

CO-CHAIRS' SUMMARY REPORT

ASEAN REGIONAL FORUM SEMINAR ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Manila, Philippines, 8-9 March 2011

Introduction

1. Pursuant to the decision of the 17th Ministerial Meeting of the ASEAN Regional Forum (ARF) in July 2010 held in Ha Noi, the ARF Seminar on the United Nations Convention on the Law of the Sea (UNCLOS) was held on 8-9 March 2011 in Manila. The seminar was co-chaired by Mr. Jose Brillantes, Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs of the Philippines, and Mr. Richard Rowe, Senior Legal Adviser, Department of Foreign Affairs and Trade of Australia.
2. The Seminar was attended by delegates from the Commonwealth of Australia, People's Republic of Bangladesh, Brunei Darussalam, Kingdom of Cambodia, Canada, People's Republic of China, the European Union, Republic of Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Mongolia, Union of Myanmar, Islamic Republic of Pakistan, Independent State of Papua New Guinea, Republic of the Philippines, Republic of Korea, Russian Federation, Republic of Singapore, Kingdom of Thailand, United States of America, Socialist Republic of Vietnam, and the ASEAN Secretariat. Several experts on UNCLOS, and observers from national government institutions, academia and think tanks also attended the meeting. The list of delegates is attached as **Annex A**. The Seminar program and agenda are attached as **Annex B** and **Annex C**, respectively.

Opening Session

3. At the Opening Session, the Philippine and Australian Co-Chairs delivered their respective Opening Addresses (attached as **Annex D** and **Annex E**, respectively).
4. The Philippine Co-Chair briefly discussed the history of the UNCLOS and its relevance in the world today given the various international security threats. He said that the presence of a good number of delegates is a clear manifestation of the ARF participants' interest in the Law of the Sea. He noted that almost all ARF participants are parties to the UNCLOS. He mentioned that this seminar is a way of striving towards a common understanding of the principles, rights, and obligations that have been intrinsically woven in a delicate way into the Convention. He expressed the Philippines' hope that this seminar will be the first of a series of discussions that will gradually move towards the formulation of

concrete and practicable regional efforts and cooperation to enhance maritime security in the region.

5. The Australian Co-Chair acknowledged the important role of the ARF Inter-Sessional Meeting (ISM) on Maritime Security in the Opening Session for ARF members to cooperate more closely in maritime issues, including through the development of the ARF Work Plan on Maritime Security. He expressed hope that this seminar would be considered both a contribution to the Work Plan and the ARF Hanoi Plan of Action. He said UNCLOS represents a remarkable achievement, striking a balance between the interests of maritime and coastal states with respect to freedom of navigation, utilization and conservation of marine resources (both living and non-living), security interests, protection and preservation of the marine environment, marine scientific research and peaceful settlement of disputes. He noted that while UNCLOS cannot *per se* eliminate difference of views between states, it helps to ensure a common language of discourse in the seeking to deal with those differences. He recalled Australia's active involvement in the negotiations which led to UNCLOS, and noted that Australia remains a very strong supporter of the Convention.
6. The Philippine Co-Chair briefed participants on the format of the Seminar. The Seminar was divided into four topics touching on some of the key aspects of UNCLOS, namely: 1) Various Maritime Zones, 2) Cooperative Mechanisms Under UNCLOS, 3) Dispute Settlement Under Part XV, and 4) Maritime Environmental Protection. Presentations in each session would be followed by an exchange of views, to be led by designated country discussants.
7. The delegation of Japan briefed participants on the Report of the 3rd ARF Inter-Sessional Meeting on Maritime Security in Tokyo on 14-14 February 2011. The Report is attached as **Annex F**. Subsequently, the agenda was adopted.
8. The profile of the Seminar's speakers is attached as **Annex G**, while the ARF Work Plan on Maritime Security is attached as **Annex H**.

Session 1: Various Maritime Zones

Basic Maritime Zones

9. Prof. Sam Bateman of the University of Wollongong in Australia spoke on basic maritime zones. His presentation (**Annex I**) touched not only on the description of these maritime zones but also on the issue of whether or not there is a common understanding of these zones. He presented the system of maritime zones, namely: internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf and the high seas. He highlighted two contentious issues for ARF participants: 1) the use of straight baselines by some coastal States in East Asia and 2) restrictions on innocent passage, specifically the innocent passage of warships.
10. Prof. Bateman said that baselines are fundamental to maritime claims. They define the outer limits to maritime claims, are the starting point for claiming maritime zones, and provide base points for generation of limits of national

maritime claims. They are often a starting point for maritime boundary negotiations. Although the Convention is quite clear on when straight baselines can be used, there is some division among countries within the region on this issue. A question is whether or not the liberal usage of straight baselines in East Asia is sufficient to shape customary international law.

11. Prof. Bateman said that the issue of restrictions on innocent passage of warships relates to the requirements of some countries that prior notification be given or authorization sought. Those who argue against this cite UNCLOS Art. 17 stating that "Ships of all States have the right of innocent passage through the territorial sea." Amb. Tommy Koh of Singapore said that the Convention is clear that warships, like other ships, have a right of innocent passage through the territorial sea and therefore there is no need for prior notification or authorization.

The High Seas: Freedoms, Obligations and Jurisdiction

12. Prof. Taisaku Ikeshima of Japan's Waseda University spoke on freedoms, obligations and jurisdiction in the high seas. His presentation (**Annex J**) included a general introduction of concepts, high seas freedoms and their limits, flag state jurisdiction and exceptions, and marine resources and Illegal, Unreported, and Unregulated (IUU) fishing.
13. Prof. Ikeshima noted that the high seas are common for the enjoyment of every state. He noted the potential for controversy over the view that the high seas are reserved only for peaceful use. Peaceful use in this regard means peaceful with reference to the U.N. Charter. The high seas are defined negatively in UNCLOS – in other words, all parts of the sea except internal waters, the territorial sea, the exclusive economic zone (EEZ), waters of continental shelf and archipelagic waters are considered high seas.
14. Prof. Ikeshima noted the high seas freedoms included in UNCLOS: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, to construct artificial islands and other installations, fishing, and scientific research. The High Seas Convention of 1958, however, does not include freedom to construct artificial islands or other installations, and freedom of scientific research.

Regime of Archipelagic States

15. Prof. Hasjim Djalal of the Center for Southeast Asian Studies in Indonesia spoke on the regime of archipelagic states and discussed the long history of Indonesia's efforts to define legally and geographically the meaning of the archipelagic state principle. For Indonesia, it was a struggle of more than a century to try to unite the country and to find a way to use its enormous natural resources for the benefit of its own people. All of Indonesia's strategies in advancing the concept of the archipelagic state bore fruit with the adoption of the UNCLOS in December 1982.

16. Prof. Djalal spoke of the characteristics and concerns unique to archipelagic states – in particular, archipelagic waters and the related concepts of archipelagic sea lane passage and innocent passage. He pointed out the difference between archipelagic sea lanes passage and innocent passage: archipelagic sea lanes passage is designated, while innocent passage does not need to follow designated routes. In innocent passage, submarines should surface while in sea lanes passage they go the normal mode. Innocent passage can be suspended, but not in sea lanes where there is only the possibility of substitution. A coastal state has more power to regulate in innocent passage than in archipelagic sea lanes. Finally, there is no definite rule if there is a need for prior notification or authorization to pass through archipelagic sea lanes. Prof. Djalal's presentation is attached as **Annex K**.

Mechanisms for Implementing the Law of the Sea Convention

17. Mr. Vladimir Jares Senior Legal Officer of the Division for Ocean Affairs and Law of the Sea (DOALOS) of the United Nations Office of Legal Affairs provided an overview of mechanisms for implementing UNCLOS. He emphasized that UNCLOS represents a legal framework for all ocean related activities and is of universal character. His presentation is attached as **Annex L**.
18. Mr. Jares highlighted mechanisms for the implementation of the UNCLOS at the national, regional and global levels, such as legislative and institutional frameworks of States Parties (e.g., through the process of harmonization of national legislation with UNCLOS), regional organizations and cooperative arrangements, and international organizations with a global outreach (e.g., organizations of the United Nations system). He described the role of the Secretary-General of the United Nations, and the role of the bodies established under UNCLOS, in particular the Commission on the Limits of the Continental Shelf.

International Seabed Authority

19. Mr. James McFarlane of the International Seabed Authority's (ISA) Office of Resources and Environmental Monitoring, discussed the history, structure, and areas of responsibility of the ISA; the Seabed Dispute Chamber's request for an advisory opinion; environmental considerations, specifically provisions and measures to protect the environment from harmful effects of deep seabed mining; available information and data pertaining to the area and the responsibilities of the ISA; and current technology used for surveys and exploitation. His presentation is attached as **Annex M**.
20. Mr. McFarlane said that the ISA came into existence on 16 November 1994 upon entry into force of UNCLOS. It is the organization through which States Parties organize and control activities in the seabed (known as "the Area"), particularly with a view towards administering resources in the Area. McFarlane emphasized the point of the rights and resources in the Area being the "common heritage of mankind".

21. Mr. McFarlane also highlighted in his discussion the recent request for an advisory opinion submitted by the Council of ISA to the Seabed Disputes Chamber of the ITLOS under Article 191 of the Convention. The ISA sought advice on three questions: What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention? What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention? What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention?

Exchange of Views

22. The exchange of views that followed the presentations centered on the issues of prosecution of pirates, straight baselines, and innocent passage of warships.
23. Several delegations spoke on the matter of piracy, citing the case of Somalia. They noted that it is difficult to expect homogenous and satisfactory results in prosecuting piracy suspects because while every state is expected to exercise jurisdiction over pirates, each has its own criminal rules and procedures. Some have rigid mechanisms but others do not. Bridging the gap is the hard part and countries have been encouraged to adopt robust domestic laws against piracy.
24. Some delegations took up the issue of straight baselines raised by Prof. Bateman. A question raised by a participant was that with many coastal states in Southeast Asia applying straight baselines for internal waters does it create customary international law for the region? Is it customary regional practice?
25. Some delegations also drew attention to the fact that there is not explicit right of innocent passage under UNCLOS in the internal waters inside territorial sea baselines. In their view, this represents a further difficulty with the use of territorial sea straight baselines, which can theoretically expand the amount of internal waters through which ships must navigate. In practice, however, relatively few countries in the region that use territorial sea straight baselines are enforcing the waters inside these baselines as internal waters. It was pointed out that the use of straight archipelagic baselines may not present the same operational difficulties, as UNCLOS expressly allows right of innocent passage through archipelagic waters.
26. China stated it believes that Articles 2 and 25 of UNCLOS support the right of coastal states to take national security measures in its territorial seas. Those in favor of prior notification or authorization argue that while no provision in the Convention explicitly grants the right of innocent passage to warships, the passage of warships should follow the laws and regulations of the coastal States. Prof. Bateman responded that it is not valid to presume that all passage of warships through the territorial seas of coastal states is not innocent. The United States agreed with Prof. Bateman's assertion. The United States said that the issue of prior notification by warships in innocent passage was expressly debated in the negotiations of UNCLOS, and it was deliberately decided to not include it as an aspect of the convention. The United States further stated that Article 2(3) of UNCLOS clearly indicates that the sovereignty of a coastal state is

subject to the other provisions of the convention, including the right of the ships of all states to conduct innocent passage, and other rules of international law. Additionally, the United States stated that Article 19 of UNCLOS provides an exhaustive list of what activities would constitute non-innocent passage, and that any domestic law of a coastal state must make reference to that list of activities.

27. Regarding the use of straight baselines by some states in the region, the Philippines stated that the rules on establishing baselines for archipelagic states are clear, but that the rules for straight baselines are less clear. However, the Philippines further stated that states can find guidance in the Norwegian Fisheries case that the length of a 30NM straight baseline might be reasonable, but the length of a 100NM straight baseline is not reasonable. The Philippines further stated that a coastal state that has some outlying archipelagic islands is not an archipelagic state.

Session 2: Cooperative Mechanisms under UNCLOS

Part IX (Enclosed and Semi-enclosed Seas)

28. Ambassador Alberto Encomienda, former Secretary-General of the Maritime and Ocean Affairs Center (MOAC) of the Philippines, gave a presentation (**Annex N**) on Cooperative Mechanisms under Part IX of UNCLOS. Amb. Encomienda began his talk by explaining how the whole ARF region could be viewed as an *archipelagic continent*. He said that the ARF region includes interconnected enclosed and semi-enclosed seas surrounding the chain of archipelagos that is in a north-south alignment constituting the Pacific Ocean rampart of the Asian continent, from Papua New Guinea to Indonesia and the Philippines, which are the three largest archipelagic states in the world, and Japan, a large archipelago. The sheer size of the maritime area covered by this collection of archipelagos would amount to an archipelagic continent where the application of UNCLOS Part IX becomes more relevant.
29. Amb. Encomienda stressed that cooperative mechanisms are the essence of UNCLOS. He said that UNCLOS Parts XII, XIII, and XIV, which underscore cooperative activities in the areas of *protection and preservation of the marine environment*, *marine scientific research*, and *development and transfer of marine technology* respectively, are aptly enumerated under UNCLOS Part IX. Amb. Encomienda added that aside from UNCLOS Part IX, *Annex VI of the Final Act of the Third United Nations Conference on the Law of the Sea (Resolution on development of national marine science, technology, and ocean service infrastructures)* could also be another channel of cooperation. He further expounded on the rights and obligations of states under these provisions, and the importance of these provisions in establishing effective regional cooperative arrangements. He specifically emphasized the significance of Article 123, which *exhorts cooperation* among states.
30. Amb. Encomienda stated that the Philippines is the maritime heartland of Southeast Asia and the epicenter for protection of marine environment in the region. He said that under UNCLOS, states have an obligation to cooperate on marine environment protection while taking into account unique characteristics

of the region. He added that the Philippines see the Gulf of Mexico incident as a wake-up call for the region – something of that magnitude happening in the region would gravely affect not just the Philippines, but the whole of the South China Sea and the littoral states surrounding it.

31. Amb. Encomienda said that since UNCLOS Part IX welcomes participation of as many states as possible in cooperative arrangements for ocean governance, Australia should have a vital role in creating effective cooperative mechanisms in the region. He noted that the building blocks of Part IX are already being pursued by Australia by way of AusAID's support for cooperative work relating to environmental protection.
32. During the open forum, Indonesia said that it has already launched cooperation in the protection and preservation of the marine environment with Malaysia and the Philippines. The trilateral cooperation eventually expanded to include other states. While Indonesia recognizes the importance of regional cooperative mechanisms, it maintained that a step-by-step approach would be ideal in establishing effective cooperative arrangements in the region. Indonesia added that management and conservation of fish stocks, migratory and straddling stocks should also be prioritized in regional cooperative mechanisms.
33. Vietnam cited the vital role of the Joint Oceanographic Marine Scientific Research Expedition (JOMSRE), its joint endeavor with the Philippines, in contributing to the peace and stability in the South China Sea. Vietnam said that JOMSRE is a good example of an effective cooperative mechanism under UNCLOS Part IX. Amb. Encomienda added that a trans-border marine peace park could be the next cooperative undertaking between the Philippines and Vietnam

Regime of Marine Scientific Research

34. Prof. Sam Bateman of the University of Wollongong in Australia focused on the UNCLOS regime for Marine Scientific Research (MSR), as well as contentious issues regarding UNCLOS MSR regime, hydrographic surveys and military surveys. He said that while UNCLOS Part XIII outlines the general provisions for the conduct of MSR, it does not provide a clear definition of MSR. At best, UNCLOS, differentiates *pure* MSR from *applied* MSR: pure MSR is used for the common interest of mankind; applied MSR is undertaken mainly for the exploitation of the EEZ.
35. Prof. Bateman said that the term MSR is used loosely to cover all forms of marine data collection, and its conceptual definition often overlaps with that of hydrographic surveys and military surveys. He cautioned that these three concepts could imply different meanings depending on the purpose of the scientific activity. Prof. Bateman also discussed the various issues concerning the rights and duties of coastal states with respect to the application of hydrographic surveys and military surveys in the EEZ, citing several incidents between states arising from differences over whether certain activities amount to MSR or military surveys. Prof. Bateman concluded that the right to conduct hydrographic surveys and military surveys in an EEZ are essentially different,

and that the arguments for military surveys in the EEZ being outside the jurisdiction of the coastal state may be stronger than those for hydrographic surveys. Prof. Bateman concluded by stressing the need for greater regional agreement on MSR and referring to the relevance of the Guidelines for Navigation and Overflight in an EEZ produced by the Ocean Policy Research Foundation of Japan.

36. Prof. Bateman said that the ARGO system is a major global oceanographic research system. Data collected by the system are used in climate, ocean and fisheries research. He observed that there are no ARGO floats located in the enclosed and semi-enclosed seas of Asia. As a result, he said, the region is denying itself the benefits of research using this advanced system. His presentation is attached as **Annex O**.
37. Discussions during the open forum centered on the need for coastal states to regulate military surveys in their EEZs. China said, while the Convention has no definition for Marine Scientific Research, many State practices treat military surveys as Marine Scientific Research, and military surveys within EEZs should be within the jurisdiction of the coastal States. China is in favor of such practices. The United States said that, with respect to requests to conduct MSR in areas that are claimed by multiple claimants, the United States Government's practice is to ensure such MSR requests are submitted to all claimants. The United States also stated that the text of UNCLOS is quite clear that military surveys are distinct from hydrographic surveys and marine scientific research. The United States also stated that the meaning of "peaceful uses" on the high seas should be interpreted in conjunction with Article 2(4) of the United Nations Charter. Singapore cited UNCLOS Article 56, asserting that the article clearly states the jurisdiction of the coastal state over MSR. Singapore also maintained that military surveys cannot be considered as MSR, and that UNCLOS distinguishes between MSR and surveys. Singapore also stated that the phrase *with due regard* commonly used in UNCLOS means giving notice or consulting the coastal state. Singapore believes that regular consultation among states would lead to a more peaceful region.

Session 3: Dispute Settlement under Part XV

38. Mr. Richard Rowe outlined a change to the agenda in Session 3. He said Prof. Genevieve Bastid Burdeau would speak first on the obligation to settle disputes peacefully, the role and primacy of the parties in UNCLOS dispute settlement, and the compulsory dispute settlement procedures, as well as her original topic of "Case Application – Maritime Delimitation". Dr. Suzette Suarez spoke second on the topic of ITLOS, and Prof. Wu Jilu delivered his presentation third on the Advisory Jurisdiction of ITLOS.

Case Application: Maritime Delimitation

39. Prof. Bastid Burdeau spoke in detail about the three-way dispute over maritime boundaries in the Bay of Bengal between Bangladesh, India and Myanmar. Her presentation is attached as **Annex P**. She pointed out the complexities caused by the particular geographic configuration of the Bay of Bengal, which has

resulted in maritime claims by India and Myanmar which effectively enclose Bangladesh waters and cut it off from its claimed extended continental shelf.

40. Prof. Burdeau gave a brief history of the legislative developments which have contributed to the overlapping claims and contested maritime areas which now exist. She noted that the recent discovery by Myanmar of substantial gas deposits in one of the contested areas, and its subsequent issuance of exploration concessions, gave the dispute greater urgency and prompted greater efforts to resolve it, particularly on Bangladesh's part. In addition, Myanmar and India had made submissions to the Commission on the Limits of the Continental Shelf (CLCS) for recognition of areas of extended continental shelf. This had prompted objections from Bangladesh and also contributed to Bangladesh's decision to seek third-party dispute settlement of disputes over territorial sea, EEZ and continental shelf boundaries in the Bay of Bengal.
41. Prof. Burdeau noted that Bangladesh and Myanmar have agreed to refer their maritime boundary dispute to ITLOS, in accordance with Article 287(4). While the dispute between Bangladesh and India was referred to arbitration under Annex VII of UNCLOS pursuant to Article 287(5) because they had not otherwise agreed. Prof. Burdeau noted that the parties' use of UNCLOS in this case had resulted in parallel proceedings covering similar issues.
42. Prof. Burdeau emphasized the importance of this case for ITLOS, as it would be the first case of maritime boundary dispute submitted to the Tribunal. She also noted that coherence of the two judgments would be important in the case, given that the issues were similar and, by choice of the parties, many of the judges and arbitrators would be hearing both cases. She noted that the CLCS had refused to consider extended continental shelf submissions in the Bay of Bengal due to the maritime boundary disputed there. She noted tribunals have previously refused to rule on extended continental shelf boundaries before the CLCS had made recommendations. She suggested there would be scope for the parties to agree to ask the CLCS to determine whether there were areas of extended of continental shelf in the contested area before the two tribunals give their respective decisions.

ITLOS

43. Dr. Suarez noted that she was attending the Seminar in her personal capacity, and not necessarily expressing the official views of ITLOS. Her presentation is attached as **Annex Q**.
44. Dr. Suarez ran through some of the basic aspects of the Tribunal's functions, including the composition of the benches and its jurisdictional competence. With regard to jurisdiction, she noted that the Tribunal is open to the 161 States Parties to UNCLOS. But other entities, including the International Seabed Authority, state enterprises or natural or legal persons may appear with respect to disputes relating to exploration and exploitation of the deep seabed area. She mentioned that ITLOS does not have jurisdiction to try piracy suspects. This jurisdiction remains with domestic courts according to the article 105 of UNCLOS.

45. Dr. Suarez emphasized that of the 161 States Parties to UNCLOS, only 43 have made declarations under Article 287 accepting the jurisdiction of ITLOS. Many of these have accepted the jurisdiction of more than one forum and place mechanisms in order of preference. In practice, in many cases arbitration will be the only means of settling the dispute. She noted that arbitration often imposes additional costs to pay for arbitrators, premises and other expenses.
46. Dr. Suarez noted that the Tribunal's compulsory jurisdiction covers cases under Part XI (submitted to the Seabed Disputes Chamber), prompt release cases under Article 292, and requests for provisional measures pending constitution of an arbitral tribunal. Dr. Suarez briefly noted the advisory jurisdiction of ITLOS, and gave an overview of the recent advisory opinion rendered by ITLOS in response to the International Seabed Authority's request in relation to exploration activity in the Area. She also touched on key procedural aspects of ITLOS, including in relation to costs, facilities offered to parties on the ITLOS premises, the right of parties to appoint an *ad hoc* judge to sit along the elected judges, parties' right to request that a case heard by a chamber of judges, procedures for instituting proceedings, and official languages.
47. Dr. Suarez briefly noted the cases currently pending before the Tribunal – the *MV Louisa* case and the *Bangladesh/Myanmar* case – and the judicial history of the Tribunal's work including provisional measures and merits cases.
48. Dr. Suarez also cited the Tribunal's efforts to organize regional workshops to build capacity on dispute settlement under UNCLOS, and the Tribunal's internship program.
49. In conclusion, Dr. Suarez noted the mix of States involved in cases before the Tribunal – from all regions and developed and developing States. She noted the Tribunal in the conduct of proceedings, and the substantive contribution the Tribunal has made in several areas of international law in its short history to date.

ICJ and Advisory Jurisdiction of ITLOS

50. Prof. Wu noted the foundation of the ICJ's jurisdiction, stemming from Article 92 and 93 of the UN Charter, establishing it as the principal judicial organ of the UN and making all parties to the Charter also parties to the ICJ Statute. He noted that Article 96 gives the ICJ advisory jurisdiction. This is reinforced by Chapter IV of the ICJ Statute.
51. Prof. Wu recalled that the ICJ has given 25 advisory opinions since it was established. These opinions cover a broad range of issues and legal contexts. Prof. Wu pointed out that the practice of PCIJ and ICJ shows that advisory jurisdiction of an international judicial body should be explicitly provided for in its Statute.
52. In relation to ITLOS, Prof. Wu noted that neither the Convention nor the Statute of the Tribunal gives the Tribunal as a whole the competence to exercise

advisory jurisdiction over requests referred to it. The only document mentioning the advisory jurisdiction of the Tribunal as a whole is Article 138 of the Rules of ITLOS. Prof. Wu noted that the advisory jurisdiction of the Seabed Disputes Chamber of ITLOS is conferred by the ITLOS Statute and Section 5 of Part XI, UNCLOS.

53. Prof. Wu made brief reference to the recent request by the International Seabed Authority for an advisory opinion on the responsibilities of states in relation to minerals exploration in the Area.
54. Prof. Wu noted that UNCLOS, the ITLOS Statute and the Rules of the Tribunal all contain provisions conferring advisory jurisdiction on the Seabed Disputes Chamber, while only the Rules give advisory jurisdiction to the Tribunal as a whole. He posed the question whether this was sufficient basis for the advisory jurisdiction of the Tribunal. His presentation is attached as **Annex R**.

Exchange of Views

55. Discussion on focused on the legal relationship between ITLOS and the CLCS, various aspects of the Bay of Bengal dispute, and the advisory jurisdiction of ITLOS.
56. Malaysia queried whether ITLOS can make judgments on the extended continental shelf claims of states around the Bay of Bengal. Prof. Burdeau noted the lack of clarity in UNCLOS on this point, but noted that Article 76(10) provides that delimitation of the extended continental shelf is without prejudice to delimitation of continental shelf between states with opposite or adjacent coasts. She noted that areas of extended continental shelf were often in the Area before being recommended by the CLCS, and were thus the common heritage of mankind under UNCLOS. Therefore, she had difficulty with the idea of tribunals judgments apportioning this area to states, and believed priority should be given to the definition of the extended continental shelf.
57. Differing views were expressed on whether the extended continental shelf should be delimited before boundary disputes are resolved, or whether the reverse is preferable from a legal and practical perspective. Some delegations noted the CLCS backlog, which could delay resolution of maritime boundary issues if a recommendation on extended continental shelf was required first. It was noted that the CLCS has adopted the practice of deferring consideration of submissions where disputed maritime boundaries are in play. The CLCS is not a judicial body – it merely confirms that states have correctly identified their extended continental shelf boundaries.
58. Australia noted a dilemma, in that ITLOS may decline to rule on a boundary delimitation case unless CLCS has made recommendations first, while the CLCS is reluctant to review a submission unless boundary issues are settled first. Australia noted that under UNCLOS, the CLCS is in fact not permitted to refuse to consider a submission because of a boundary dispute. The CLCS should consider submissions and give its recommendations on a without prejudice basis.

59. On the advisory jurisdiction of ITLOS, Rule 138 is quite clear that ITLOS can also provide advisory opinion if an international agreement allows it. Dr Suarez clarified that the statute of ITLOS extends its jurisdiction to matters arising under bilateral agreements which give it jurisdiction. In practice, some countries have entered into agreements specifically to confer jurisdiction on the Tribunal regarding their case.
60. Dr Suarez suggested that whether an advisory opinion could be binding would depend on the nature of the request. If the request could be characterized as a current dispute that the parties had agreed to settle under the Tribunal's jurisdiction, the advisory opinion could possibly be binding.
61. Dr Suarez also addressed the concern that the growing number of international tribunals may lead to inconsistencies or 'fragmentation' in the interpretation of UNCLOS. She argued that ITLOS has not experienced this problem, as it has following ICJ rulings where relevant. Parties before ITLOS have liberally referred to ICJ jurisprudence in their submissions. She noted that the Rules of ITLOS are modeled on those of the ICJ, so the harmony between them extends to procedural matters also.
62. Prof. Djalal raised two questions: Why is it that there is no discussion on provisional measures for joint development or joint cooperation in the Bay of Bengal? Is it a political matter? Ms. Burdeau said that it is difficult to answer for the countries involved. The other question was on the composition of the ITLOS: Why are the ITLOS judges from Asia always from the same countries? These are the countries who do not wish to bring their cases to the Tribunal. Countries in Southeast Asia, however, bring their problems to the Tribunal but no judges have come from these states. Is there a lack of confidence on the Tribunal? Ms. Suarez did not wish to answer that question and said that perhaps it is for those countries to answer.

Session 4: Marine Environmental Protection

63. Dr. Angel Alcala of the Philippines' Silliman University spoke about environmental protection in the Spratlys and the South China Sea in the context of UNCLOS (specifically Part IX, on cooperative mechanisms) and the Joint Oceanographic and Marine Scientific Research Expedition in the South China Sea (JOMSRE-SCS) conducted by the Philippines and Viet Nam. He discussed the unique features of the marine environment in the area, in particular the atolls, and their significance to the coastal states near and around the South China Sea as breeding ground and centers of dispersal of fish, propagules and other marine organisms.
64. Dr. Alcala also described the disparity in fish biomass between the first and fourth JOMSRE-SCS expeditions (undertaken in 1996 and 2007 respectively) as a result of heavy exploitation and compared these with more encouraging data from islands in the Philippines with Marine Protected Areas (MPAs).

65. Dr. Alcala recommended the establishment of Trans-border Marine Peace Parks (TMPPs) in the Spratlys and the establishment of a multilateral regional structure for cooperation for the long-term protection and management of the marine environment in the South China Sea. His presentation is attached as **Annex S**.
66. Prof. Taisaku Ikeshima of Japan's Waseda University spoke about UNCLOS as a comprehensive approach to marine environmental protection that must nevertheless be complemented by other, more specific agreements and arrangements for the effective and efficient safeguarding of the world's oceans. His presentation is attached as **Annex T**.
67. Part XII of UNCLOS, entitled "Protection and Preservation of the Marine Environment", obliges states to protect and preserve the marine environment and to establish measures to prevent, reduce, and control the pollution of such environments, including through the formulation of international rules and standards.
68. Prof. Ikeshima argued that cooperation regionally and internationally is thus necessary not only to harmonize policy but also to ensure that a balance is struck between the benefits states and individuals derive from the use of marine resource and the value of protecting the marine environment. He suggested consideration should also be given to the economic and technological gaps that exist between countries and the question of generational equity.

Exchange of Views

69. The United States, in reaction to Dr. Alcala's and Prof. Ikeshima's presentation offered to share with interested countries its experience with regard to offshore oil drilling and the practice of government agencies working in tandem other agencies and other state bodies to manage protected areas and respond to accidents. Regarding the discussion of Maritime Protected Areas (MPAs), the United States stated that it supports the establishment of networks of MPAs, but emphasized that those networks must be consistent with existing international law, including customary law reflected in UNCLOS. The United States further stated that it does not support the establishment of an overarching governing mechanism or any international entity to oversee a particular MPA.
70. China pointed out that Dr. Alcala's presentation touched upon two issues, namely marine scientific research and marine environmental protection, the undertakings of which should follow the provisions of the Convention. According to the Convention, marine scientific research in the EEZs is within the jurisdiction of the coastal States. Marine scientific research expeditions in disputed waters, like that of the South China Sea, should acquire prior consent of all claimant countries through consultations. China has reached a Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the South China Sea with Vietnam and the Philippines, it is hoped that the three parties could start such tripartite joint marine scientific research as early as possible.
71. The European Union, following Dr. Alcala's presentation of scientific findings under JOMSRE-SCS III & IV pointed to the upcoming ASEAN-EC Dialogue

Meeting on Science and Technology (S&T) in May 2011. The ASEAN Committee of Science and Technology (COST) and the European Commission (EC) agreed to increase S&T collaboration between the two regions. Areas of Cooperation comprise inter alia marine science, incl. coastal management and environment, climate change, including impact on the marine environment, mitigation and adaptation and disaster risk reduction. The 7th Research Framework Programme is the main instrument for implementing S&T cooperation with ASEAN. Delegates may wish to explore ways in taking advantage of the program which is set to expire in 2013.

72. Indonesia's observation that UNCLOS seems to put more weight on navigation and technology than on marine environment protection led to discussions on the need to be innovative when using UNCLOS to safeguard the marine environment. It was suggested that climate change could possibly be considered "pollution" of the marine environment under UNCLOS, to the extent that it is a consequence of the exploitation of non-living marine resources (in other words, offshore oil-drilling). Present technologies in oil and gas exploration have allowed deepwater drilling, which continually poses serious risks to the marine ecology and Earth's climate change. While there exists a range of international agreements covering oil spills from vessels, there is no global agreement to address oil spills coming from oil exploration, including pollution which crosses maritime boundaries. Much exploration activity falls within the national jurisdiction of coastal states. Indonesia proposes a new item to the legal committee of IMO that would address this timely issue.
73. During discussions on marine environmental protection, several delegations reminded the Seminar that any activity related to the protection and preservation of the marine environment, particularly establishment of marine protected areas, should abide by international agreements and be consistent with international law such as UNCLOS.

Closing Session

74. Mr. Richard Rowe, the Australian Co-Chair, thanked all presenters and representatives for their active participation. He highlighted the excellent exchanges and discussions throughout the Seminar, and noted that the Seminar had fulfilled its objective of promoting regional security through the exchange of views on UNCLOS. It had also made a valuable contribution to the ARF Work Plan on Maritime Security and to the Ha Noi Plan of Action. Mr. Rowe proposed that ARF continue its dialogue on UNCLOS through a similar seminar following the same format in the near future. He suggested that future consultations could determine the venue, timing, and format of the next seminar, and proposed that the next seminar might focus in detail on some of the specific subjects covered over the past two days. Mr. Rowe warmly thanked Mr. Brillantes for co-chairing, and all members of the Philippines organizing team for the excellent arrangements they had made for the Seminar. The Seminar represented a new phase of ARF cooperation and dialogue which he hoped could be continued in the future. A copy of Mr. Rowe's closing statement is included in **Annex U**.

75. Mr. Jose Brillantes, the Philippine Co-Chair, thanked the participants for their active participation. He characterized the Seminar as an attempt to gain a common understanding of the key provisions and to share national perspectives on the interpretation of UNCLOS. Mr. Brillantes also spoke about the difficulties that the organizers experienced in preparing for the Seminar, and likened such hurdles to the complexities and challenges that remain in achieving a common language for UNCLOS. Mr. Brillantes described the Seminar as but the first step in this process, one that would hopefully be followed by concrete and practicable proposals and enhanced cooperation between countries. He ended his statement by again thanking the participants, the presenters, and the ASEAN Secretariat for their participation in the Seminar and expressed the hope that they enjoy the rest of their stay in the Philippines. A copy of Mr. Brillantes' closing statement is included in **Annex V**.

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