

**Co-Chairs' Summary Report**  
**2<sup>nd</sup> ASEAN Regional Forum Seminar on UNCLOS**  
**Manila, Philippines, 28-29 May 2014**

## **Introduction**

1. Pursuant to the decision of the 20<sup>th</sup> Ministerial Meeting of the ASEAN Regional Forum held in Bandar Seri Begawan, Brunei Darussalam on 2 July 2013, the 2<sup>nd</sup> ASEAN Regional Forum Seminar on UNCLOS was held in Manila, Philippines on 28-29 May 2014. The Seminar was co-chaired by Eduardo Jose A. de Vega, Assistant Secretary of the Office of Legal Affairs of the Department of Foreign Affairs of the Philippines, and Katrina Cooper, Senior Legal Adviser of the Department of Foreign Affairs and Trade of Australia.

2. ARF participants from Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, the European Union (EU), India, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, New Zealand, the Philippines, Republic of Korea, Russia, Singapore, Sri Lanka, Thailand, the United States of America and Viet Nam attended the Seminar. Expert speakers from various academic institutions in the region also attended the Seminar. The List of Participants appears as **ANNEX 1**.

## **Opening Remarks**

3. In his remarks, Assistant Secretary Eduardo Jose A. de Vega recognized the significance of UNCLOS as the international law governing the rights and responsibilities of nations in their use of the oceans. For the Philippines in particular, the UNCLOS has enabled the recognition of the country as an archipelagic and maritime State in a legal sense. He also mentioned that the UNCLOS underpins all cooperative mechanisms in the protection and preservation of the marine environment, which is of great importance for all States. Assistant Secretary de Vega emphasized the importance of the Seminar, which aims to facilitate the implementation of the rule of international law within the ARF by education on the rights and obligations conferred by Convention. He noted that the diverse participation of delegates and observers from various agencies attests to the multilateral, transboundary, and cross-cutting nature of maritime issues that no one state can address alone. Assistant Secretary de Vega's speech appears as **ANNEX 2**.

4. Katrina Cooper remarked that the aim of the seminar is to foster dialogue towards a common regional understanding of the application of UNCLOS to the wide range of maritime activities and interests pursued by ARF member states. She noted that 2014 marked a significant milestone, as it was the 20th year since the UNCLOS' entry into force. UNCLOS has been regarded by many as the 'constitution for the ocean', and is a product of one of the longest and most complex law-making negotiations in history whose significant achievement is the creation of a robust but flexible rules-based framework for the conduct of all activities in the oceans and seas. The Convention also provides a framework for resolving disputes. It ensures that when disagreements arise, there is a common vocabulary and mechanisms

through which to seek peaceful solution. Since the 1<sup>st</sup> ARF Seminar on UNCLOS in 2011, the range of maritime issues discussed within the ARF has grown significantly. This 2<sup>nd</sup> Seminar is the fourth maritime-related meeting in the current ARF cycle. Ms. Cooper also updated the Seminar participants on other relevant bodies addressing maritime matters, for instance, the recently-concluded 6<sup>th</sup> ARF Inter-Sessional Meeting on Maritime Security (ISM on MS) in Bali as well as other maritime-related initiatives of the ASEAN Maritime Forum (AMF), Expanded ASEAN Maritime Forum (EAMF), and second track institutions such as the Council for Security Cooperation in the Asia Pacific (CSCAP). Ms. Cooper's speech appears as **ANNEX 3**. Ms. Cooper also noted that Chatham House rule would apply to encourage a frank exchange.

5. Mr. Ralph Cossa, President of the Pacific Forum Center for Strategic and International Studies (CSIS) in Honolulu, U.S., briefed the Seminar on the Bilateral USCSCAP-CSCAP Philippines Workshop on Maritime Security in East Asia held in Manila on 27 May 2014. The CSCAP Workshop produced a summary of key findings in the areas of dispute settlement mechanisms, freedom of navigation, environmental conservation, and management of marine resources. Mr. Cossa suggested that the ARF could play a more proactive function, especially since there are tools within the ARF such as good offices, the troika and an eminent persons group that could be utilized for fact-finding activities in the settlement of disputes. Although the preferred method for dispute settlement is for parties to discuss and talk among themselves to solve the problem, Mr. Cossa stated that in the South China Sea and East China Sea, this requires outside support as this is unlikely to be done bilaterally. He suggested the possibility of the ARF providing such a function. Further, he pointed out the role of ARF in encouraging adherence among member countries to the rule of law in regards to freedom of navigation and in bringing national laws into conformity with the UNCLOS. The ARF could also serve as a sounding board to harmonize national legislation with UNCLOS and encourage members states themselves to eliminate excessive maritime claims and focus on enhancing local enforcement. In the area of environmental law enforcement, Mr. Cossa said that ASEAN, already having frameworks and mechanisms in place, has the opportunity to set an example and lead the way for the rest of the ARF countries. ARF can be a confidence building forum in the management of living resources. As part of this study of better understanding of traditional fishing rights, ARF would also encourage bilateral fishery management. Mr. Cossa stressed that the end goal of the ARF is to move from preventive diplomacy to conflict resolution. He encouraged the ARF not to just call on parties to exercise restraint, but to be proactive in finding common ground in areas where parties themselves are unable to resolve disputes. The Report of the Bilateral Workshop appears as **ANNEX 4**.

6. The Seminar adopted the Agenda, which appears as **ANNEX 5**.

### **Session 1: UNCLOS Implementation and Practice**

7. Professor Robert Beckman, Director of the Centre for International Law, National University of Singapore, delivered a presentation on the UNCLOS's implementation and practice in maritime zones, in particular, the rights and responsibilities in the high seas and exclusive economic zone (EEZ) of coastal

states. He emphasized freedom of the high seas as a fundamental principle. Unlike other treaties and conventions, such as those governing Antarctica and outer space, UNCLOS does not specify what activities are not allowed in the high seas, and it is generally understood that the high seas is open to the conduct of military exercises. As for jurisdiction in the high seas, except in cases provided for in international treaties or in UNCLOS, laws of a vessel's flag state apply exclusively. On EEZs, Prof. Beckman noted that the zone is a sui generis regime, affording sovereign rights to exploit the resources in waters extending 200 nautical miles (nm) from established baselines consistent with the UNCLOS. Jurisdiction in the EEZ is only as provided in the UNCLOS; there is no residual jurisdiction. In the exercise of sovereign rights in the EEZ, due regard must be given by both the coastal State and the State intending to exercise its rights in that coastal State's EEZ – in conducting surveys on laying pipelines in another State's EEZ, for instance. Prof. Beckman's presentation appears as **ANNEX 6**.

8. The discussant for the topic, Mr. Eric Chaboureau, Legal Adviser of the European External Action Service (EEAS), shared that the 28 Member States of the EU have conferred to the Union exclusive competence in the conservation of marine biological resources under the Common Fisheries Policy (CFP). This means that only the Union may legislate and adopt legally binding acts on fisheries. Although it uses different terms from those found in UNCLOS, the CFP refers to the same zones that UNCLOS does – territorial waters and EEZs. Mr. Chaboureau noted that the most important consequence of the CFP was to reduce the sovereign rights of Member States, such that all EU fishermen have equal access the fishing grounds of other Member States, with some exceptions. Mr. Chaboureau's remarks appear as **ANNEX 7**.

9. Participants expressed several views on: the applicability of international law as a whole, not only UNCLOS, in adjudicating overlapping EEZs; the ways in which states are attempting to reach an 'equitable solution' to dispute settlement under Article 74; the difficulty in prosecuting crimes just outside of EEZs, where flag state jurisdiction holds in instances of flag states of convenience; the scope of the 'due regard' obligation under Articles 56 and 58 and whether it requires States to take into account security interests of coastal States; and whether artificial installations generate maritime zones and allowable means to enforce the 500-meter safety zone around them under UNCLOS.

10. There was an exchange of views on the recent tensions in the South China Sea, including the construction of an oil rig and the sinking of a fishing vessel in contested waters. The Seminar was also briefed on updates on work to implement the Declaration on the Conduct of Parties in the South China Sea (DOC), which was described as inextricably linked to the full and effective implementation of UNCLOS in the region. Cooperative activities such as training exercises in joint search and rescue operations demonstrate the ability of China to work with ASEAN. There is also an ongoing process towards a Code of Conduct in the South China Sea (COC).

11. Professor Seokwoo Lee of Inha University Law School, Incheon, Republic of Korea spoke about recent jurisprudence from the International Court of Justice (ICJ) on maritime boundary delimitation. He noted that in light of the flexibility of provisions on delimitation in the UNCLOS, it is not surprising that delimitation in practice has

been diverse. The ICJ ruling on maritime boundary delimitation in the Black Sea (Romania v. Ukraine, decided in 2009), articulated three stages for delimitation: the establishment of a provisional equidistant delimitation line; the consideration of factors calling for the adjustment of the line to achieve an equitable result; and the verification that the final delimitation line results in an equitable result. The Bay of Bengal delimitation case under ITLOS (Bangladesh v. Myanmar) was the first opportunity to apply this method. Prof. Lee presented the more recent ICJ cases of Nicaragua v. Colombia and Peru v. Chile to illustrate that the equidistant line is a preferred starting point for delimitation. Prof. Lee's presentation appears as **ANNEX 8**.

12. As country discussant on the topic, Prof. Mariko Kawano of Waseda University in Japan shared her observation that a single maritime boundary has become the preferred method of delimitation, although it does not stem from any international treaty. As UNCLOS contains no explicit criteria or method for delimitation, it has been up to the courts to formulate a method that would lead to an equitable solution. For practical reasons, the provisional equidistant line has been most convenient, but there remains a need to harmonize methods of delimitation across maritime institutions. Prof. Kawano's remarks appear as **ANNEX 9**.

13. During a general discussion among participants, it was emphasized that maritime boundary delimitation is a process separate from the delineation of the outer limits of a State's continental shelf, and that both can proceed in parallel. The opinion of Judge Donoghue in the Nicaragua v. Colombia case was noted as useful in this regard. It was also observed that the application of the three-stage provisional equidistant line method is useful as a consistent starting point in past jurisprudence, but that all cases are unique – in the Peru v. Chile case, for instance, a tacit agreement between both parties on an 80- nautical-mile boundary prior to the case proceedings, was recognized by the ICJ. Participants also discussed the finality of maritime delimitation, despite natural occurrences such as landslides or rising sea levels.

14. Dr. Suzette Suarez of the Centre for International Ocean Law based in Hamburg, Germany discussed the functions of the Commission on the Limits of the Continental Shelf, one of three institutions created by the UNCLOS. The CLCS considers submissions and makes recommendations in accordance with Article 76 of the UNCLOS, which defines the continental shelf of a coastal State. The outer limits of the continental shelf beyond 200 nautical miles established based on CLCS recommendations are final and legally binding. The CLCS can also provide scientific and technical advice to States during the latter's preparation of their submissions, but States have never availed themselves of such advice. Because recommendations rendered by the CLCS cannot be appealed, Dr. Suarez advised States with questions on CLCS recommendations concerning them to submit revised or new submissions to the CLCS. She also emphasized that the process of establishing continental shelf limits is a matter between the CLCS and the coastal State. Should third parties object to the process, the CLCS prefers to delay consideration of a submission until such time that consent or agreement has been obtained or intervening disputes are resolved. Dr. Suarez's presentation appears as **ANNEX 10**.

15. A general discussion among participants yielded questions on a number of issues, including: the absence of limits on the number of State re-submissions to the CLCS; the application of the Statement of Understanding on establishing the outer edge of the continental margin adopted on 29 August 1980; and various interactions between maritime boundary delimitation and continental shelf delineation. Dr. Suarez noted that the Commission does not have the competence to decide on whether repeated resubmissions constitute an abuse of right but that coastal states should exercise their discretion in good faith and repeated submissions are impractical; the Statement of Understanding would apply in relevant cases; and that while delimitation proceedings are separate from continental shelf delineation, the former nevertheless informs the work of the CLCS.

## **Session 2: UNCLOS Implementation and Practice (continued)**

16. Captain J. Ashley Roach, Senior Visiting Scholar from the Centre for International Law, National University of Singapore, discussed freedom of navigation, including overflight, under UNCLOS. He emphasized that freedom of navigation has worldwide political, operational and legal impact since the seas are interconnected and form a single world ocean. Capt. Roach discussed the basic navigation rights and duties in the high seas and in territorial sea. Warships and ships owned and operated by a State have complete immunity from the jurisdiction of any State other than the flag State on high seas and EEZ, in contrast to government ships operated for commercial purposes, which have no immunities. Capt. Roach also discussed the different requirements sought by ASEAN Plus Three States on navigation in territorial seas and EEZs and emphasized that none of these requirements is authorized by the UNCLOS. Mr. Roach pointed out that some States attempt to restrict navigation and overflight rights by national legislation, diplomatic objections, or overt interference with the exercise of those rights, and enumerated several options for resolving differences, including the compulsory dispute resolution under Part 15 of the UNCLOS. Mr. Roach reiterated the possible role of the ARF in encouraging strict adherence to rule of law including the terms of the UNCLOS and in emphasizing UN General Assembly's (UNGA) annual call since 1994 for the harmonization of national legislation with the UNCLOS. Capt. Roach's presentation appears as **ANNEX 11**.

17. A general discussion among participants yielded questions on the freedom of navigation in the EEZ by warships or naval vessels that are conducting marine scientific research and surveys; how realistic the call for restraint on excessive maritime claims is and the US' approach of travelling through waters of states with excessive maritime claims and on 'due regard' that must be given to the interests of the coastal State. Capt. Roach responded that scientific research requires prior permission from the coastal State if the exercise is within its EEZ. He pointed out, however, that a key question is what constitutes marine scientific research, since there is no definition of marine scientific research in the UNCLOS and UNCLOS sometimes refers to research and surveys separately. In describing the US practice in responding to excessive maritime claims, he explained that the US will often sail naval vessels through the waters of states with excessive maritime claims and keeps records of whether or not the relevant State issues a diplomatic protest. If States do protest, the US will respond by saying they are exercising their freedom of

navigation. On due regard, Mr. Roach responded that the rights considered are spelled out in Article 56 as economic rights, and this article attempts to reconcile the legitimate rights of coastal states to economic resources in the water adjacent to their shore with the legitimate rights of navigation of other states. Despite being treated the same under international law, the political perceptions of government vessels with grey hulls, as opposed to white hulls, was also discussed.

18. Captain Martin A. Sebastian, Fellow and Centre Head of the Centre for Maritime Security and Diplomacy, Maritime Institute of Malaysia followed up the discussion with naval and law enforcement perspectives. He emphasized that UNCLOS, which was a result of a decade of negotiations among over 150 countries, now serves as the common code for the new maritime order. In his view, although there are States that have not acceded to the UNCLOS, these States have the responsibility to observe all of its provisions. He highlighted how there can be synergy between maritime security and the ARF, particularly in the areas of confidence building, preventive diplomacy, and conflict resolution. Capt. Sebastian also updated the body on the trust building and naval cooperation initiatives of the Western Pacific Naval Symposium (WPNS) through convening biennial forums and symposiums on maritime issues. The Code for Unplanned Encounters at Sea (CUES), endorsed by the WPNS in Qingdao, China on 23 April 2014, provides safety procedures, a communications plan, and manoeuvring instructions for naval ships and aircraft during unplanned encounters at sea. On cooperation guidelines, Capt. Sebastian cited Memoranda 4, 5, 6, 12, and 13 of the CSCAP. He also updated the body on the result of the 6<sup>th</sup> ARF ISM on Maritime Security held in Bali, Indonesia on 26 May 2014. Capt. Sebastian's presentation appears as **ANNEX 12**.

19. Another general discussion among participants yielded questions on security incidents at sea and the need to arm fishing vessels. Capt. Sebastian responded that fishing vessels are licensed to fish, not to carry arms. In the case of large fishing vessels that employ privately contracted armed security personnel (PCASP), there is no problem in the high seas if the national laws allow it. The International Maritime Organisation (IMO) has guidelines and recommendations for PCASP. Industry standards have also been issued and incorporated with regards to employment and conduct of PCASP. Capt. Sebastian shared that issues relating to employment of PCASP in the EEZ of another country will require policies by flag, coastal and port States as recommended by the IMO.

### **Session 3: Cooperation under UNCLOS**

20. Professor Dr. Hasjim Djalal, Senior Advisor to the Indonesian Minister for Maritime Affairs and Fisheries & Indonesian Naval Chief of Staff, discussed Parts IX, XII, and XIII of the UNCLOS in relation to the claims and disputes in the South China Sea. He emphasized how a number of UNCLOS provisions, especially Articles 47, 56, 57, 76, and 121, could be useful and instrumental in clarifying the nature of competing claims, especially those pertaining to features. He also discussed several legal instruments, mechanisms and cooperation frameworks for resolving disputes in the South China Sea. He also shared that Indonesia has supported joint development as originally suggested by China. However, difficulties noted on this approach include defining the area for such joint development and the modalities for

such programs. Dr. Djalal concluded that devising cooperative programs on technical, scientific, and environmental matters are relatively easier than dealing with issues of resources, jurisdiction and territorial claims. In the interim, he recommended ASEAN to continue encouraging China to agree on the expeditious formulation of a Code of Conduct on the basis of the already agreed Declaration on the Conduct of Parties in the South China Sea of 2002. He further informed the meeting that Indonesia has already drafted a zero draft for the COC. It would be a monumental development, he said, if the concerned parties would also agree to seek solution through a third party mechanism, either through arbitration or judicial adjudication, or other regional mechanisms. In light of the current tensions in the South China Sea, Dr. Djalal underscored the need to maintain and promote peace and stability in the area and suggested the development of rules of engagement for law enforcement and military authorities in the South China Sea. Dr. Djalal's speaking points appear as **ANNEX 13**.

21. Professor Robert Beckman discussed Practical Example 1 on joint development of resources. Prof. Beckman, in his discussion on the legal framework for joint development in the South China, stated that many States subscribe to former Chinese leader Deng Xiao Ping's concept of setting aside disputes and pursuing joint development to be the only long term solution. He emphasized the need to fully understand the concepts involved in joint development, particularly on the question of location. Prof. Beckman explained that provisional arrangements are designed to promote regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation. He emphasized that provisional arrangements are without prejudice to the final delimitation agreement. They cannot be interpreted to be a renunciation of a State to its claim or as recognition of the claim of other parties. He cited the case of the Guyana-Suriname arbitration under Annex VII of the UNCLOS in 2007, where the arbitral tribunal found both States to be in violation of their obligation to enter into provisional arrangements. In particular both parties had conducted unilateral activities which might affect the other parties' rights in a permanent manner and thereby prejudice the final agreement and unilateral exploitation of oil and gas reserves leading to a permanent physical change. On the way forward on areas in dispute, Prof. Beckman recommended the convening of Track 1.5 discussions to define areas, inclusion of outside experts as resource persons. Prof. Beckman's presentation appears as **ANNEX 14**.

22. Dr. Suzette Suarez discussed Practical Example 2 on deep sea mining. She cited the increased demand for metals, rise in metal prices, decline in the tonnage and grade of land-based deposits, and the technological advances in deep-seabed mining and processing as major growth drivers in the field. She informed the body that over 300 exploration licences had already been granted by several Pacific Island countries to companies exploring the deep seabed. The International Seabed Authority, on the other hand, had already issued 19 contracts for exploration in the international seabed area. Dr. Suarez pointed out the destruction of living organisms and their habitat as one of the environmental consequences of deep sea mining. She referenced the ITLOS Seabed Disputes Chamber Advisory Opinion on the application of the 'precautionary approach' found in Principle 15 of the 1992 Rio Declaration to protection of the marine environment in connection with deep seabed mining. Dr. Suarez cited the initiatives of the Pacific Islands Applied Geoscience

Commission (SOPAC) and the Pacific Deep Sea Minerals Project to harmonize national deep sea mining legal instruments, minimize risk of environmental harm, and promote investment and an integrated regional approach to deep sea mining. Dr. Suarez's presentation appears as **ANNEX 15**.

23. A general discussion led by the country discussant from India informed the body of India's active participation in the meetings of the International Seabed Authority as well as its initiatives in the field of relinquishment. India was the only state to get a contract for polymetallic nodules in the Indian Ocean. The Plan of Work was approved in 1997, the same year it was submitted for approval, and India signed a 15-year contract of exploration with ISA in Southern Indian Ocean. In 2002, India had relinquished 50% of its initial claim area in three phases. In March 2013, it submitted for ISA approval its plan of work on prospecting for polymetallic nodules in the area. It reassured the body of its full cooperation with the international community with regard to deep sea mining.

24. Dr. Tran Truong Thuy, Director of the Centre for East Sea Studies, Diplomatic Academy of Viet Nam discussed Practical Example 3 on the importance of cooperation among States bordering an enclosed or semi-enclosed sea, particularly in view of a pending agreement for the settlement of disputes. Cooperative activities that could be undertaken may include marine scientific research (MSR), marine environmental protection (MEP), safety of navigation and communication at sea, search and rescue operation and combating transnational crime. In particular, Dr. Tran cited the Joint Oceanographic and Marine Scientific Research Expedition (JOMSRE-SCS), the Coordinating Body on the Seas of East Asia (COBSEA), Partnerships in Environmental Management in East Asian Seas (PEMSEA), the UNEP/GEF South China Sea Project, and various bilateral and multilateral cooperative activities for the management of living resources and the development of hydrocarbon. Dr. Tran noted that MSR and MEP are considered less sensitive issues, allowing parties to achieve cooperation agreements more easily. Cooperation agreements for the development of living and nonliving resources are currently focused on the Gulf of Thailand and the Gulf of Tonkin due to the absence of territorial disputes and the reasonable maritime claims based on UNCLOS – as opposed to the difficulties presently being encountered in the South China Sea. Dr. Tran's presentation appears as **ANNEX 16**.

25. Dr. Robin Warner, Associate Professor of the Australian National Centre for Ocean Resources and Security, University of Wollongong discussed Practical Example 4 on the protection and preservation of the marine environment. Her presentation focused on the regional initiatives that have been undertaken in the East Asian Seas, particularly the work of PEMSEA in protecting the shared marine environment and preventing, reducing and controlling marine pollution in the region. She noted that the area covered by PEMSEA is exposed to marine pollution pressures primarily because of the large number of vessels that pass through the Straits of Malacca, Singapore and the South China Sea. PEMSEA adopted the Sustainable Development Strategy for the Seas of East Asia (SDS-SEA) as a management framework, with programs such as the Port Safety Health and Environmental Management System, Framework of Agreement of Oil Spill Preparedness and Response in the Gulf of Thailand. Dr. Warner's presentation appears as **ANNEX 17**.

26. A general discussion led Professor Xue Guifang, Chair Professor of International Law and Executive Director of the Centre for Oceans Law and Policy, Shanghai Jiao Tong University, China identified various regional cooperation initiatives on the protection and preservation of marine environment. Prof. Xue specified the Yellow Sea Large Marine Ecosystem Project (YSLMEP), International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, commonly called the "London Convention", and the Convention on the Protection and Use of Transboundary and International Lakes, also known as the Water Convention, as some examples. Participants shared their respective countries' initiatives in the form of legislation, bilateral and multilateral agreements and joint development. For example, the Partnerships in the Environmental Management for the Seas of East Asia and the Co-operative Mechanism for Safety of Navigation and Environmental Protection in the Straits of Malacca and Singapore were discussed as positive examples of cooperation. They also conveyed their concern on the need to increase awareness and develop implementation strategies as a way forward. Dr. Djalal discussed long-running efforts to promote joint development in the South China Sea that are difficult progress because it is unclear which area exists for joint development, what issues are conducive to joint development, which states are willing to participate joint development efforts and what modalities of joint development are most appropriate.

27. Professor Xue Guifang discussed the distinctions of marine living resources (MLR) under the UNCLOS: (1) resources under states' sovereignty, (2) resources under states' sovereign rights, and (3) freedom of fishing on the high seas. She also distinguished the cooperation requirements on transboundary stocks specifically on highly-migratory species and marine mammals. Regional Fisheries Management Organizations (RFMOs) have been established to achieve cooperation between and among fishing nations for the conservation and effective management of international fisheries. Some of the various RFMOs in the region include the Asia-Pacific Fishery Commission (APFIC), Southeast Asian Fishery Development Center (SEAFDEC) and the International Center for Living Aquatic Resources Management (ICLARM). Prof. Xue noted that all ASEAN Member States, except Cambodia, are Parties to the UNCLOS. She also identified the challenges being faced by RFMOs such as the regional differences among Parties, operational weaknesses, and their reliance on voluntary compliance of member states. As a way forward, Prof. Xue gave importance to the need for fresh thinking on implementation strategies. In this regard, she suggested the possibility of establishing a South China Sea Fisheries Commission, which can provide an institutional framework overseeing the conservation and management of fisheries resources in the South China Sea. Prof. Xue's presentation appears as **ANNEX 18**.

28. Canada initiated a general discussion on RFMOs, citing its support for the United Nations Fisheries Agreement (UNFA) and the Northwest Atlantic Fisheries Organization (NAFO). Canada also notes the benefits derived from the work of RFMOs, particularly the Western and Central Pacific Fisheries Commission (WCPFC).

29. Participants agreed during the discussion that RFMOs, although valuable in order to achieve cooperation in the management and conservation of marine resources, also need improvement in their implementation strategies. The cooperative projects in relation to conservation of endangered species in the South China Sea in the Declaration on the Conduct of Parties in the South China Sea were canvassed. It was suggested that setting up a regional fisheries organisation would be a way of regulating activities of members of ASEAN that are not part of the South China Sea in the region.

30. Capt. Martin Sebastian briefly defined piracy and armed robbery, citing that these incidents have continuously plagued the maritime community in the region. He mentioned that the Straits of Malacca, South China Sea, Gulf of Aden and the Gulf of Guinea are some areas in the region prone to piracy and armed robbery, which therefore necessitates increased security measures that can be brought about through regional agreements. He talked about the Malacca Straits Patrol (MSP), Eyes in the Sky and Intelligence Exchange Group initiatives as examples of regional responses to address the issue of piracy. The land-sea nexus was also highlighted as a framework to address piracy and armed robbery as parts of transnational organized crime activities. Considering that these activities are profit-motivated, Capt. Sebastian stressed the need to know the logistics chain of these crimes and the importance of different enforcement agencies both within and between states to work collectively to bridge the gap in the land-sea nexus through proper intelligence sharing and cooperation. Capt. Sebastian's presentation appears as **ANNEX 19**.

31. A general discussion clarified that piracy occurs not only in the high seas but also in the EEZs. The lack of clarity on maritime jurisdiction in the South China Sea creates issues when determining jurisdiction for prosecuting people charged with acts of piracy – defined under UNCLOS as an act beyond national jurisdiction. The discussion highlighted the importance of a holistic approach to address the issue of piracy through regional cooperation and domestic legislation to implement international legal obligations. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia was discussed as one example of regional cooperation contributing to declining trend of piracy in the Strait of Malacca.

#### **Session 4: Dispute Settlement**

32. Professor Seokwoo Lee provided an overview of Part XV of the UNCLOS, specifically the compulsory dispute settlement mechanisms therein, which he called a major achievement. In cases where consensual settlement is not possible, Article 286 of the UNCLOS provides that the dispute may be brought to a court or tribunal having jurisdiction as listed in Article 287. In the absence of a declaration, the dispute will be submitted to an arbitral tribunal in accordance with Annex VII. It is also possible for non-parties to the UNCLOS to appear before judges with respect to disputes relating to exploration and exploitation of the seabed and ocean floor beyond the limits of national jurisdiction. The court or tribunal subscribed to may issue provisional measures pending final settlement of disputes (Article 290) and may decide on the release of vessels and crews held by either party to the dispute, if requested (Article 292). Prof. Lee's presentation appears as **ANNEX 20**.

33. On dispute settlement, Captain J. Ashley Roach discussed provisional measures and prompt release of vessels and crews as provided for by the UNCLOS. For provisional measures, the UNCLOS provides for two kinds under Article 290: those that preserve the rights of respective parties and prevent harm to the environment pending decision, and those limited to situations pending the constitution of an arbitral tribunal. In order to be issued, provisional measures must preserve the rights of the Parties and guard against the possibility that prejudice of rights may occur. On the prompt release of vessels and crews detained by a coastal State, upon posting of financial security by the flag State, it is a legal requirement of detaining State to release detained vessels and crews. Provisions for prompt release guard against over-long periods of detention and excessive penalties for flag States, and also secure the appearance in court of coastal States and their payment of penalties. The prompt release of vessels and crews is not dependent on the existence of legal dispute, and it is not a requirement that local remedies are exhausted; prompt release is a separate proceeding, distinct from the filing of other international or national case. Capt. Roach's presentation appears as **ANNEX 21**.

34. A general discussion among participants raised questions on: the reasonableness of financial security required by courts for prompt release and qualification for non-financial conditions; the applicability of Article 292 to cases of illegal, unreported and unregulated fishing (IUU); immunities from arrest for navy vessels and crews; and the perceived special treatment under the UNCLOS afforded to foreigners vis-à-vis nationals of a coastal State for the same violations. Article 293 does not address the non-appearance of states, but there have been no instances of non-appearance by coastal states to date.

35. The case of Bangladesh v. Myanmar under the ITLOS was presented by country discussants Bangladesh and Myanmar. The dispute began with discussion in 1974 and concluded with final judgment on 14 March 2012. Myanmar had argued for the equidistance method, adjusting for equity based on the natural prolongation of land and with respect for the territorial sea of other states. Due to the concavity of its coast, Bangladesh had opposed this method, as it would have resulted in an inequitable division of the EEZ and would have cut it off from the outer limits of its continental shelf. The location of St. Martin's Island, which belongs to Bangladesh but is off Myanmar's coast, also raised questions about the territorial sea afforded to the island. The adjusted equidistance line determined by the ITLOS resulted in an outcome amenable to both parties. Myanmar and Bangladesh's presentations appear as **ANNEXES 22 and 23**, respectively.

### **Session 5: Current Issues for UNCLOS**

36. Dr. Robin Warner discussed the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (BBNJ) as a global challenge and current issue for UNCLOS. She emphasized that the ocean provides our planet with a life-support system, providing 50% of oxygen supply and over 20% of total animal protein. She discussed that although 40% of oceans are highly impacted by human activities, there is no comprehensive governance framework for areas beyond national jurisdiction (ABNJ). She reported that fishing, ocean transport, ocean garbage, climate change, and new emerging ocean uses altogether comprise

stressor risks that contribute to the collapse of marine ecosystems and fisheries. She shared the view that governance, regulatory, substantive, and implementation gaps limit the effectiveness of the high seas regime in securing sustainable conservation and use of the marine environment beyond national jurisdiction. Dr. Warner emphasized the view that the effective protection of the high seas marine environment requires a more integrated and cross-sectoral governance structure. She stated that in view of the flaws in the current high seas regime, the international community is exploring the scope, parameters and feasibility of negotiating a new instrument under the UNCLOS. Potential elements in the new agreement could consist of the modern principles of ocean governance to include science-based, precautionary and ecosystem-based approaches. Dr. Warner's presentation appears as **ANNEX 24**.

37. The country discussant from the United States opined that while action is needed to improve conservation and sustainable use of BBNJ, the gaps identified are largely issues of political willingness dependent on state consent and expressed doubt on whether a proposed new international agreement would be effective to address gaps of such nature. The discussant highlighted that there is already an abundance of agreements, mechanisms and organizations in place that have the mandate to regulate the human activities in ABNJ needing regulation. He emphasized the view that gaps are more implementation gaps rather than legal gaps, and that the best way to improve conservation and sustainable use in ABNJ would be to build upon the structures and mechanisms already in place. He also raised concern about the proposed establishment of a benefit-sharing regime for marine genetic resources in ABNJ, which might inadvertently impede research and development and ultimately be counterproductive. He stated that everyone now is benefiting through the worldwide availability of marine genetic products and scientific knowledge and the contribution of these products across various sectors, including public health and scientific knowledge.

38. The country discussant from New Zealand supported the need for the creation of a more integrated legal framework or agreement to address the current piecemeal and sectoral approach to marine biodiversity protection and conservation in ABNJ. He expressed the view that existing, fragmented international mechanisms are not well suited to addressing current pressures on BBNJ. In addition, the current regime must manage the cumulative impact on ABNJ; the current regime takes as a starting point the activities managed by each organization, whereas it should be conservation of BBNJ in general that should be the main thrust. Following are elements that might characterize an international mechanism on BBNJ: the mechanism would complement, and not duplicate, existing organizations and their mandates; it would not necessarily affect existing legal frameworks or obligations; and it would promote marine biodiversity within framework of those existing frameworks. He mentioned enhanced cooperation on conservation and an appropriate balance between conservation and sustainable use of resources as important guiding principles.

### **Closing Remarks**

39. In his closing address, Dr. Djalal reiterated the importance of the UNCLOS and its acceptance by all countries, particularly by ASEAN Member States, for the

stability and development of the countries in the region. He noted that the Seminar provided a good opportunity for the ARF to discuss and assess the developments on the practically all aspects of the Law of the Sea, as well as some sensitive issues like the problem of maritime claims and the adjudication of disputes. He commended the speakers on providing useful information to the officials present who are dealing with issues on the UNCLOS but still have little knowledge on the detailed aspects of the laws of the sea. He suggested ongoing and in-depth discussions on the issues of the concept of giving 'due regard' to coastal states, implementation 'joint development' of resources in the South China Sea and East China sea, a potential regional mechanism for dispute settlement in the South China Sea, a 'South China Sea Fisheries Commission' and further promotion of cooperation on anti-piracy and armed robberies in the region. He recommended ARF promote peaceful development in the region, particularly in the South China Sea. Dr. Djalal, on behalf of all the participants, thanked the governments of the Philippines and Australia for their hospitality and the successful convening of the Seminar. Dr. Djalal's closing remarks appear as **ANNEX 25**.

40. The co-chairs reiterated that the importance of UNCLOS cannot be overstated. They supported the conclusions of Dr. Djalal and agreed that the discussions had been enlightening and educational. The co-chairs conveyed their appreciation to all the participants and the speakers who shared their knowledge and contributed to the success of the seminar.

41. Participants thanked the Philippines and Australia for their effective co-chairmanship and expressed gratitude to the Government of the Philippines for the hospitality and arrangements in hosting 2<sup>nd</sup> ARF Seminar on UNCLOS.