank you Mr. Chairman. Your Excellencies, Ladies and Gentlemen;

I represent the UN Organization on Drugs and Crime and just to tell you what the organization does; the UNODC is headquartered in Vienna and we look at issues concerning drugs, which includes reducing demand for drugs and reducing the supply of drugs. These are the two broad things which the UNODC addresses. The UNODC also addresses issues concerning international organized crime and that includes counter-terrorism activities, anti-money-laundering activities, countering piracy, and a host of other issues, which are clubbed under international organized crime, the most important of which is the smuggling of migrants.

Our office on counter-piracy is based in East Africa in Nairobi, and thus the hub of the anti-piracy programme. We in South Asia support Kenya office in anti-piracy efforts. During the presentation I will tell you which areas we support Kenya on. First, let me give you a brief overview of our anti-piracy programmes.

Just to give you a background, piracy on the coast of Somalia started in the mid-2000s and it spread not only into the Gulf of Aden, but also the Indian Ocean. There is a report by "Earth Future Foundation" that assesses that piracy cost to international economy annually is USD 7-Billion. This is probably the reason why the contact group for piracy on the coast of Somalia was set-up in 2008, and it is another organization which oversees the global piracy programme. It has been successful and the figures speak for itself. Successful piracy attempts have dropped from 47 in 2010 to 25 in 2011 to 5 in 2012. So obviously there has been a success in the anti-piracy programme. However, the underlying causes of piracy remain and pirate action groups are still active.

The UNODC commenced its counter-piracy programme in 2009 in Kenya which was affected by pirates off the coast of Somalia. It is now in six countries; Kenya, Seychelles, Tanzania,

Maldives, Mauritius and Somalia. The objective of the counter-piracy programme is to foster cooperation of the region and beyond the region, holding fair trials and overseeing safe, secure imprisonment of pirates, particularly in Somalia. That is the underlying objective of the counter-piracy program.

These are just a few of the Security Council resolutions which provide the UNODC mandate. Resolution 1851 which encourages all states to increase naval and military anti-piracy capacity with the assistance of the UNODC. Resolution 1976 requests states and other legal organizations to facilitate the transfer of suspected pirates for trial and convicted pirates for imprisonment. The trials and prosecutions are not done in Somalia. They are done outside the region. So when they get hold of pirates they transit to certain regions which have agreed to conduct trials. That is what the Security Council resolution says. It also urges states to increase, improve and enhance the prison capacity in Somalia because pirates are ultimately transferred to Somalia. Another resolution, 2015, basically commends the ongoing work of the UNODC, so there is a Security Council umbrella under which the UNODC works.

If you add it all up there are over 1000 pirates convicted or facing trial in various countries. The key countries are of course Kenya, Seychelles and Mauritius. In Kenya there are 83 convicted, 87 awaiting trial and 17 acquitted.

This is the counter-piracy strategy and it is very simple. It supports countries conducting piracy prosecutions in Kenya, Seychelles and Mauritius. And the objective, I repeat, is for fair and efficient trials, and humane and secure imprisonment within the prosecuting states. Connected with this, after the trials, prisoners have to be transferred to Somalia or Puntland. Therefore the UNODC also has a prisoner transfer program. These are objectives 1 and 2.The third objective, which we are still working on, is to ultimately have fair and efficient trials in Somalia itself.

I'll just rush through the elements of the anti-piracy program in these four countries. The first pillar is support police. These are the various headings under which the training of police is taking place. The programme provides hardware to law enforcement personnel, and also software support and intense training. Dog-handlers, training for police and coast guard members on how to gather evidence on a pirate boat, investigative assistance, inventory assistance. We provide mentors as UNODC has a substantial mentoring programme where the mentors are placed in countries for six months, one month or one year depending on the need. And, of course the exchange programme where law-enforcement personnel are sent to other countries for exchanges of experience.

Support to prosecutors and the Coast Guard; this is the second pillar where broadly we assist the countries in conducting legislative reviews. If there is already a regime we assist with amendments, rules and procedures and of course a whole host of other activities we do under legislative review. We also assist in the preparation of a library for legal research where a lot of

reference material is organized. Training in naval operations, law of the sea, handover guidance, prosecution assistance, all this comes under the support to prosecution and the Coast Guard.

There is also the third pillar, which is support to the court. Legislative review, better security in courtrooms, judicial training, interpreters, witness expenses and so on.

Support to countries is the fourth pillar and there is a fairly large funding available for countries who agree to try pirates. Countries which agree to try pirates are supported with management of their infrastructure. This basically includes a whole lot of these activities; assessment of prisons, standard operating practices, SoP's in prisons, equipment, education; all kinds of support to enhance the infrastructure of the prisons. And when prison infrastructure is enhanced it can be used for not only for pirates, but for criminals.

Repatriation of the trials or even before trials if the law of the land does not permit trials is an important area where the UNODC assists countries. Maldives has, over the last three years, collected pirates in more than one incident. Most of them say they drifted or have other excuses but they now add up to a number of 42. There are 42 suspected pirates in Maldives where there isn't a law where piracy is an offence, so they are held on the island and the government of Maldives is very keen to repatriate them. The UNODC is assisting them. We have reached the final stage of repatriation where the only issue that remains is to charter a flight for them from Malé to Puntland. It is very expensive and finding the right aircraft is a problem because the preferred route is Malé to Puntland straight and that has to be a four-engined aircraft that has permission to fly over the sea. A twin-engined aircraft does not have permission to fly over the sea and has to fly near the coast, which means that it has to refuel at more than one airport and that creates problems.

Mr. Yuri Fedotov is the Executive Officer of the UNODC and this is a quote from him:

> "In order to counter piracy, we must pick-up the criminal groups, identify and isolate the ringleaders and financiers and stop their cash shipments through coordinated police action. The UNODC's role is to sort the criminal justice chain. We also recognize that there is no piracy without pirates. As a result, downstream we need strong advocacy for community leaders and others in Somalia for the young men hijacking ships."

I have interacted with pirates many times and they are from various backgrounds, largely from agricultural backgrounds and are seeking a source of living and unfortunately fall into this.

Thank you.

Mr. Narinder Singh: I thank Mr. Walia for this presentation on the UNODC's work on piracy. Mr. Walia has to leave very soon for another meeting so he has agreed to take questions before that. Would anyone like to ask any questions?

If there are no questions we can move on to the next presentation. The next presentation will be by Dr. Sunil Agarwal on "**The Legality of Carrying Weapons on Ships**".

Dr. Sunil Agarwal, National Security Council Secretariat: Let me take this opportunity to thank AALCO, and the Legal and Treaties Division of the Ministry for External Affairs, Government of India for this invitation. In fact, I am going to discuss the legality of the carriage of guns on board ships. As my predecessor has pointed out, piracy is a big issue and there are various measures being taken at the international and regional level which are long-term solutions, I would say. In the meantime the operators and ship owners who run the day-to-day operations cannot wait a long time so they have to take certain short-term measures. This is how the practice of having contract armed security personnel started around 2010.

Now the issue is that we have to examine the legality of these things and whether they are permitted or not. The issues I will identify are the legality of carrying weapons aboard a ship and the legal liability of a company when an armed guard kills or injures a third-party or causes damage to the ship or its cargo or in case of some other damage or marine pollution.

As you know we are celebrating 30 years of the coming into force of UNCLOS. Article 92 provides that flag-states have exclusive jurisdiction on the high seas. High sea is not only beyond 12 nautical miles, but even within 12 nautical miles can be high seas beyond the territorial seas. We must make a very clear distinction as far as the piracy issue is concerned. If piracy occurs within 12 nautical miles it is armed robbery. Article 94 of UNCLOS provides that State must exercise jurisdiction and control over vessels flying its flag. Accordingly, it is up to each individual State to legislate on the matters related to Privately Contracted Armed Security Personnel. Flag-States can also make regulations for carriage of weapons, albeit a ship has to comply with coastal/port state regulations whose waters it enters.

Another provision where you can find the use of privately contracted guards is the SOLAS (International Convention for the Safety of Life at Sea) convention. Subsequently it was developed into the International Ship and Port Facility Security (ISPS) Code. Basically, Ship Security Plan indicates the minimum-security measures to be taken by the ship in responding to a security incident or threat. These measures are prescriptive, and so the carriage or use of firearms for self-defense is not prohibited *per se*.

There are other regulatory statutes at various levels like the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. Then we have the International Code of Conduct for Private Security Providers. All these initiatives were taken when piracy was at its peak.

Now the issue is that the maritime community faces challenges because of the fact that there are weapons on board vessels. This may escalate as pirates themselves might start equipping themselves with weapons. And then there are certain challenges regarding the jurisdictional

claims by other states where citizens are killed or injured. Illustrative example is the *MV Enrica Lexie* case where Indian courts wanted to try two Italian guards in the killing of Indian fishermen.

In the *MV Enrica Lexie* case, Italy claimed that the vessel was in international waters when the incident took place and that is why it was not within the jurisdiction of Indian courts. The Indian courts claimed that while the incident took place beyond 12 nautical miles, it was within the contiguous zone that is 24 nautical miles. The issue is whether you can apply the law within the contiguous zone because the contiguous zone is not really meant for anti-piracy etc. Anyway, the trial is going on in the Indian court. I would just like to make a point here that this is not really the right thing that the Indian court is doing because the contiguous zone is not meant for piracy and the court should not get involved and should abide by international rules.

Not all States will exonerate the user of the firearm on the basis that he acted in self-defence. Seafarers may face unforeseen penal consequences under foreign laws. Therefore, States may therefore prohibit the carriage of weapons into its Maritime zone, even though in compliance with flag state laws.

Solutions? In fact, because of this practice of use of armed guards, IMO took cognizance of this fact and issued certain interim guidelines and recommendations to ship owners, operators, as well as the flag-States and to port and coastal states, and to private companies also. These are only recommendations and are not binding as such. However, no endorsement of the use of armed guards specifically because the Safety Committee of the IMO has specifically ruled out allowing seafarers to use arms. That is why they have started this practice of carrying dedicated security guards.

To my mind, ITLOS dealt with these sorts of issues. Relevant case is *M/V Saiga (No.2) (Saint Vincent and The Grenadines v. Guinea)* (ITLOS, 1 July 1999). In this it held that:

> "international law….requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances." [para. 155].

I think that use of privately contracted security personnel is a risk-management measure to reduce vulnerability of sea-borne trade from piratical attacks in certain hot spots and high risk areas like Kenya and the coast of Somalia, gulf of Aden etc. IMO guidelines aims at promoting safe and lawful conduct at sea, but in no way does it endorse privately contracted armed security personnel as it would amount to deviation from UNCLOS provisions. India's attempts to assert jurisdiction, to try two Italian marines for murder in *MV Enrica Lexie* case, highlight the risks that armed guards and their employers run there are no easy solutions. Flag States need to follow the principles laid down in the *M/V SAIGA* case (1999) for combating maritime piracy. The underlying principle is that Use of Force should be the last resort. There is a need for a

Mechanism to coordinate POC (point of contact) of Coastal/Port states and Maritime Security Centre Horn of Africa.

So all these things are relevant when dealing with the use of private armed security guards. Thank you.

Mr. Narinder Singh: I thank Dr. Sunil Agarwal for his presentation. The main point that you have made is that you do not favour the use of armed guards aboard commercial vessels and that Indian Courts are not justified in exercising jurisdiction in the *MV Enrica Lexie* case because the act took place outside territorial waters in the contiguous zone.

We now move onto our next presentation on '**Implementation of Relevant Provisions on Maritime Security**' by Dato Zulkifli Adnan.

Dato Zulkifli Adnan, Director General of Maritime Affairs Department, Ministry of Foreign Affairs, Malaysia: Thank you Mr. Chairman. Excellencies, ladies and gentlemen, I would like to first take this opportunity to thank the organizers, the Legal and Treaties Division of the Ministry for External Affairs of India, and the Asian-African Legal Consultative Organization, for convening this legal experts meeting more so in extending this invitation to me as a speaker on this the 30th Anniversary of the coming into force of the United Nations Convention on the Law of the Sea.

I will be speaking on maritime security in the Straits of Malacca. It is a very specific topic and I will try and limit my presentation to within the 15 minutes given to me.

Basically, Malaysia signed the UNCLOS on 12 December 1982, when it was opened for signature, and subsequently ratified it in 1996. As a state practice, Malaysia has always and continues to implement the provisions of UNCLOS as much as we possibly could. With a coastline of 4492 kilometers, we share extensive maritime boundaries with a lot of other neighbouring countries such as Brunei, Indonesia, Singapore, Thailand and Vietnam. Despite having achieved our independence for the past 55 years, we still have pending maritime boundary issues with some other countries. We agree to develop the area concerned and put aside pending sovereignty issues for the time being. We believe that once we have prospected the hydro-carbon resources within the seabed then it will be much easier to start the delimitation process for the maritime boundaries.

We also have a tripartite area especially in Malaysia, Vietnam and Thailand and basically negotiations are ongoing and we hope that we could at least start the details of what kind of model we want to do

With Indonesia and Malaysia we have mutually opted to bring our disputes to the International Court of Justice and the Court has already given their judgment but we still have some unfinished business despite the Courts giving judgments in 2002 and also in 2008. It's just that

we did not provide the question whereby we wanted the Court to do the delimitation. We just wanted the general approval issued by the Court and also finalize the deal between the two countries.

For this afternoon's presentation I will focus on maritime security issues in the Straits of Malacca and since the theme is the UNCLOS' 30th Anniversary, I will inform you on what is being done with the States in implementing the UNCLOS provisions. I will also touch on piracy and privately contracted armed security personnel and what we are doing about these issues.

As we know the Straits of Malacca are one of the most important waterways and connects the Indian Ocean to the South China Sea and the Pacific Ocean. Due to the positive growth and development of the Straits in connection to international trade, it continues to pose a variety of interests in terms of economy and environmental sustainability of the Straits. In Part III of UNCLOS on straits used for navigation the nation is obligated to ensure the safety and security of the straits.

Vessels crossing the Straits are expected to increase from the present of about 75,000 vessels per year. The results of the study of the Ministry of Maritime Affairs show that the carrying capacity of the Straits is limited to 122, 600 vessels per year and this could be achieved not too long from now in 2024. So it'll be about ten years before the Straits are very congested. However, another study by Singapore had mentioned that the Straits could maintain traffic up to five times the current level. Another study by Japan says that it could accommodate 140,000. So, there different methodologies and conclusions by these studies but the general agreement is that there is a steady increase in traffic levels and problems with congestion in the Straits of Malacca will be inevitable.

The safety and security of the Straits is of interest to all of us and criminal activities at sea, such as piracy and armed robbery against ships, could endanger the safety and security of the Straits. Figures on piracy and armed robbery in the Straits before 2005 were extremely high. Here we have the report from the IMO about incidences of piracy throughout the world and also near the Indian continent and the Far East and South-East Asia. Here the table shows that from 2001 to 2010, the incidences of armed robbery reached its peak in 2004 and in 2005. And as a result the cost of freight and shipping had gone up.

When we talk about the definition of piracy and of course we have basically three questions. One is UNCLOS in 82 where piracy is going to be committed on the high seas or outside the jurisdiction of any State and the act was committed from one ship against another ship and the act is committed for private ends. Acts that are committed in the territorial sea of any State cannot be termed as piracy. Similarly, acts committed for motives other than private ends should not be termed as piracy. These acts are defined by the International Maritime Organization as armed robbery against ships.

A broader definition is adopted by the International Maritime Bureau, which states that,

> "Piracy is the act of boarding vessels with the intent of committing any crime and with the intent and capability of using force in furtherance of that act."

This definition includes acts of armed robbery against ships within the jurisdiction of States.

Let me point to one effort that we have made in ensuring that the figures go down. Firstly, we have established the Malaysian Maritime Enforcement Agency by Malaysia's Maritime Enforcement Agency Act of 2004. This agency came into being on 20 October 2005 and is empowered to enforce Malaysia's maritime acts. Previously we do not have this coordinated effort by Malaysia's Maritime Enforcement Agency so the actions were taken by individual departments using their own resources. For example, the department of fisheries, the police, the navy, etc, and if one of those departments comes across suspicious vessels carrying contraband, cigarettes for instance, it could not always act on that particular vessel. So we had that problem.

In addition to its physical presence, Malaysia has also upgraded its monitoring capabilities to ensure better surveillance of maritime activities in the Straits. These are the sea-surveillance systems manned by the Maritime Enforcement Agency and the automatic identification system. And there is an upgraded traffic scheme in the Straits of Malacca and Malaysia and other states also conduct patrols in the Straits. Indonesia, Malaysia and Singapore have launched coordinated patrols, which comprise of basically two components; the joint sea-patrol between Malaysia and Indonesia and the eyes-in-the-sky patrol between Singapore and Malaysia. These patrols, which are a comprehensive arrangement for maritime security, have been successful.

Of course, our relationship with the International Maritime Bureau has improved greatly with the decrease of incidents in the Straits of Malacca.

Our attention will also focus on the Gulf of Aden in Somalia because three of our ships were hijacked by pirates. The vessels were released upon the payment of some ransom, which was not disclosed so we don't know how much was demanded but I understand it runs into the millions. The Malaysian Navy had sent a total of five warships to the gulf region beginning in September 2008 and until now the mission of the ships to patrol the Gulf of Aden continues. The warships will subsequently be replaced by two naval auxiliary ships. Basically, in 2011 we had another incident where one of our vessels was involved but it was thwarted by the auxiliary ships as I mentioned.

In view of the high risk of piracy off the coast of Somalia and the Gulf of Aden and the use of armed security personnel, the IMO had made it explicitly clear that it is up to the Flag State to decide whether armed security personnel should be authorized for ships flying their flag in the Gulf of Aden and other high-risk areas, and if a Flag State decides to promote these activities it is up to that State to determine the conditions under which authorization will be granted.

The Government of Malaysia has been very cautious on the issue of armed guards on board ships in Malaysia's Maritime Zone. The idea of having uncontrolled numbers of people with weapons

in the Straits of Malacca conflicts with security and practices on Malaysian soil. Measures inherent to deal with armed mercenaries have cautioned us on the use of armed security personnel. We have strict laws regarding the carriage of weapons on land which are well-regulated and enforced. This has brought about a number of challenges for us in Malaysia and firstly, there are increased numbers of ships which are traversing the Straits of Malacca with armed security personnel on board. Secondly, ships with armed security personnel are already docking at Malaysian ports. Third, Malaysian ships are not only faced with threats in the Gulf of Aden but also other parts of the world, and recently a ship flying the Malaysian flag was hijacked off the coast of Nigeria. The ship was released but the crew was held hostage until the ransom was paid by ship owners. Malaysian private security companies are already seeking licenses for approval from the government to enable them to set up their own private maritime security companies to put armed guards on Malaysian ships.

So basically Malaysia does not support the use of private armed security personnel carrying weapons on board and we do have difficulties in accepting the presence of ships with armed guards on board. We have already licensed private security agencies for providing security services for places like banks and shopping malls, etc., and legislation already exists in the form of the Private Agencies Act, 1971. This Act defines the business of private agencies as the act of giving protection for the personal safety and security of a person or a property, which is restricted to land-based property. Discussions are currently in progress between various agencies - The Ministry of Transport's Marine Department, the National Security Council - and the issues of use of privately contracted armed security personnel are being guided by the IMO's MSC.1/Circular 1443 or the interim guidelines to private maritime security companies providing armed security personnel on board ships in high-risk areas. The Private Agencies Act 1971, although it is only applicable on land, there have been negotiations about it being extended to the territorial sea. In the meantime our ships are under the protection and escorted by the two marine auxiliary ships currently plying around the Gulf of Aden.

Ladies and gentlemen there are some different procedures which we need to harmonize and simplify in Malaysian ports. The ships need to report to the Port Authority in advance and basically for the Port Authority they look at the provision of ship police for a premium and the weapons that were brought in are kept at the Port Authority until the ship sails away. Basically our authorities are in the process of creating new port laws whereby the Marine Department of the Ministry of Transport is coming out with measures to instruct ships to declare private security personnel and store weapons in separate containers for weapons and munitions before entering port limits.

Ladies and gentlemen, that concludes my presentation on security issues in the Straits of Malacca. Thank you very much.

Mr. Narinder Singh: I thank Dato Zulkifli Adnan for his very interesting presentation. He has provided us with several details about the situation in the Straits of Malacca and we are happy to

note that there has been a positive effect from the efforts of all the States bordering the Straits of Malacca which has resulted in a reduction in incidents of piracy. He also highlighted some of the problems with ships having private guards.

We now come to the last presentation by Ms. Ticy Thomas on the '**Legal Regime of Maritime Piracy: Problems and Progresses'**.

Ms. Ticy Thomas, Research Associate at the Centre for Maritime Studies, National University of Singapore: Thank you very much and a good afternoon to all. I would like to reiterate my thanks to the organizers of this meeting for extending the invitation to me, and as the last presentation I think what I'll try to do is sort of wrap up the session by informing all of you of the maritime piracy regime and identifying the problems in the regime and the UNCLOS regime and highlight the developments and progresses that have happened in this regime. Towards that end, my presentation will be on the following lines: after a brief introduction which I'm sure will be a reiteration of all you've heard through the day, I will briefly talk about the UNCLOS regime on piracy, the limitations of the regime, the developments in the piracy regime, current legal challenges, and conclusion.

Piracy is not a new crime at all, but it's resurrection in recent times impacts on the international community because, particularly in a globalised world, a pirate attack or armed attack on a ship in one part of the world will definitely have a ripple effect on other parts as well. The main reasons for piracy can be geography, inefficient coastal states, changes in shipping technology – because as shipping technology develops, ships become bigger and slower with smaller crews, making it more difficult to secure. Moving onto the costs of piracy, it is very difficult to quantify the costs of piracy. Definitely there are costs in terms of economics, human costs and loss of human life, and its adverse effects on international trade, development and security.

I just want to take a minute to talk about the complexity of the piracy problem because a ship which is attacked by a pirate might be owned by one ship owner, registered under a different flag, and that ship will be carrying cargo that is destined for various different countries and it will be crewed by people who are again from other different countries. So it is really a complex problem, which is compounded by the non-homogeneous nature of States. Presently, as the other speakers have already mentioned, the number of incidents of piracy has drastically come down. As of now we only have sporadic events on the east and west coasts of Africa.

We now move on to the legal regime of piracy. The 1982 UNCLOS, whose 30th anniversary we are commemorating today, provides the legal framework applicable to combating piracy under international law. The piracy related provisions in the UNCLOS reflect customary international law. The piracy provisions are Art. 100 – 107. Art 110 also provides the right to board suspected pirate vessels. UNCLOS provides for universal jurisdiction over those who commit acts of piracy. This is an exception to the principle of exclusive flag State jurisdiction over ships on the high seas.

I will move on to the definition of piracy. Art 101 shows that there are 4 elements of piracy; 1) an illegal act involving violence, detention, or depredation; 2) committed for private ends; 3) on the high seas; and, 4) involving at least two ships. I am sure you are all aware of this and it is a reiteration of previous presentations, but I bring up the elements and definition to highlight the problems with when it is implemented at the domestic level. Again, the definition says that any voluntary participation, incitement or facilitation also amounts to piracy in UNCLOS. Any legal activity that happens within territorial waters is not piracy but armed robbery.

As for the rights of States under UNCLOS, Art. 105 of UNCLOS set forth the enforcement and criminalization actions which States may take to repress piracy. Enforcement Rights include: right to visit, seize and arrest, but all these rights may only be exercised by military ships and subject to Human Rights law. All the States are also given the right to prosecute and impose penalties by courts of the States that seized the pirate ship. All this sounds simple and clear, but the problem is that UNCLOS does not impose obligations on states to enforce and criminalize and UNCLOS does not go into detail about the penalties also.

Now we move on to the duties of States under UNCLOS. Only one Article, Art 100, deals with duties and that is the duty to cooperate to the fullest extent, but UNCLOS doesn't specify the forms or modalities of cooperation. However, when read with the good faith requirement in Art 300, it amounts to an international duty on all States to take measures against piracy.

Moving on to the limitations of the UNCLOS regime: The geographical scope of the regime is limited to areas beyond national jurisdiction. The regime's universal jurisdiction is only permissive not obligatory. The right of visit, arrest and seizure is limited to military vessels and subjected to reasonable grounds without defining what is "reasonable". All these rights are regulated by liability and compensation provisions. This is one important reason which we find in the case of Somalia why the states are reluctant to take actions. The regime does not impose an obligation on States to enforce or criminalize the acts of piracy. If you look at the present context of Somalian piracy, other limitations which we can infer from the UNCLOS regime is that it is silent on attempts to commit piracy or conspiracy to commit piracy, and it does not address ransom payment and other things which are happening in Somalian piracy.

So, the main question is: Is it, correct to say that UNCLOS piracy provisions are ineffective, and if so, need to be replaced?

I would actually concur with experts who say that UNCLOS is sufficient. We do have a general framework, and UNCLOS is the general framework, so we cannot expect it to be too prescriptive as to modalities. And, the critical issue here is implementation. Being a framework treaty, UNCLOS regime relies on individual States to take enforcement actions. The piracy off the coast of Somalia proved the difficulties in implementing the UNCLOS regime in the absence of national legislative framework, allowing effective piracy prosecutions. Domestic law of a

number of States lacks provisions criminalizing piracy and/ or procedural provisions for effective criminal prosecution of suspected pirates.

I will now try to elaborate on some of the responses that have come up as a result to the restrictiveness in the UNCLOS regime. You can say it's a multi-dimensional response and I will not delve into international naval operations or the industrial measures like vessel protection, security and things like that. I will be dealing only with selected measures, because of its unprecedented nature, and of course its effectiveness, where I will try to examine how well it is working.

First we will look at measures which primarily supplement the UNCLOS regime with another treaty. Then we will look at measures undertaken at International level through UNSC resolutions, then the Regional level and then National level. We also have the contributory role played by other international organizations. Mr. Rajiv Walia talked about the role of the UNODC, which I would say provides customized assistance to States. We also have international standards organization, which is helping IMO provide standards for private armed security guards. Then there's the International Maritime Bureau of ICC, which is important in providing guidance and assistance to the shipping industry. INTERPOL has also been playing a very important role by providing a global piracy database.

Moving on to the first measure, supplementing the UNCLOS regime, Other International Conventions such as the 1988 SUA Convention, the 1979 Hostage Convention, and 2000 UN Convention on Organized Crime, all these conventions, by setting out number of offences that are relevant to acts of piracy as crimes, including participation, conspiracy and attempts, supplement the UNCLOS regime. These conventions also supplement the UNCLOS regime by placing obligations on State Parties to establish jurisdiction over the offences and by placing obligations on State parties to extradite if they refuse to establish criminal jurisdiction. However, the problem here again is the reliance on State parties for implementation.

Moving on to international and regional measures, I would like to talk about UN Security Council resolutions. We see that the UNSC passed very good, unprecedented measures under Chapter VII. However, these are limited in geographical scope, pertaining to the Somali coast and Gulf of Guinea, as well as being temporary in nature with a restricted time, and are a reactionary measure.

One of the important regional measures to combat piracy was RECAAP, the Regional Agreement to Combat Armed-Robbery and Piracy, in 2006, which was the first multilateral Asian anti-piracy effort with 17 signatories. The objective was limited to Information sharing, capacity building and co-operative arrangements.

Moving on, the Djibouti Code of Conduct 2009. This had limited geographical scope with 20 signatories, but the important feature of this is that they called for criminalizing piracy and armed robbery at the domestic level, criminalizing attempted piracy, and authorizes and extends pursuit,

provided the state permits it. So these are actually new issues that have come out as a result of the piracy problem in Somalia. However, this Djibouti Code of Conduct is non-binding and it has only a persuasive effect.

For national measures, I will not go into most of the measures taken by individual States like India. Most of these countries actually cooperate in regional and international security operations. I would like to concentrate on the national legislations. Under the information available under the UN, 42 States have taken steps to criminalize piracy and prosecute pirates under their domestic law, including the enacting of legislation that allows carrying of armed guards onboard in countries like Norway, Germany and Belgium. This has resulted in instances such as the *MV Enrica Lexie* incident of 2012. I personally feel that having armed guards on board ships would not have been possible 10 or 15 years ago.

What is noticeable in all these domestic legislations is a lack of uniformity, starting from the definition of piracy to all the procedures that follow. This will have an adverse impact on the prosecution of pirates. For example, if you look at domestic laws countries like Singapore, Thailand, Kenya, US, and UK have laws that define piracy as something that occurs on the high seas, consistent with UNCLOS. But if we look at the 2009 legislation of Japan, it is defined that that piracy occurs in territorial waters as well as high seas, which is not in consonance with UNCLOS. If you take the Philippines, it recognizes piracy only in territorial seas interestingly. In Scotland and France, piracy is recognized in both territorial and high seas. Belgium recognizes piracy committed for other ends and not just the private ends recognized by the UNCLOS definition. The Republic of Korea recognizes attempts to commit piracy. So you see how different UNCLOS provisions are when incorporated into national regimes.

I'll just take a few minutes to see what India has been doing to combat piracy. India is a party to the UNCLOS and is also legislating treaties. We have got a 2012 piracy bill in the pipeline. But again, if you look at the bill, you'll see that the definition as well as the scope is different from UNCLOS. As of now, the laws applicable in India are the Indian Penal Code and Criminal Procedure Code, which do not specifically define piracy or criminalize acts of piracy. Another important distinction is that while some States like the United States tend to use force, for example in the case of *Mersk Alabama* where force was used to release captives from the kidnappers, you see that India does not resort to the use of force. India has set up an Inter-Ministerial Crisis Management Group for taking decisions in case of hostage situations, negotiations and arbitrations. We have deployed naval ships, but basically this is a national act not a regional cooperative act. We are a member of a tight group, CGPCS – Contact Group of Piracy off the Coast of Somalia – and in 2008 we have initiated the India-Africa forum and since 2011 India has also allowed armed guards on board provided they are ex-Defence personnel.

Moving on to the legal challenges faced by the piracy regime; there is a lack of harmony, coherence and effectiveness between and among international and domestic piracy regimes. We also have the problem of differences in criminal trial procedure and rules of evidence in

Common law, Civil law and Islamic law jurisdictions. We have a lack of and difficulty in gathering evidence to support prosecution. I understand that UNODC is helping a lot with that. We have long term burden of prosecution, imprisonment and repatriation issues. We have complexities in the legal systems governing the piracy and limitations inherent in the existing State-centric international legal order.

Just a word in conclusion which is my opinion and not my University's; I feel that the piracy regime is certainly progressing but in random directions. The most striking to me is the dual nature both at the international and national level of the piracy regime. Thank you very much for listening.

Mr. Narinder Singh: Thank you Ms. Ticy Thomas for that very detailed presentation especially on the measures being taken by countries including India. The nations in Asia and Africa have felt the most effects of piracy. The places where piracy has occurred the most are the Straits of Malacca, the Coast of Somalia and the Gulf of Aden, and all those regions are Member States of AALCO. The topic is thus of direct interest to AALCO and I thank the Secretary-General and the Legal and Treaties Division of the Ministry of Foreign Affairs for organizing this meeting.

Mr. Jambolkar requested Ms. Ticy Thomas to explain the deficiencies in the Anti-Piracy bill proposed to be brought out in India. In response to this question Dr. Neeru Chadha responded that most of the provisions in the Anti-Piracy Bill were in conformity with India's obligations at the international level. She said that due to paucity of time more clarifications could be sought from her after the meeting.

V. SESSION FOUR OF THE LEGAL EXPERTS MEETING TO COMMEMORATE THE 30TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA HELD ON TUESDAY, 5TH MARCH 2013 AT 3.45 PM

SESSION IV: UNCLOS AND AALCO

1. Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO in the Chair.

Chair: Ladies and Gentlemen in this last session we will now take up the next topic relating to UNCLOS and AALCO. The expert panelist for this session is Prof. Yogesh Tyagi, Dean and Professor, Faculty of Legal Studies (FLS), South Asian University. Prof Tyagi obtained his Ph.D. in Legal Studies from Jawaharlal Nehru University, and LLM in Legal Studies from Columbia University. He has many publications to his credit the most recent one being The UN Human Rights Committee: Practice and Procedure (Cambridge, UK: Cambridge University Press, 2011). His research areas of interest include International Law; International Organizations; Human Rights; Legal Theory and Globalization.

2. Prof. Yogesh Tyagi, Dean, Faculty of Legal Studies, South Asian University, New Delhi

Good Afternoon. Excellency Prof. Rahmat Mohamad, Dr. Chadha, esteemed elder members and jurists, Mr. B. Sen, Amb. Ericksson, Mr. Mathias, Prof. Hayashi, Mr. Rajan. Dear colleagues and students.

I once again congratulate the Asian-African Legal Consultative Organization and the Ministry of External Affairs, Government of India for organizing this very fruitful day long intellectual debate on UNCLOS, as well as for granting me this opportunity to address this wonderful audience.

AALCO's contribution to UNCLOS, we are fortunate to have some outstanding speakers this morning, the level of engagement is very high, the participants are very well prepared and must have benefitted from this intense research and all this must have laid down the foundation for me to share with you a few thoughts. When we talk of AALCO and when we talk of UNCLOS we have a good feeling, a feeling of happiness, fulfillment and pride. This is a great achievement for the United Nations which was created for this very purpose. Therefore, celebrating the 30th anniversary of UNCLOS is also a golden chapter in the history of the Asian-African Legal Consultative Organization. UNCLOS is a feather in the cap of the international legal community, not just AALCO. I would like to look at UNCLOS in a different perspective to provoke thoughts reflecting on different achievements and also on the shortcomings. I would look at UNCLOS in the following ways: (1) UNCLOS as a process; (2) UNCLOS as a product; (3) UNCLOS as a special treaty; (4) UNCLOS as a legal revolutionary; (5) UNCLOS as a development strategy; (6) UNCLOS as a trend-setter and much to the dismay of the organizers of this seminar, (7) UNCLOS as a grand failure. Don't be afraid of failing in life because in failure lies the seed of success and UNCLOS has that.

UNCLOS began as a long process, it was the beginning of a prolonged process, it was a worldwide transparent long process that lasted 13 years. It started in late 1960 into the 1970's where it was the most comprehensive exercise in the codification of the Law of the Sea. A product which anybody could be proud of it is the heaviest, longest and most meticulously drafted instrument. It is the "Charter of the Oceans", 320 Articles, several annexure, several resolutions and lot of excitement at the time of adoption.

This product has initiated a process, UNCLOS is the product of a process and UNCLOS itself is a process and this process and product should be understood by looking at its legal status. UNCLOS as a treaty, if we simply call UNCLOS as a treaty it is an understatement. In the 20th Century 75,000 treaties were adopted, not all treaties are of the same legal value, in the 20th Century the United Nations Charter was also adopted. It therefore cannot be said that the UN Charter was one of those 75,000 treaties. Likewise it cannot be said that UNCLOS was one of those treaties.

Therefore, UNCLOS is a special treaty. Under the Vienna Convention there is no distinction between a special treaty and any treaty, all treaties are treaties and they don't have any categorization based on any criteria that we may attach, but the reality is that there are some treaties that are more important than others. Here we can also cite the example of the Geneva Conventions, they are also treaties, and thus we have to ask the question how come the UNCLOS is a special treaty. UNCLOS is a special treaty for a variety of reasons. One, as rightly told by the then President of the Conference "It is the Charter of the Oceans"; the most comprehensive codification of the Law of the Sea, in which all the civilizations participated in the making of law. This factor is extremely important because no treaty can command legitimacy unless all principal forms of civilizations don't participate in the making of that treaty.

When the Geneva Conventions on the Law of the Sea of 1958 were adopted most states in the Asian African regions were not able to make any significant contribution. So the real opportunity for all developing countries to shape Law of the Sea came in the form of UNCLOS III and UNCLOS is a part of that process where all forms of civilizations participated in law making. This is the first reason why it is a special treaty. Second reason is that it is a treaty which not only makes law; it is also a treaty that establishes institutions to implement that law, the International Sea bed Authority, we have quite a few institutions created under the UNCLOS. So UNCLOS is a law making treaty and it is also a charter for International Seabed Authority; International Tribunal for the Law of the Sea; Commission on Continental Shelf; and several other important organs. So it creates law and it creates machinery to implement law. If you look at the panorama of treaties in the world you will not find many treaties that have done both the things, which make law and also create machinery to implement them.

The most revolutionary feature of UNCLOS is that it is a treaty that has met a very outstanding demand of the international community that not met earlier as it was met through this treaty and that demand is to have a mechanism for settlement of disputes. Look at any treaty of any kind before that you will hardly find a treaty that envisages compulsory dispute settlement mechanism. You have been relying on optional clauses; optional protocols; these were the mechanisms adopted earlier before the UNCLOS as a treaty was adopted. So you have a treaty

which makes law, a treaty which has the mechanism to implement that law and it also has a mechanism to settle disputes that arise out of the interpretation and application of that law. All three put together "three-in-one". These three features put together make UNCLOS a special treaty. Besides this is a treaty which prohibits reservations, I remember Mr. Narinder Singh worked on this aspect when he was with the Indian Society of International Law, a very important piece of work. This treaty prohibits reservations, it has overriding effects, it prevails over other treaties, so in the field of the Law of the Sea it has that kind of supremacy clause, this is the kind of supremacy clause the UN Charter has which prevails over other treaties. So when it comes to the Law of the Sea the overriding effects of the Law of the Sea Convention is articulated in the Convention itself.

It also has something more in that UNCLOS is the first codified expression of the codification of environmental conscientiousness. It came 10 years after the Stockholm Declaration, but it came 10 years ahead of Rio Declaration. What was the state of affairs in 1982 about environmental obligations? There was no binding treaty Rio Declaration came but the concept of sustainable development was not recognized. There was no legal obligation on the part of States to prevent pollution in the oceans; it was UNCLOS which has not one provision but innumerable provisions for the preservation and protection of marine environment. In fact the normative seeds of the concept of sustainable development are laid down in the UNCLOS. It says two things, one, optimum utilization of resources at the same time conservation of living resources. So you have freedom of fishing but you don't have freedom of over fishing. When you put both these freedoms together you find the seeds of sustainable development in the Law of the Sea Convention.

This was a convention which received ratification from 165 countries in the world. Mr. Sen rightly mentioned in his inaugural speech that it is one of the most widely accepted conventions in the world. In fact it is very close to the number of ratifications received by the Covenants of human rights. It is a convention which is revolutionary in nature, because for the first time it was adopted along with a resolution where national liberation movements were considered legitimate and were a part of the Law of the Sea process. This was a Convention which was adopted when countries were not ready to accept even 50 nautical miles of exclusive fishery zone, Iceland Fisheries case, UK, Germany protested and litigated against Iceland when Iceland wanted just 50 nm of exclusive fishery zone. And here we have 200 nm of Exclusive Economic Zone, it was known as then a revolution. One can easily conclude that it is not only a treaty, it is a revolutionary treaty. It was a treaty that was open for signature and ratifications by international organizations.

It was also a treaty that for the first time codified a principle into law, that principle was that the development of resources of the ocean to be exploited for peaceful purposes in the interest of mankind as a whole, particularly for the benefit of developing countries. What was the scenario in 1970's? the scenario in 1970's was that developing countries were looking at developing a new international economic order, nobody was ready to listen to them, they talked about permanent sovereignty over natural resources, nobody respected that, people were talking of historic rights, of concessions and of habits of fishing in distant waters and then came a binding treaty which talks about the use of resources specially for the benefit of developing countries and what would be more revolutionary than the issue of common heritage of mankind, so whether it

is extension of fishing zone, the incorporation of provisions relating to conservation of resources, whether it is participation of international organizations, or national liberation movements, transfer of technology, settlement of disputes, common heritage of mankind, on all these accounts the United Nations Convention on the Law of the Sea emerges as a special treaty.
I am not original on this account, somebody else before me has also said it, what I have done is to add a few more arguments that comes to the conclusion that the UNCLOS is a special treaty and certainly a revolutionary treaty. It was a development strategy in 1970's developing countries were looking for a New International Economic Order (NIEO), they wanted to increase their industrial production, and they were short of minerals: Nickel; Copper; Cobalt; Manganese, and then it was found that abundant minerals were lying on the ocean floor, it is then it was found that these should be exploited and made available to mankind, so that the industrial production in the developing world goes up and when that went up they would be able to eradicate their poverty, people would have more employment opportunities they would be able to participate in international affairs with stronger credentials, this was the development strategy. If they were allowed to have a larger Continental Shelf, that means they would have more development resources. If they were allowed to have a larger Exclusive Economic Zone at least their living natural resources were part of their sovereign rights, which no body from outside could exploit, so preservation of resources, giving those resources to developing countries was a strategy to provide resources for development. It was a trend setter in the sense that when the UNCLOS process was going on, people were talking of launching global negotiations on economic issues, I remember when in 1982 when the Convention was adopted there was a talk that the next round would be the round of global negotiations on the pattern of UNCLOS negotiations.

So, the idea was that the Law of the Sea issues had been dealt with and next was the turn of dealing with economic issues, monetary issues, development issues, and there was a strong possibility of launching global economic negotiations on the pattern of UNCLOS and Mr. B. Sen was well prepared to participate in global negotiations after the UNCLOS. Therefore, it set a trend, not only did it set a trend in terms of negotiations, but also on the confidence of the developing countries that if they could succeed on the Law of the Sea front they could also succeed on other fronts by coming together. But the reality was that when they were enjoying the success of UNCLOS they had to confront something serious, hazardous, in the form of a change of regime in the country that mattered most at that time, and it matters a lot even at this stage. When the Law of the Sea Convention was going to be adopted it could not be adopted because the regime changed in the United States, and then came a counter-revolution, it was that this international charter was unacceptable, International Seabed Authority should not be allowed to come into existence, free enterprise should not be affected, and right to participate in activities of trans-national cooperation should not be encouraged. The result was that the enthusiasm of the negotiations was punctured in 1982. And when the world was on the verge of defeat a compromise was reached in the form of a formula that we call today as a major content in the form of the Law of the Sea Convention, and in 1982 the Convention was adopted in a very different form than what was envisaged at the beginning of UNCLOS. This was a grand failure for all those who dreamt that the new Law of the Sea with the desire of a revolution, development strategy, a new trend and all that, they were told that you are not practical, look at new realities, America has already walked out of the negotiations and that the Convention is not going to make any difference until you don't bring the United States into the fold so at best what

you can do is to strike a compromise in the hope that someday the United States would come back and then the rest of the world could have the satisfaction of some of their dreams in a modest form, not in the original form.

This was a big setback to Arvid Pardo, and to his followers. So then when the Convention was about to be adopted someone asked him, what do you think of the UNCLOS, Arvid Pardo being the proponent of the "common heritage of mankind" said "what is left of common heritage of mankind is few fish and few waves nothing left". The success of the UNCLOS also lies in its failure. If EEZ would not have been projected as a concept attractive for developing countries, they would not have jumped for it. More EEZ means less common heritage of mankind. This war between the EEZ versus Common Heritage of Mankind was won by the fighters, warriors on the part of the common heritage of mankind and more than that by those who were on the side of EEZ more than common heritage of mankind. So is it a success or failure, it is both. For certain provisions like EEZ, personal state sites, sovereign rights of coastal states, then it can be said it is a grand success. On the other hand when you look at Part XI of the UNCLOS then it was a failure. So, if the comparison is between what you started with and what you achieved then it is a mixture, which is neither a success nor failure it is a mixed bag. Immediately after the adoption of the convention a few articles appeared in Indian newspapers and journals I will summarize two articles: (1) Winners are Losers; (2) Deep Seabed Mining: A case for cautious optimism. The conclusion was that the gain that you have made is in fact not the gain that you had visualized. The enthusiasm with which you were talking of deep sea-bed mining is not going to realize in the near future. These articles were published and can be easily located.

This brings us to the question what happened in 1982, that was the time I joined Asian-African Legal Consultative Committee (now AALCO), and I know precisely well what AALCO was doing at that point of time. On the one hand lot of pride in celebrating what had been achieved; on the other hand lot of depression about what was likely to happen. At a time when UNCLOS was not going to come into force in the near future we did not know what to do, at that point of time Mr. B.Sen the leader of the Organization did at that time, and what he has not told you today, it goes into the credentials of AALCO that he thought of those areas where UNCLOS could make some contribution in some ways. He asked me to do a study on "Delimitation of Maritime Boundaries" because they thought that after the adoption of UNCLOS a lot of maritime disputes would erupt. I prepared a study and he invited a French Legal Adviser to visit AALCO and being a person of few but substantive words he took out two relevant pages which were useful for discussion and AALCO had discussion on Maritime Boundary Delimitation in 1983. If you compare the scenario of 1980's with the scenario of today then you find many boundary disputes in every part of AALCO Member States be it in South China or Bay of Bengal or others, this was visualized by AALCO in 1980's after the adoption of the Law of the Sea Convention. Therefore, the conclusion that I would like to draw is that in popular perception AALCO made excellent contribution to the Law of the Sea Convention and the failure was not a big one. But if you rest with that kind of satisfaction you would not be doing your duty of a reflective individual about an international law exercise.

Here I would like to bring in another model of evaluating AALCO's role, that model is based on our understanding of treaty making process or treaty process. When we talk of a treaty one has to think of the following: the first element is conceptualization; we don't jump into a negotiating

process without thinking of what is it that needs to be done, that was very well done by Arvid Pardo in 1967 when he said that the resources beyond national jurisdiction should be governed by an international regime. Therefore, the conceptualization was done way back in 1967 after that the preparation of studies began wonderful work was done by AALCO at that point of time. A number of studies were prepared that helped negotiators a lot. Then comes strategies, I am not sure what kinds of strategies were drawn up by AALCO at that point of time. Next, negotiations. In the morning Mr. B. Sen rightly pointed to us that the active participation of AALCO, its representatives, AALCO Member States in the negotiations, all the leading negotiators from the developing world happened to be related to AALCO in one capacity or the other. What he has not mentioned is the negotiations beyond the Convention and at that stage that phase is extremely important in the history of UNCLOS. Unless you look into that you cannot understand the importance and limitation of UNCLOS. Soon after the adoption of UNCLOS as a treaty the process of undoing UNCLOS was started. You adopted a treaty and then you have to kill the treaty, both processes started almost simultaneously. What did AALCO do at that stage? I was going through the reports prepared by AALCO and came across a few studies that don't tell the reader much about those negotiations because they were secret negotiations.

I happened to be in New York when these negotiations were going on. It was by sheer chance that in one meeting Mr. Satyanandan came to speak and then I sensed that something was going on. After inquiry I got the answer that they were trying to bring the United States and the Western world into the fold of UNCLOS and were thinking of some adjustments. I found that it was a negotiation that was totally against the spirit of UNCLOS, the spirit of UNCLOS was, "open convention openly arrived at". Modern civilization behavior of negotiators, UNCLOS was publicly discussed, debated and adopted and publicly signed, and then how come they were going to undo UNCLOS by secret negotiations. I was quite angry and unhappy and my reaction was that you have a right to review, amend, change, and revise UNCLOS but not through secret negotiations. My prescription was that you had adopted UNCLOS by following the process of the Third United Nations Convention on the Law of the Sea after the conclusion of the Law of the Sea Convention, the process is completed, the only way you can amend Part XI of the UNCLOS is by launching new round of negotiations that is by having a Fourth Convention on the Law of the Sea. I published it as UNCLOS Four, which was published in 1983.

However, the powers of the day were not interested in an open negotiation openly arrived at. They had behind the scene negotiations and came out with a Boat Paper, Non-Paper and then one day we found that the General Assembly has adopted a resolution to kill Part XI of the UNCLOS. Part XI was the part which was the source of inspiration for people in the developing world. Therefore, without Part XI we had a Convention whose heart had been taken out a "heartless convention", and that heart was transplanted with an instrument called "1994 Agreement on the Exploitation of the Deep Seabed Resources". So when we are talking of the 30th Anniversary of the UNCLOS you are also celebrating the 30th Anniversary of the killing of the heart "Part XI" of the UNCLOS. In effect what we have today is the Law of the Sea Convention minus Part XI plus 1994 Agreement on the Exploitation of the Deep Seabed Resources. But I strongly urge you to celebrate that event next year, because that is what the Law of the Sea Convention actually is. So that important part of the change of regime, through an undemocratic, non-transparent process is the one that strikes me a lot. So if someone asks me

tomorrow what was AALCO doing when the heart of the UNCLOS was being killed? I will not answer that question and that's why I call AALCO's Contribution: Critical Appreciation.

Next came consensus building, of course in respect of certain issues consensus building was there, EEZ, Archipelagic Waters, Transit Passage and a few other things but what about pioneer investors? We were told that pioneer investors idea came all of a sudden and it was only at the last session of the conference that the idea came up and it was adopted. There was no consensus on any pioneer investor status in any of the AALCO Sessions preceding the UNCLOS. In treaty making it is important to appeal to public at large, it is critical; you need treaty supporters before it is negotiated, at the time of its negotiation and after its conclusion. If a treaty does not have public support it will not be ratified by the country concerned. A classic case is that the United States is not even ready to ratify the treaty even today. Last month there was a move to seek ratification of the UNCLOS by USA and 30 plus senators said that they would not allow that treaty to be ratified. So if you do not have treaty support for a treaty, whatever the beauty of that treaty could have been it could not be of impact at least in that country's jurisdiction.

What about ratification? When a treaty is adopted the very next step should be to promote its ratification. To the best of my knowledge AALCO did not do anything much to promote the ratification of UNCLOS. What about implementation? Did we talk to countries about ratification of the treaty and incorporation of its provisions into domestic law? I am not sure. What about adapting to new challenges? Piracy, before that migratory fishes and others, what did the AALCO do to face those challenges? My conclusion is that until 1980's AALCO played an excellent role until 1981, in the drafting process, the negotiating process, in the process of consensus building, confidence building measures particularly in terms of giving moral support to those representatives who were representing the third world; the developing world at the international level. But after 1981 that enthusiasm was not as it was expected. Out of this process came something extraordinary and that extraordinary thing is that for the first time at the international level, in the law making process, multilateral diplomacy, we had one celebrated, authoritative, eloquent speaker and articulator of the Asian-African approaches to the Law of the Sea. We talk of TWAIL today Third World Approaches to International Law, today many academics claim that they did a lot to propagate the Third World Approaches to international law, what they forget is that TWAIL came in the form of views from third world countries, the developing countries and AALCO was the expression of those views. It represented the most authoritative voice of the third world countries. If today someone asks me who is the founder of TWAIL, I would rate AALCO as one of the principal authors of TWAIL and the credit for this goes to Mr. B. Sen, please give him a big hand.

After this picture of not so overwhelming success or depressing failures, the question is where do we move forward from here. I already have ten suggestions namely: (1) Studying ratification difficulties; we still have a situation where a number of countries Members of AALCO are not yet parties to UNCLOS, Iran, Syria, Libya, UAE, North Korea and Palestine is not a party to the UNCLOS, so are we talking of AALCO minus these countries or are we talking of all the countries together. If we are talking of all the countries together then it is incumbent on AALCO to understand the ratification difficulties of these countries and try to address them so that all are on the same boat all of them are together and project themselves as a unifying force.

(2) It is important to find out the implementation impediments there is no need to have a very comprehensive exercise, don't focus on deep seabed mining you could rather focus on ideas that are not so well understood and analyzed.

(3) Compare domestic legislation, Ms. Ticy Thomas from NUS has done a wonderful job of comparing various domestic legislations those kinds of studies should be done on different areas.

(4) Collating best practices; we should not restrain ourselves we should instead learn from each other for example from Japan, Malaysia, India and AALCO could come out with a Compendium of Best Practices in the implementation of the law of the sea.

(5) Next we should engage ourselves on the pattern like ICRC did in identifying customary norms of international law; there is a very standard position and that position is minus Part XI of the UNCLOS the rest of the provisions of the convention have become part of customary international law, this is the position taken by the United States and a large number of countries. But you still have a certain countries that do not believe in that theory, they still question the customary value of certain provisions of UNCLOS, for instance Iran has signed the Law of the Sea Convention with this statement, that not all provisions of the Law of the Sea Convention are customary norms of international law and those norms which are not part of customary international law should be governed on the basis of the Vienna Convention on the basis of characterization of those provisions. So there are two schools of thought one school of thought claims that the entire Law of the Sea Convention minus Part XI has become customary international law, another school of law questions this hypothesis, AALCO can address this question and come out with a intellectual study which will help not only in the context of the law of the sea it will also help in better understanding of international law in general.

(6) The next point is that doesn't focus on state centric issues, I feel quite uncomfortable when I see that it seems that the Law of the Sea is a matter of concern for states only. I heard a speaker say that the cost of piracy was several billion dollars, as if the cost to the state exchequer is the threshold test, what about the suffering of the people, how many fishermen suffer because of the ambiguities in the Law of the Sea Convention. What price do we pay in terms of human lives because of the lack of cooperation on the part of countries concerned to come out with cooperation in different areas? I would like to appeal to AALCO to do studies of this kind where people are at the centre not just states. States are at the centre of attention by their presence but people demand sensitivity on the part of organizations like AALCO.

(7) Identify areas of international cooperation, a lot has been discussed in terms of regional, sub-regional, piracy is one area, there could be other areas like exploitation of resources, a rich experience of disputes relating to maritime boundaries, I am sure that Prof. Hayashi who comes from that part of the world can tell us that though they have a dispute there you also have models of sub-regional cooperation of how to exploit resources together.

(8) Next you have to develop the law of the sea expertise; unfortunately the conclusion of the Law of the Sea Convention also happened to be the obituary of intellectual enthusiasm. The last article I wrote about this convention was in 1983, it's not that I did not work after that on that subject, but I did not feel inspired or enthusiastic about writing on that subject. We have to renew

interest in the subject by developing expertise in different fields. By having training programmes, expert meetings, sharing information by involving the United Nations Seabed Authority, Office of the Legal Affairs and many others who are involved in this area, so that we can have a pool of resources available to us whenever we are confronted with any law of the sea problem.

(9) A new development has taken place exploring inter-regime linkages, when we talk of the law of the sea today we are not just talking about that subject only we are talking of many other regimes. We are talking of Security Council while addressing piracy concerns, we talk of Rio regime when we talk of environment concerns, we are talking of IMO when we are talking about pollution concerns, if you read the advisory opinion of the ITLOS regarding responsibility of pioneer investors, the Tribunal has recognized the importance of these linkages of the different regimes, liability regime first; we have to study law of the sea today not only from the angle of the law of the sea but also from the angle of state responsibility; law of environment; law of human rights; binding nature of Security Council Resolutions; technical cooperation among developing countries and cooperation with a number of other organizations in different areas. This should be a frontier area of our activities.

Finally, Mr. Chairman when I joined AALCO Mr. B. Sen had one dream and he implemented that dream to a considerable extent and that dream was that developing countries happen to be at the mercy of developed countries for the settlement of their disputes, the process was long, expensive, unreliable, and you don't know what you would achieve out of it. Thus, there was a move to have Regional Arbitration Centers for the settlement of disputes that were set up in Cairo, Kuala Lumpur and Lagos, what was the spirit of this goal; the true spirit was to have true independence in the developing world for the settlement of disputes. Is that spirit not important in the settlement of the Law of the Sea disputes? If that spirit is important then how come the developing world does not believe that they have the capacity, expertise, enthusiasm and desire to settle their disputes? So this calls for a regional or sub-regional mechanism, I am not making a suggestion that AALCO should become a dispute settlement mechanism, not at all, this is not the role of AALCO, but AALCO has a role to suggest a mechanism where these developing countries settle their disputes, can minimize their costs, is it desirable on our part to leave the settlement of disputes to the rest of the world, in the hope that they can do better than what we can do, I think there is need on the part of AALCO to think over this issue.

I hope this celebration will be a provocation and inspiration to keep the Law of the Sea alive as a subject of study. Thank you very much.

Prof. Dr. Rahmat Mohamad: Thank you very much Prof. Tyagi, as he was speaking he was looking at me. I have heard all the suggestions very carefully and will now take it up as a challenge. I am very inspired by the presentation made by Prof. Tyagi and it's very important to understand that AALCO remains relevant in the coming years. As Mr. B. Sen had positioned AALCO as a very important Organization, I am also inspired also to do the same. I have one request before we call for the vote of thanks we have amidst us Mr. H.P. Rajan, I think it will be very opportune to hear his views on this occasion.

Mr. H.P. Rajan: Thank you very much. I am very grateful to the Secretary-General of AALCO for extending the invitation to me to participate in this important meeting amidst such a distinguished audience. I have been listening to all the presentations since morning which were indeed of a very high standard. I am particularly nostalgic to be present here today, as I had started my career here at the then Asian African Legal Consultative Committee or AALCC, as I still happen to refer to it, way back in 1973. I was very privileged to have had the opportunity to work directly and closely with Mr. B. Sen who is my "Guru". Indeed even today, I go to him and seek his valuable advice. I take this opportunity to once again pay my respects to him.

I left AALCC in 1981, and my friend Prof. Tyagi joined the Organization. Prof. Tyagi mentioned that that was the Golden Era of AALCO, and indeed it was. Prof. Tyagi very eloquently traced the history of the Law of the Sea as it happened in AALCO. I am certainly impressed with his presentation and as a lawyer, I do agree with many of his observations. However, I would differ with him on some of his conclusions on the Third UN Conference on the Law of the Sea (Conference), as well as his remarks on some of the developments that took place immediately thereafter; and finally, at no point of time can I subscribe to the view that the 1982 UN Convention on the Law of the Sea (Convention) is a failure. I wish to take this opportunity to speak on some very salient points that were raised today as we celebrate 30 years of the opening for signature of the Convention.

Having been involved with the Law of the Sea for over forty years, I have noticed that there are several developments that took place during and after the Conference which are more often than not, interpreted out of context, especially by those away from the background and who were not fully involved in the process when such developments took place. It is in my view, important to interpret the developments in the perspective in which it took place. One of the unique features of the Conference as well as post-conference negotiations is the golden rule that all efforts must be made to arrive at decisions through consensus. The United Nations has throughout facilitated this process, and at times the ways in which the negotiations take place are somewhat different from conventional negotiating forums or methods. That said, United Nations maintains complete transparency and particularly in the context of the Law of the Sea, there were indeed no "secret" deals. The decisions and compromise formula have always been reached through understandings by sovereign States through formal, informal, regional and interest group consultations. It is important to understand the process as a whole as well as the entire chain of events. Indeed, the whole process is somewhat complex and long-drawn, but is usually open-ended, allowing for participation of all interested States. This process facilitates arriving at decisions by consensus, allows flexibility, and helps to accommodate the most critical concerns of States. To cite some examples, off-hand, anyone away from the background may find it difficult to understand why the very first Council of the International Seabed Authority comprised of 37 members instead of the prescribed 36, or the Legal and Technical Commission had 21 members instead of the stipulated 15; or, why a coastal States can make their submissions to the Commission on the Limits of the Continental Shelf even after the deadline of 10 years for the State is long over. The Convention as we all know is not only the "Constitution for the Oceans", but also a "package deal".

Maritime issues, and codification of rules governing such issues are predominantly State issues; any codification process would therefore, undoubtedly reflect the interest of concerned States.

Even the freedom of the seas doctrine advocated by Hugo Grotius was mainly to protect the Dutch interest for trade and commerce with India. In fact, *Mare Liberum*, published in1609 was indeed a part of the main book *De Jure Praedae*. It is interesting to note that this fact was discovered when the descendants of Grotius auctioned his papers in 1864 nearly 200 years after *Mare Liberum* was published.

The Law of the Sea is a controversial subject and will always remain so.

During the course of discussions today, it was mentioned that one of the drawbacks of the Convention is that it does not allow participation of individuals and non-States in the law making process. This is not entirely true. To ensure a more in-depth consideration of topical ocean-related issues, in the year 2000, the General Assembly of the United Nations established the United Nations Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS). The purpose of the informal Consultative Process (sometimes also referred to as ICP) is to facilitate the review by the General Assembly of developments in ocean affairs and the law of the sea. The Consultative Process identifies areas where coordination and cooperation at the intergovernmental and inter-agency levels should be enhanced. The Consultative Process is informal in nature as it is open to all Member States of the United Nations, (not just States Parties to the Convention), specialized agencies, entities with a standing invitation to participate as observers in the work of the General Assembly, and intergovernmental organizations with competence in ocean affairs. Several NGOs and IGOs participate in the annual meetings of the Consultative Process. It is coordinated by two Co-Chairpersons appointed by the President of the General Assembly and proposes elements for the consideration of the General Assembly.

You may recall that in 1994, the General Assembly decided that it was the global institution with the competence to undertake an annual review of the overall developments relating to the law of the sea. Every year the General Assembly adopts two resolutions: one on Oceans and the law of the sea and the other on Sustainable fisheries. The United Nations Division for Ocean Affairs and the Law of the Sea, where I had the privilege to serve for many years, services the intense negotiations that lead to the adoption of both resolutions. These negotiations take place through informal consultations which are held from September to November of each year leading to the formal adoption of the resolutions in December. It is important to note that these resolutions are UN resolutions and not resolutions of States Parties to the Convention only. Not all members of the United Nations are party to the law of the sea Convention and in the negotiations leading to the General Assembly resolution States that have not ratified or yet acceded to the Convention participate and make significant contribution. The practical side of the Law of the Sea as we implement today is not just the provisions of the Convention, but together with the annual mandate of the General Assembly resolutions.

Let me now briefly turn to one oft repeated and rather over-emphasized general statement that USA is not a Party to the Convention and that it had in fact voted against the Convention. It is important to bear in mind that Law of the sea is a subject of extreme importance to the USA. While it is yet to accede to the Convention for whatever domestic reasons, in practice, as is evident from its participation and consistent stand in every important meeting on the subject, it is a strong supporter of the principles enshrined in the Convention. It is therefore, important to examine its role more closely. In accordance with the provisions of the Convention, it was to

come into force twelve months after the deposit of the sixtieth instrument of ratification. As it turned out in 1993, of the first 60 ratifications, 59 were developing countries and only Iceland from industrialized States. US was concerned with the prospect of the Convention entering into force without participation by industrialized States, and it was through its initiative that urgent consultations took place to find ways and means to facilitate participation by the Western European and Others Group (WEOG). Their participation obviously was crucial, or else we were going to have a convention that is difficult to implement, because there are several provisions relating to deep sea-bed mining, transfer of technology, marine environment and number of other scientific and technical issues where much of the knowledge and information rested with the western world. This initiative resulted in the adoption of the Agreement Relating to the Implementation of Part XI of the Convention, (Agreement) by the General Assembly in July 1994, as some of the provisions relating seabed mining issues beyond the limits of national jurisdiction as contained in Part XI of the Convention were the critical make or break issues. While I may not be able to go into all the intrinsic details right now, suffice it to mention that the Agreement immediately paved way for several ratifications from Europe. US again lend its support when as a provisional Member in the Council of the International Seabed Authority it agreed that the initial budget of the Authority for the first three years come from the UN budget. My experience in the United Nations revealed that US participates in every meeting concerning the Law of the Sea, be that formal, informal, ad-hoc, open-ended, Working group to name some, and its delegation always includes experts in the relevant field. Most importantly, in the implementation of the Convention, as an Observer State in the Meeting of States Parties to the Convention or in the meetings relating to the General Assembly resolutions, its support to the Division for Ocean Affairs and the Law of the Sea functioning as the Secretariat for the Convention has been immense viz. be that the setting up of a state-of-the-art GIS laboratory with large budgetary implications to facilitate consideration of the submissions by coastal States to the Commission on the Limits of the Continental Shelf, or increase of highly qualified staff in the Division. To cite another example, USA as an Arctic country maintains that the Arctic like any other ocean is governed by the provisions of the Convention. In short therefore, to consider the Convention as failure because US is still not a party to it even after 30 years of its adoption is not correct; US itself does not consider it so.

One of the United Nations' greatest achievements in the field of progressive development and codification of international law is without any doubt the United Nations Convention on the Law of the Sea. It was adopted after years of intense legal, scientific and diplomatic negotiations. The Third UN Conference on the Law of the Sea ranks in the history of the UN as the longest and most widely attended international conference, and the 1982 United Nations Convention on the Law of the Sea has become one of the most widely ratified Conventions, currently with 165 States parties, including the E.U. As we all know, several important initiatives on the law of the sea took place in the AALCO forum; several new concepts emerged from here. AALCO can once again take the lead role in the implementation of some of the important provisions whereby the Asian and African States stand to benefit. The opportunity is ahead.

Please accept my sincere thanks for giving me the floor, and my apologies for taking so much of your valuable time.

Thank you.

Prof. Dr. Rahmat Mohamad: Thank you very much Mr. Rajan for that very detailed comment. Now as we come to the end of this meeting I would like to request Dr. Neeru Chadha to propose a Vote of Thanks.

Dr. Neeru Chadha thanked the Secretary-General of AALCO for proposing this very timely initiative and for taking all the necessary steps to finally convene such a successful meeting in a short span of time. She thanked all the panelists, some of whom had travelled long distances to be present at this meeting and said that each one of the presentations was very enriching and had touched many relevant issues pertaining to the UNCLOS. Finally she thanked the legal and administrative staff members of AALCO for their efficient coordination to ensure that all the details were looked into for hosting this meeting and hoped that in future the Legal and Treaties Division would have more such joint endeavours with the AALCO Secretariat.

The meeting was thereafter adjourned.

LIST OF PARTICIPANTS

Member States

Bahrain	Ms. Maram Al Saleh Counsellor Embassy of the Kingdom of Bahrain New Delhi
Bangladesh	Mr. Mohammad Monirul Islam Counsellor High Commission for the People's Republic of Bangladesh New Delhi
Brunei Darussalam	Mr. Muhamad Ali-Azri bin Haji Mohd. Alipah Second Secretary High Commission of Brunei Darussalam New Delhi
People's Republic of China	Mr. Wang Jin Feng Minister Embassy of the People's Republic of China New Delhi
	Mr. Huang Wenfeng Attache Embassy of the People's Republic of China New Delhi
Cyprus	Ms. Rona Marie Panteli Second Secretary High Commission of the Republic of Cyprus New Delhi
The Gambia	Mr. Alieu Bah Counsellor High Commission of the Republic of The Gambia New Delhi
Ghana	Mrs. Jennifer Lartey Minister Counsellor/Head of Chancery High Commission of the Republic of Ghana New Delhi
India	Ms. Uma Sekhar

	Director Legal and Treaties Division Ministry of External Affairs Government of India
	Mr. M. K. Rao, Director Legal and Treaties Division Ministry of External Affairs Government of India
	Mr. K.S. Mohammed Hussain Legal Officer Legal and Treaties Division Ministry of External Affairs Government of India
	Ms. R. Mythili Legal Officer Legal and Treaties Division Ministry of External Affairs Government of India
Indonesia	Mr. Edy Wardoyo Counsellor (Political) Embassy of the Republic of Indonesia New Delhi
	Ms. Novitanti Nurmala Third Secretary (Economic) Embassy of the Republic of Indonesia New Delhi
Japan	Ms. Yumiko Tanabe Third Secretary Embassy of Japan New Delhi
	Mr. Keisuke Kanemaru
Kenya	Mr. David K. Gatuthu First Secretary (Political)

	Kenya High Commission New Delhi Mr. Eliphas M. Barine Counsellor (Political) Kenya High Commission New Delhi
Lebanon	Mr. Georges Fadel Charge d' Affaires Embassy of Lebanon New Delhi
Libya	Mr. Salem Abulgasem Embassy of Libya New Delhi
Malaysia	Mr. Raszlan Abd. Rashid Deputy High Commissioner High Commission of Malaysia New Delhi
	Mr. Mohamed Ariff Mohamed Second Secretary (Political) High Commission of Malaysia New Delhi Mr. Ahmad Hashim Mahmood Counsellor High Commission of Malaysia New Delhi
	Mr. Wan Ahmad I. Bin Wan Adnan Second Secretary (economic Affairs) High Commission of Malaysia New Delhi
Mauritius	Mrs. Bineshwaree Napaul Second Secretary Mauritius High Commission New Delhi
Myanmar	U Ba Hla Aye Minister Counsellor Embassy of the Republic of the Union of Myanmar

	New Delhi
	Aung Kyaw Mue Embassy of the Republic of the Union of Myanmar New Delhi
Nepal	Mr. Tirtha Raj Wagle Counsellor (Political) Embassy of Nepal New Delhi
Sultanate of Oman	Mr. Salim Hamed Al-Battashi Deputy Chief of Mission Embassy of the Sultanate of Oman New Delhi
Pakistan	Mrs. Ayesha A. Ahsan Counsellor High Commission of Pakistan New Delhi
State of Qatar	Ms. Fawziya Edress S. Al-Sulaiti Counsellor Embassy of the State of Qatar New Delhi
Kingdom of Saudi Arabia	Mr. Turki Al Saloon
	Mr. Faizal Nasser
	Mr. Sagr S. H. Al-Qurashi Second Secretary Royal Embassy of Saudi Arabia New Delhi
Singapore	Mr. Lucian Hong First Secretary (Political) Singapore High Commission New Delhi
Sudan	Mr. Ahmed Abdelwahid Embassy of the Republic of Sudan New Delhi

Non-members **European Union**	Ms. Anne Marchal First Counsellor and head of Political Affairs, Delegation of EU to India
Organizations	
United Nations	Mr. Stephen Mathias Assistant Secretary General for Legal Affairs United Nations
UNODC	Mr. Rajiv Walia, Regional Programme Coordinator, UNODC, Regional Office for South Asia
ICRC	Ms. K. C. Sowmya Legal Advisor
AARDO	H.E. Eng. Wassfi Hassan El Sreihin Secretary-General
Panelists and Chairpersons	Mr. B. Sen, Former SG of AALCO
	Mr. Pinak Ranjan Chakravarty Secretary(ER) Ministry of External Affairs, Government of India
	Dr. Neeru Chadha, Joint Secretary, L&T Division, MEA Government of India
	H.E. Gudmundur Eiriksson, Amb. of Iceland to India
	Dr. Moritaka Hayashi, Japan Mr. Narinder Singh Secretary General Indian Society of International Law New Delhi
	Prof. Yogesh Tyagi, Dean and Professor, Faculty of Legal Studies South Asian University New Delhi

	Ms. Ticy Thomas, Research Associate National University, Singapore
	Dato Zulkifli Adnan, Director General, Maritime Affairs, Ministry of Foreign Affairs Malaysia
	Dr. Luther Rangreji, Assistant Professor Faculty of Legal Studies South Asian University New Delhi
	Mr. H P Rajan, UN Expert on the Law of the Sea New Delhi
Others	
South Asian University New Delhi	Dr. V.G. Hegde Associate Professor Faculty of Legal Studies Dr. Sai Ramani Garimella Associate Professor Faculty of Legal Studies Dr. Aman Ullah Malik Associate Professor Faculty of Legal Studies
	Dr. Burra Srinivas Assistant Professor Faculty of Legal Studies Dr. Nafees Ahmad Assistant Professor Faculty of Legal Studies Dr. Stellina Jolly, Assistant Professor Faculty of Legal Studies

	Ms. Christine Richardson Student
	Mr. Deepender Shekhawat Student
	Mr. Ranjan Kumar Student
	Mr. Nirbhay Prakash Student
	Ms. Astha Tripathi Student
	Mr. Asutosh Sinha Student
	Mr. Md. Mostafa Hosain Student
	Mr. Abdullah H. Arif Student
Indian Society of International Law (ISIL)	Prof. Lakshmi Jambolkar Executive President Indian Society of International Law New Delhi
	Prof. V.K. Jambolkar JNU New Delhi
	Mr. Amit Upadhayay Indian Society of International Law New Delhi
Indian Institute of Management, Kolkata	Dr. R. Rajesh Babu Associate Professor
National Law University, Delhi.	Prof. A. Jayagovind,
	Prof. S. Sachidharam
Faculty of Law, South Campus	Ms. Martha Philip

	Student
	Mr. Anubhav Tyagi Student
	Rahul Srivastava Student
University of Delhi	Ms. Pooja Bakshi Student
Jindal Global Law School	Ms. R. Prem Raja Kumari Student
	Mr. Arun Natraj C. Student
AALCO Secretariat	Prof. Dr. Rahmat Mohamad Secretary General
	Dr. Hassan Soleimani Deputy Secretary General
	Dr. Yasukata Fukahori Deputy Secretary General
	Mr. Feng Qinghu Deputy Secretary General
	Mrs. Anuradha Bakshi Principal Legal Officer
	Ms. Shannu Narayan Legal Officer
	Mr. Pandiaraj Legal Officer
	Mr. Parthan Vishwanathan Legal Officer