

South Asia International Economic Law Network

| SAIELN |

2nd Biennial Conference



RAPPORTEUR'S REPORT

The Law of the Blue Economy:
International and South Asian Perspectives

27 - 28 July, 2019 | Hotel Uday Samudra | Kovalam, Kerala

INAUGURAL SESSION

The South Asia International Economic Law Network (SAIELN) organized its 2nd Biennial Conference on the theme of 'Blue Economy' to build awareness and cohesion towards protection of oceans and water bodies. The two-day conference was inaugurated in Thiruvananthapuram on Friday in the presence of South Asian and International academicians, government officials from Kerala and practicing lawyers and experts in the maritime sector.

The Conference was inaugurated by Dr. Christy Fernandez, Chairman of Kerala State Industrial Development Corporation Limited, Dr. Ravi Raman, Member of Kerala State Planning Board, Government of Kerala and the co-Chairs of SAIELN, Prof. James J. Nedumpara and Prof. Leïla Choukroune. Prof. Peter Van den Bossche, Former WTO Appellate Body Member and President of Society of International Economic Law (SIEL) addressed the Inauguration via a video message.

Prof. James and Prof. Leïla gave the Welcome Address and Opening Remarks to establish the theme of the Conference. Prof. James emphasized on the need for clarity on the concept of Blue Economy while preserving the development dimension. Prof. Leïla stressed on the importance of oceans in light of the carbon emissions and greenhouse gases. The concept of Blue Economy was understood to include commercial activities like fishing shipping industries along with prevention of maritime pollution.

Continuing the discussion on Blue Economy, Dr. Fernandez remarked in his Inaugural Address that different yardsticks for the protection of oceans are required for effective enforcement of policies on Blue Economy at different locations. He suggested that Kerala, a fishing-rich State, could play an active role in knowledge contribution in this field. The video message by Prof. Van den Bossche had an important suggestion that international investment law, international trade law and the international law of the sea must be developed in consonance with each other, especially in light of the historical neglect of ocean degradation.

The Keynote Address was delivered by Dr. Raman who gave a detailed insight on the fishing sector in Kerala and the policies adopted by the Kerala government to protect the

interests of the fishing communities, which depend immensely on the health of the oceans. He observed that since the share of the fisheries sector remains low in India's total exports, it presents great opportunities for the policy-makers to develop mechanisms to improve the livelihoods of fishing communities as well as prevent marine pollution. The vote of thanks to the inaugural session was delivered by Mr. Aditya Laddha, Joint Secretary of SAIELN.

PANEL 1 | THE LAW OF BLUE ECONOMY AND SOUTH ASIA

Prof. Leïla Choukroune¹ acted as the moderator and Prof. Pierre Failler² was the discussant for this session.

a. *Paving the way for Blue Economy Towards Sustainable Development: Challenges for Bangladesh*

Dr. Rumana Islam³ explained the meaning of the blue economy and then stated how Bangladesh, being a maritime country, needs to address the blue economy as a top priority to promote socio-economic growth. She further added that Bangladesh, being situated at the mouth of Bay of Bengal, has drawn attention from global players, since it acts as a key player in regional calculations due to its geographic proximity to landlocked countries such as Nepal and Bhutan. The global rise of China and its attempts to secure its sea lanes of communications has necessitated strategic policy making in the Pacific and the Indian Oceans. Although Bangladesh faces certain challenges such as lack of capacity building, lack of proper management, over-exploration, poor initiative from stakeholders and absence of policy reforms, the way forward is good coordination between all stakeholders.

b. *Regulating the Blue Economy: Lessons from the ISDS system*

Mr. Ashutosh Kumar⁴ and **Mr. Madhav Mallya**⁵ gave a presentation on how regulations will play an essential part in the growth of the blue economy, as there is a prominent

¹ Co-chair, SAIELN.

² Reader, University of Portsmouth, United Kingdom.

³ Professor, Department of Law, University of Dhaka and Assistant Director, Bangladesh Institute of Law and International Affairs (BILIA).

⁴ Advocate (India) and Non-Practising Solicitor (England & Wales).

conflict between the Investor State Dispute Settlement (ISDS) system and the regulatory authority of states. They discussed the growth of the Blue Economy being critically dependent on effective regulation by states in exercise of their sovereign authority. Since such sovereign authority is constantly vulnerable to challenge through the ISDS system, they concluded that the ISDS system clearly poses a substantial risk to the Blue Economy. Next, they discussed cases such as the *Chemtura Corp. v. Canada*, *Bilcon v. Canada* and *NextEra v. Spain* disputes to examine how ISDS balances the rights of foreign investors under investment treaties against the sovereign authority of host states in the context of environmental regulation. They further added that when drafting a regulatory measure or implementing one, countries should give importance to due process, and must check the consequence of representations and assurances, refer to environmental standards, etc. They concluded with a discussion on the need for treaty reforms in the context of the environment and the blue economy.

c. *Blue Economy and Fisheries Subsidies*

Dr. Jacob Joseph⁶ presented his paper on fisheries studies from India's perspective. He discussed the 2030 Agenda for Sustainable Development Goal 14 and its aim to facilitate conservation and sustainable use of the resources of the ocean through 10 targets, 4 out of which will mature in 2020. He delineated India's subsidies for low-income and resource-poor fishermen, for whom fishing is a matter of livelihood and advocated that Developing and Least Developed Countries (LDCs) should be exempted from the prohibition of granting certain fisheries subsidies if fishing occurs within waters under the country's authority. He explained how India asserted its right and commitment to give subsidies to small and artisanal fishermen in the country, and proposed transition periods for developing countries and LDCs before certain subsidy prohibitions kick in. India's prime consideration in his opinion, is to secure food and nutritional requirements of the population.

⁵ Research Associate, Faculty of Law, Bennett University, Greater Noida.

⁶ Director-in-charge, Centre for Law and Agriculture, The National University of Advanced Legal Studies (NUALS), Kochi.

PANEL 2 | FISHERIES SUBSIDIES NEGOTIATIONS AT THE WTO - SUSTAINABILITY AND DEVELOPMENT CHALLENGES

Prof. Abhijit Das⁷ was the moderator and Prof. Mukesh Bhatnagar⁸ was the discussant for this session.

a. Problems faced by coastal states with respect to Fisheries Subsidies issues

Mr. K.R. Jyothilal⁹ opened the discussion with emphasis on the ‘sustainability of fisherman’s livelihood’ as the key area of importance in the discussion relating to fisheries subsidies. Further, elaborating on the three key aspects to the concept of ‘sustainability’ i.e. social, economic and environmental, he stressed on the need for putting in effect measures which would facilitate the transition of fishermen’s livelihood towards greater prosperity. He also pointed out the need for social infrastructure and fuel subsidies which would cater directly to the welfare of traditional fishermen and how it can go a long way in the eradication of their impoverishment, for instance, by implementing policies favouring easier and smoother transition into adoption of greener, more efficient fuels. He also opined that a subsidy for transition into cleaner fuels and for a safe environment would easily fit into the Green Box category. He also affirmed that state machinery does not allow any sort of deep-sea fishing and has in place legal sanctions against any sort of destructive fishing practices. He ended his presentation reiterating the commitment to better the lives of the fisherfolk.

b. Fisheries Subsidies and the WTO: Lifting the Veil of Sustainability

Ms. Pallavi Arora,¹⁰ carrying forward the panel discussion, untangled the meaning of the term ‘sustainability’ and provided her opinion on the various approaches that can be adopted to answer several issues underlying the fisheries subsidies discussion. Her presentation answered how the current trade regime can be made compatible with seemingly opposing soft law obligations of international environmental law. She advocated for a legal framework which had certain flexibilities in allowing developing

⁷ Head & Professor, Centre for WTO Studies, New Delhi.

⁸ Professor, Centre for WTO Studies, New Delhi.

⁹ Principal Secretary, Department of Fisheries and Ports; Government of Kerala, India.

¹⁰ Research Fellow, Centre for WTO Studies.

countries and LDC's to be given appropriate special and differential treatment. She provided support for her reasoning by relying on the trading charts of nations engaged in imports and exports of fisheries, noting that mostly developing countries were top exporters. She also highlighted the issues surrounding a possible overlap of jurisdiction for controlling IUU activities in the EEZ, especially in light of existence of exclusive sovereignty of nation under UNLCOS. She then went on to highlight four different approaches available to tackle overfishing and overcapacity. They were list-based approach, effects-based approach, hybrid-approach and capping approach. She also opined that since the idea of countermeasure is not adequate for fisheries subsidies framework as the legal injury is global, a sui generis framework is required. Further, she suggested against amalgamating the current fisheries framework into the SCM framework.

c. WTO fisheries subsidies negotiations: Developing country perspective and large-scale fishing

Mr. Peter Lunenborg¹¹ added to the to the panel discussion by providing in his presentation three central ideas for the discussion on subsidies: prohibition capping approach, prohibition of large-scale fishing and prohibition of fishing on the high seas. He presented a fact-based, nuanced understanding of large-scale fishing activities and advocated for a multi-criterion approach to be included in the current legal framework. He identified capacity, ownership, extent of harm, and availability of information to be relevant criteria to understand, measure and determine the threshold of large scale fishing. He also highlighted certain definitional issues plaguing fisheries discussion when developing countries engage in high seas fishing.

d. Reforms of the fisheries subsidies in the developing countries

Ms. Coralie D'lima¹² attempted to answer the question of exactly how harmful fisheries subsidies can be converted into beneficial subsidies. She highlighted the reason for such efforts by pointing to the status of Indian fisheries subsidies in which mechanized vessels apparently get more fishing subsidies in comparison to small scale fishers. Further, she also noted the extent to which several states such as Gujarat and Karnataka are scaling

¹¹ South Centre, Senior Programme Officer, Trade for Development Programme.

¹² Senior Programme Coordinator, WWF-India.

up subsidies while Kerala is the only exception. She opined that a phased transition into the beneficial subsidy regime is indeed possible, practical and desirable. She illustrated it by providing the use of JFE-SSD with square mesh to minimize fuel inefficiency and saving of fishes in long term. She also highlighted the consensus in the community over the need for sustainability and fisheries management and subsidy reform globally and in India.

e. *Implementing International Legal Instruments in Marine Fisheries: The South Asian Context*

Mr. Sebastian Mathew¹³ highlighted in his presentation the importance of a bottom-up processes in the conservation and management of fish stocks. He further emphasized the need to take measures for effective conservation and management of fish stocks and protection of the marine environment, including through coastal State, flag State, and port State measures, as well as regional cooperation. He added how all this is essential for the enjoyment of human rights, poverty eradication and food security. He highlighted the human rights-based approach, consistent with the 2014 FAO-SSF Guidelines, to give a fillip to bottom-up processes and in order to create conditions for responsible and sustainable fisheries.

PANEL 3 | INTERNATIONAL INVESTMENT LAW AND THE LAW OF BLUE ECONOMY

Mr. Harshad Pathak¹⁴ as a moderator introduced the panel members.

a. *Dr. Prabhash Ranjan*¹⁵

Dr. Prabhash Ranjan began the session with his presentation on “Police Powers in Customary Investment Law”. He focused on the BITs of South Asian countries and mapped the environmental protection provisions in them. In the first part, he noted how host states must ask whether a treaty allows for environment protection, and remarked that some countries have provisions on environmental protection which are not of

¹³ Executive Director, International Collective in Support of Fishworkers (ICSF).

¹⁴ Senior Associate, P&A Law Offices, New Delhi.

¹⁵ Assistant Professor, South Asian University, New Delhi.

uniform nature. For example, a GATT Article XX- like exception is present in Pakistan-Turkey BIT and Bangladesh-Turkey BIT which provides for similar regulatory latitude. Sometimes these exceptions provide exemptions to substantive obligation such as expropriation, Fair and Equitable Treatment or MFN obligations. In the second part of his presentation, he discussed what may happen when an investor brings claims and a state wishes to defend blue economy concerns. He expanded on how police powers in customary international laws such as taxation, law and order and prevention of crime may be invoked. Some tribunals such as the one in *Methanex v. USA* have ruled that bona fide exercise of police power shall not amount to expropriation. There are three problems that he identified with this. First, there is no precise definition of police powers so it is not clear if environment protection would fall within police powers. Second, there are no boundaries to the use of police power and thus if the defence of 'protecting the blue economy' is accepted then there will remain very few limitations on expropriation. Lastly, different tribunals such as the one in *Methanex* and in *Chemtura Corporation v. Government of Canada* have given different tests which makes it unclear whether the measure maybe inconsistent with treaty obligations or not. Instead of trying to evolve common principles is made difficult by the fragmented and *ad hoc* nature of ISDS, he suggests treaty review, which may be used to solve the dilemma.

b. Mr. Anirudh Krishnan¹⁶

Mr Anirudh Krishnan began discussion with changes in the last few years, and how sustainable development is no longer a theoretical subject, international awareness on sustainable development has grown and there has been interlinking between international investment law and sustainable development. For India, BITs have become a live subject with millions of dollars of liability and now, we are at crossroads with a great opportunity to provide checks and balances and ensure that in the future, investors work towards a sustainable blue economy. He cites the jurisdictional burden in Article 5 of the COMESA Treaty, under which if an investor sues due to contravention of an environmental measure, he is precluded from remedy. A major disadvantage of this is that for a minor violations, the whole remedy is barred. Additionally, there is the question of who determines such violations. If a local court determines this, it will create

¹⁶ AK Law Chambers, Chennai.¹⁷ Advocate, Bombay High Court.

an extremely high threshold. A more realistic approach is in Article 12 of India Model BIT where a condition precedent for remedy, and not an independent provision in which state will have to file set off claim, requires compliance with environmental law to reduce the value of claim.

c. Mr. Sharad Bansal¹⁷

Mr. Sharad Bansal spoke about the extent to which counter claims can be relied upon by host states. Counterclaims can act as tools to address imbalance. Adding on why to state should take recourse to international and not domestic law, he put forth arguments on the legitimacy of forum and enforceability in multiple jurisdictions. The three conditions, he explained, for counterclaim would be: firstly, jurisdiction of the tribunal; secondly, an existing obligation - domestic or international; and thirdly, a link between counterclaim and investor claim. Jurisdiction is on three main bases: contract between state and investor, state's investment law and BIT. Generally, only investors are allowed to bring disputes. In *Roussalis v. Romania* based on the Romania-Greece BIT, the tribunal ruled that there was no right of host state to bring counterclaim. In another case, he discussed how Article 46 of ICSID Convention envisages counter claim. However, Article 46 cannot be a basis of consent as it allows for procedural rules only. Next, referring to *David Aven v. Costa Rica*, he examined how typically BITs don't state any obligation for investors. But, in *Urbaser v. Argentina*, in a significant development, the human right to water- was recognized imposing on the investor obligations under corporate social responsibility. Further, the case allowed for horizontal application of UDHR Article 13.

a. Dr. James D. Fry¹⁸

Dr. James Fry shed light on "Potential disputes under Convention on Fishing and Conservation of the Living Resources, 1958". He explored the future of ISDS how state can revive the 1958 Convention to pushback against those exploiting the high seas, so that they have more tools to combat the issue. He discussed certain provisions such as how states may adopt unilateral actions and other states are bound to follow it, their ability to regulate anything in high seas even if it is not adjacent to their territorial seas

¹⁷ Advocate, Bombay High Court.

¹⁸ Associate Professor of Law, University of Hong Kong.

and to create obligations on parties. The convention also has a dispute settlement system. He discussed how UNCLOS does not conflict with the convention nor supersedes it. As investments move from land to financial and IPR investments, extension in arbitration area to high seas is a natural progression. He concluded by observing how there are nowadays more purposive interpretation although it all depends ultimately on tribunals. He stressed on how the 1958 Convention may be a powerful and effective way to combat exploitative practices in the blue economy.

PANEL 4 | GOVERNANCE AND LAW OF THE BLUE ECONOMY

The Session was moderated by **Prof. James Nedumpara**¹⁹.

a. *Why Human Rights Matter in the Blue Economy Too*

Dr. Ranjit Singh²⁰ opened the discussion. At the outset, he identified the principles of human rights approach in the constitution as well as international covenants and instruments. He identified the centrality of the right to life, livelihood and dignity. He opined on human dignity as the spine of human rights. Following this, he introduced ocean governance, which is the collective effort of all to protect and preserve marine ecology. Elaborating, he stated that it is mainly the legal regime and the mechanism which are central to the perspective of rights. Following an analogy from the integration of human rights in the business sectors few years ago, he projected such integration to be also feasible in coming years for this sector as well. Finally, he also highlighted the importance of ocean governance and how it intertwines with sustainable development, climate change and human rights. He discussed the issues plaguing this sector: the labour conditions, the livelihood conditions, human rights, infrastructural problems and extent of the informal sector. He pointed out the need for proactive measures, effective implementation measures and strengthening of law enforcement measures to be the priority. Also, he opined, sensitization of all stakeholders and getting the conversation running is the way forward. He also observed that the institutional and structural approach to the policy making has to be data intensive as this sector requires a multidisciplinary and multidimensional approach.

¹⁹ Co-chair, SAIELN.

²⁰ Joint Secretary National Human Rights Commission of India.

b. *An International law Approach to Blue Governance: Reconciling Disciplines on the Basis of Rights*

Prof. Leïla Choukroune demystified the concept of blue economy and how the human rights approach can be integrated with the notion of blue governance. International law, she opined is presently a collective framework of fragmented regimes covering investment, trade, commerce, labour, business and environment, and human rights. She talked and highlighted the right to development which is based on the sovereignty over natural resources which had a central place in the negotiating history of International law of the Seas. She also pointed out that the different drafting approaches while moving forward in the formulation of jurisprudence around blue economy. She finally highlighted the need for a ‘multidisciplinary’ and ‘multidirectional’ approach in moving towards exploring and attempting to govern this sector.

c. *The Institutional Challenges for the implementation of a Blue Economy Governance*

Prof. Pierre Failler added to the panel discussion by providing in his presentation a discussion around four important areas: concept and the theory of blue economy governance, the existing practices, the standard development approach and the major constraints in this sector. He opined that this sector is currently bereft of planning, coordination and consideration for ecosystem services and climate change effects. Presently, this sector is unsustainable for not having a strong financial support system. Most importantly, he talked about the efforts that will be needed even before focusing on the Blue economy development. For instance, the unaddressed land-based pollution, lack of enforcement norms in the environmental arena and the subsisting IUU practices. Finally, he provided focus areas in which much work is needed for blue economy to flourish. It ranged from call for efforts in areas like awareness of importance of ocean and water, coordination and planning, capacity building, information asymmetry and maritime sovereignty.

PANEL 5 | THE LAW OF WTO AND BLUE ECONOMY

Dr. Sharmila Mary Joseph²¹ moderated the panel.

a. WTO, Climate Change and Blue Economy

Ms. Shiny Pradeep²² discussed the imposition of a carbon tax, to curb climate change. She noted that taxing carbon pollution will cause businesses, consumers and policy makers to reduce emissions, and develop low-carbon energy sources. While there are concerns in implementing a carbon tax such as carbon leakage, the problem of free riders and the competitiveness of the domestic industry, there are significant benefits in terms of protecting the environment as well. She then discussed implementing a carbon tax in the background of Border Tax Adjustment measures. She concluded with a suggestion that the Paris Agreement be combined with a carbon tax in order to enable coastal ecosystems to support the establishment of sustainable blue carbon economies.

b. WTO and Blue Economy: Towards a more sustainable trade policy in maintaining the marine biodiversity in South Asia

Mr. Kar Lok Carlos LI²³ after speaking about the importance of Blue Economy and the six pillars of the sustainable Blue Economy, moved on to the core issue of his presentation, which was-how to apply Blue Economy to trade policy in fisheries and aquaculture in South Asia. Illustrating Sustainable Development Goals, primarily the Sustainable Development Goal 14 along with its targets and indicators, he went on to discuss issues such as overfishing, dumping of plastic, climate change and fishery subsidies in India's seas especially Bay of Bengal. Then he focused the discussion on how trade plays an important role in the Fisheries and Aquaculture industry. Explaining briefly bio-trade and its seven core principles, he highlighted how WTO jurisprudence has become environment friendly and stated the co-relating WTO trade policies in Fisheries and Aquaculture with other Blue Measures which are in furtherance of SDG 14. He noted how, despite measures by the government, the economies are not being able to control the various problems faced due to over-exploitation of resources

²¹ Secretary, AYUSH, Government of Kerala.

²² Centre for Trade and Investment Law.

²³ The Chinese University of Hong Kong.

especially over-fishing. He concluded by emphasizing how there is a gap in South Asian countries especially India regarding the Blue Economy and implementation of SDG in their Fisheries and Aquaculture industries.

c. *Harmonization with Multilateral Trade Laws and implementation the environmental protection provisions in South Asian Bilateral Trade Agreements – Challenges and future perspectives*

Mr. E.N.R de Silva²⁴ began his presentation by giving a background on the issues faced by South Asia such as protection of intellectual property rights, protection of environment, labour standards, digital technologies, etc. Despite having ample natural resources and FTAs, it is challenging for South Asia since it is the least economically integrated region. Thereafter, he moved to discuss the struggle faced by this region without a perfect economic development which is due to the lack of regional integration. Going over cases such as *US – Tuna* and *US – Shrimp*, he touched upon the ‘polluter pays’ principle and emphasized how utilizing environmental protection provisions in regional trade agreements would support internal trade. Thereafter, he briefly went over the Intra-regional and Extra-regional Bilateral trade agreements of South Asia to show the lacunae therein. The primary objective of his presentation was to examine international trade law implications for an alignment of environmental protection related standards between bilateral trade agreements of partner countries of South Asia as well as the data and proper methodology to incorporate environmental protection into bilateral trade agreements. He went through various RTAs to show the country wise efforts and undertakings of environmental measures provided in various international trade agreements. He presented his recommendations under three heads- Inclusion of Environment Impact Assessment at a national level, Empowerment of domestic legal systems to protect environment and the Protection of seas and oceans. He concluded by stating that although RTAs of South Asia are lagging behind in comparison to other countries however, the lack of economic integration is the primary cause for such a nuance hence the guidelines need to be followed.

²⁴ International University of Japan.

PANEL 6 | LAW OF THE SEA AND BLUE ECONOMY

The moderator for this session was Prof. Suresh Nanwani.²⁵

a. *Colonialism's Final Frontier: India's Interventions on Law of the Seas*

Dr. Kirsten Sellars²⁶ began the discussion on India's interventions on the law of the sea by detailing the history of the Geneva Conferences, mainly the Second Conference on the Law of the Sea, in 1960, to remedy the issues that remained unsolved at the close of the First Conference in 1958. The primary issue that was to be resolved at the Second Conference was related to the breadth of territorial sea bordering coastal states, and fishing zones by coastal states in the high seas, beyond their territorial limits. The primary point of contention between maritime states and coastal states was questions regarding the innocent passage of warships, maritime commerce and fisheries rights. In this context, Dr. Sellars narrated India's involvement, detailing how when then Defence Minister V. K. Krishna Menon was approached by Western Maritime powers to persuade India's stance, he refused, stating that the Western states were attempting to maintain colonial powers over the seas even after de-colonised states were attempting to assert territorial rights. Therefore, India was staunch in its view that warships were not to be allowed to travel through imperial territorial seas or exclusive fishing zones without prior approval. Dr. Sellars referred to this as the collapse of the 1960 conference, and attributes to this, the consequent change in strategy that the Western maritime powers adopted to India's position.

b. *Law of the Blue Economy and UNCLOS*

Mr. Aditya Laddha²⁷ started his presentation by acknowledging that the seas provided a new economic frontier, but also that, as with any economic expansion, there is significant stress on the environment and natural resources. Comparing the current rate of marine environmental damage to what the world witnessed during de-colonisation or the cold war, he discussed how this was supposed to be remedied within the UNCLOS. The UNCLOS is not without provisions regarding equitable and efficient utilization of

²⁵ Durham University, School of Government and International Affairs, United Kingdom.

²⁶ Visiting Fellow, Coral Bell School of Asia-Pacific Affairs, Australian National University.

²⁷ Joint Secretary, SAIELN.

resources, and rights and obligations of states regarding the marine life and environment. However, these are ineffective because of a lack of judicial certainty regarding overlapping claims, which leads to marine initiatives being hampered. He suggested that either these ambiguities regarding jurisdiction be solved using the provisions of the UNCLOS. He noted that, because there is a fragmentation of international law, and since UNCLOS is not the primary treaty regarding the seas, he suggested that a human rights based approach be taken to protect the environment, regardless of what instrument is used to govern the law of the seas. In the alternative, he suggested negotiations between states regarding disputes over the seas, and to include marine environmental concerns within these negotiations.

c. Law relating to Deep Sea Mining in the Area and ABNJ

Prof. M. Gandhi²⁸ addressed deep sea mining and the Area Beyond National Jurisdiction (ABNJ). He explained concept of ABNJ, and detailed the various resources that are found in it, in order to provide context. He detailed that these resources, unlike fisheries, may not be exploited by one particular person or State, as they are to be considered as common property. He identifies certain problems – namely that only certain countries have access to the technology required for deep sea mining, that there is imminent corporatization of the same, and lastly, that the same body is in charge of both exploitation of the deep sea, as well as its preservation. He identifies this inherent paradox in the bodies duties, and points out the wide spread criticism of the same. In spite of all this, he points out that since mining is a long process that takes over 2 decades, little benefit is seen at present.

d. The evolving international treaty on marine genetic resources and its potential impact on future economy

Ms. Anjali Sugadev²⁹ dealt with the evolving international treaty on marine genetic resources and its potential impact on future economy. She took the audience through what marine genetic resources are, the evolving international treaty on these resources and their impact on the future economy. Marine genetic resources are a subset of genetic

²⁸ Dean, VIT School of Law, Chennai.

²⁹Independent Researcher.

resources (genetic material with actual or potential value) as covered under the Convention on Biological Diversity (CBD). A treaty is currently being prepared for the sustainable use and conservation of marine genetic resources, in areas beyond national jurisdiction. The negotiating treaty is to be an implementing agreement under the UNCLOS, which is necessitated by the lacuna caused by the UNCLOS only regulating mineral deposits, and the CBD only regulates genetic resources within national jurisdictions. She details the how the treaty treats marine genetic resources, as well as the benefit sharing mechanism that it seeks to implement.

Prof. Suresh Nanwani³⁰ gave concluding remarks, regarding the changes in the law of the seas, starting from changing the mechanisms of treaty making, to the change in the dynamics of States, and finally to the development of the common heritage of mankind. He concluded the session by laying out the path ahead for the blue economy.

SPECIAL SESSION | KERALA AND THE BLUE ECONOMY

*a. Smt. J. Mercykutty Amma*³¹ *(Special Address)*

The Hon'ble Minister highlighted that there is a need for a national economic law in India. She pointed out that the World Bank regards the Blue Economy as a sustainable use of ocean resources. Human activities such as fishing, transport, waste management, tourism, and climate change raise concerns regarding the safety of the marine belt. In this regard, the UNCLOS is an important instrument for the regulation of the blue economy. However, there are challenges in implementing the Blue economy, especially in South Asia. There are a variety of conventions and free trade agreements which are in force to protect and preserve the marine environment, which must be used to achieve this goal. Restoring the habitat to improve biodiversity would aid in food revenue and job generation. The elimination of unregulated fishing and development of blue economy strategies are important. Human activities and fishery management on appropriate geographical scale are to be seen through. The cooperation of stakeholders, necessary institutions, and the government is necessary for surveillance. The Government of Kerala has amended the regulations in territorial borders under the

³⁰Durham University, School of Government and International Affairs, United Kingdom.

³¹ Hon'ble Minister for Fisheries, Harbour Engineering and Cashew Industry, Government of Kerala.

following heads – juvenile fishing ban, making the registration of fishing nets mandatory, prescribing fishing net sizes, making the use of tracking and life saving devices compulsory, etc. A meaningful deliberation in achieving legal framework for blue economy is crucial.

b. Prof. Mukesh Bhatnagar (Remarks)

He focused on the Fisheries subsidies negotiations from India's Perspective. Starting with an overview on fishery subsidies negotiations, he pointed out the inputs that are being made to central government on the account of Marine Fishing (Regulation) Bill. The 2005 Hong Kong declaration gave specific guidance to trade ministers for implementation of effective special and preferential treatment which are integral, taking into account livelihood and food security concern of fishermen population in developing countries. Although the Doha rounds did not make much progress, the spirit of negotiation terms are still high, given India has taken part in these negotiations since the inception. Touching briefly upon SDG 14.6, he discussed the ministerial meeting of December, 2017. The trade ministers had agreed that by next ministerial meeting which would be in June 2020, a comprehensive and effective discipline on fishery subsidies would be adopted. For an effective approach to the issue, few pillars were laid down on the IUU subsidies, over fishing and overcapacity, and gradual reduction commitments. He concluded by stating that India would continue to negotiate along the lines of proper management of fisheries industry.

c. Sri. S. Venkatesapathy³² (Remarks)

He began by discussing aspects of the blue economy such as species-specific exploitation, subsidies, the difference between quantum of fish that is sustainably exploitable and the amount that is currently being exploited, propagation of species in natural environment and how Kerala is leading in India in environmental compliances related to fishery management. Out of 39,280 vessels that are on Kerala waters, approx. 35,000 get 60% of total catch, which implies that Kerala is not entirely environmentally sensitive in this regard. He stressed that Kerala would focus on sustainable exploitation, so that future generations may avail the same benefits that Kerala enjoys today.

³² Director of Fisheries, Department of Fisheries, Government of Kerala.

d. Ms. Gayatri Nair³³ (Remarks)

She began by delineating the importance of the blue economy and the reason for its impact. As per her inference, the policy approach towards fisheries sector is along the lines of development of both ecosystem and human resources. Contribution of fisheries sector in GDP is around 1% and therefore she believes there is a possibility to exploit the same to enhance the percentage figure. Marine fishery is dominant in Kerala. Thus, an approach towards production, social security, and infrastructure development along with the need to preservation and conservation of environment aids in better upliftment of the industry. The sustainable fishing management practices such as technical support, sea safety, insurance claims and such other support to fishermen adds up to the policy of Kerala Government to take care of human development along with environmental protection.

**PANEL 7 | ROLE OF INTERNATIONAL ORGANIZATIONS IN
FORMULATING INTERNATIONAL STANDARDS RELEVANT UNDER TBT
AGREEMENT AND SPS AGREEMENT – IMPLICATIONS AND ISSUES
FACED BY DEVELOPING COUNTRIES**

Dr. Ravi Raman³⁴ was the moderator for this session.

a. Codex Alimentarius and Fish & Fish Products

Mr. S. Dave³⁵ opened the session 7 panel discussion and at the very outset identified and highlighted the importance of WTO's SPS Agreement in facilitating the trade in Fish and Fish Products, how it provides for protection of human, animal or plant life or health and at the same time prevents members from creating disguised restriction on international trade. He further mentioned that Codex Alimentarius followed the same principle mentioned in the SPS Agreement and its mandate is to ensure the safety and health of consumers and facilitate trade. There are several committees under the Codex Alimentarius of fish and fish products which have worked on food safety of fish and fish products. While explaining different committees, he went to the depth of hazards of

³³ Economic Advisor, Kerala State Planning Board.

³⁴ Member, Kerala State Planning Board, Government of Kerala.

³⁵ Former Chairperson of Codex Alimentarius Commission.

fisheries and stated that the responsibility lies at 3 levels i.e government, industry and informal sector. In conclusion, he stated that there is need for cooperation between the region with respect to optimal use of Codex standards, alignment of standards, enhancement of regional trade, infrastructure and food safety.

b. Augmenting India's Marine Products Export – Way Forward

Mr. K S Srinivas³⁶ carrying forward the panel discussion highlighted the Indian fisheries scenarios in India, SWOT analysis of marine products and further identified the SPS issues that Indian exporters are facing. He mentioned that developing countries try to follow the Codex standards. However, every country is coming up with its own standards; especially the developed countries have suddenly imposed standards higher than the Codex standards. In addition, farmers are still using chemicals which are banned. These are some of the reason as to why Indian exporters are struggling to get market access and resulting in stagnancy/ decrease in export of marine products. Some countries are using the SPS Agreement to put a disguised restriction on international trade. He stressed that the way forward is to use SPS to retaliate against actions which are unreasonable and disguised restrictions to international trade.

c. International Standards and the Blue Economy: Trade Concerns & Developing Countries

Dr. James J. Nedumpara discussed the legal side as to how TBT and SPS Agreement concern the Developing economy in terms of market access. The SPS Agreement directly refers to three international agencies: CODEX, Organisation for Animal Health (OIE) and International Plant Protection Convention (IPPC). Their main role is to decide international standards. In addition, a large number of standards are private standards i.e. sustainable standards. The elements of sustainable standards are effective conservation, management, and development of living aquatic resources, and with due respect for the ecosystem and biodiversity. But, most standards will not be able to bridge the differences between geographical locations, habitats and processing technologies and in turn, would also result in unreasonable restrictions to international trade. He explained the issue with WTO cases – *US-Tuna II*, *US-Shrimp*, *EC-Sardines*, *Australia-Salmon*. Even in standards, there is distinction between mandatory standards (called

³⁶ Chairman, Marine Products Export Development Authority.

technical regulation) and voluntary standards, with respect to the international standard setting organization; though, many believe that only inter-government organization can set the standards. However, the TBT Agreement recognizes that it need not be an organization, it has to be a recognized party. Therefore, even a private party could be an international standardsetting body. As per TBT Agreement, for a standard to be considered legit, it has to be approved by a Recognized Body and provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods as well as certain principles. In addition, he stressed how the national standard which complies with scientific requirements must mirror the international standard.

PANEL 8 | MARITIME SILK ROAD AND BLUE ECONOMY

Prof. Suresh Nanwani was the Moderator and Prof. Leïla Choukroune was the Discussant for this panel.

- a. *The Maritime Silk Road and the Investment Treaty Network between South Asian States and China: Potential 'Chilling Effect' on Environmental Regulation?*

Mr. Aweek Chakravarty³⁷ started his presentation by explaining the research question: whether the existing BITs between China and its South Asian BRI partners risk inducing regulatory chill, under the context of domestic environmental regulation and various infrastructural and construction projects under BRI (Belt and Road Initiative) and MSR (Maritime Silk Road) initiatives. His methodology was to look at existing research relating to the impact on South Asia and at the global level. Explaining the concept of Regulatory Chill, he entered into the arena of the content of BITs and various BRI projects undertaken between South Asian countries and China. Showing various reports, he highlighted the impact of these projects on environment and identified the primary risks associated with it. Due to high dependence on FDIs coming from China, South Asian countries are more susceptible to risks. The negotiating prowess of China and medium to low governance contribute heavily to the negative aspects of such BRIs and

³⁷ Economic Policy Consultant, Ernst and Young, Gurugram.

project undertakings. Pointing out how most old BITs leave high degree of arbitrary power due to ambiguity, he proceeded to show how BITs have little to no protection provisions. Chinese SOEs are waking up to utilize ISDS under BIT to enforce their desires. He concluded by stating that since these countries have very little bargaining power, thus collective bargaining methods and monitoring programmes should push China towards enforcing the environmental provisions.

b. *Environmental Considerations in Strategizing the Maritime Silk Route*

Mr. Rishabh Raturi³⁸ started his presentation on the topic by assigning it with three theoretical thoughts: International Livestock Research Institute (ILRI) framework, the managerial model and community institutions. He pointed that the classic legal positive approach is provided by ILRI framework. He provided a succinct articulation of the success and failure of the concept. He also encapsulated the role of intergovernmental organisations and transnational corporations in the influencing and mobilising support for support in law and policy making. He then concluded by expounding further on the lack of approach that we currently are facing in the sphere of international policy and rule making. International negotiations operate by consensus of least common denominator among member parties, which is inept as a method to solve the current issues. He concluded by saying that the core goal of policy making should be to create institutions that bring out the best in us and that hard international law principles might not be enough for blue economy governance.

c. *Belt and Road Initiative: An analogy to none*

Ms. Sreelakshmi S. Kurup³⁹ added to the discussion by elaborating the history and vision behind the concept of Belt and Road Initiative. While expounding on the importance of the needs of such policy and the real intent behind it, she elaborated upon the financial and trade related effects of current policy. Pointing out that BRI is in its nascent stage, there really are more unknowns than known. She also brought into the

³⁸ Economic Policy Consultant, Ernst and Young, Gurugram.

³⁹ Research Fellow, Centre for Trade and Investment Law.

discussion, the alternatives to the current BRI policy. She pointed out the areas which need more discussion and attention. She went on to discuss how the *lex mercatoria* was originally a body of rules and principles laid down by merchants to regulate their dealings and consisted of rules and customs common to merchants and traders in Europe, with some local variation. The growing scope and ambit of trade presented to the world, she pointed out, is precisely the reason it is not possible to come up with the single agreed definition of *lex mercatoria*. She concluded by stating that there is no alternate to the BRI and that an in-depth study is required to understand the grey patch it stands on.

VALEDICTORY SESSION

Keynote Address

Amb. Anup Kumar Mudgal⁴⁰ presented a keynote address by congratulating the stakeholders in discussion and noted the timely nature of the conference. He further observed that our worry is that a developing country such as India needs to be very careful, because of our long experience of suffering from unequal treaties and paying the price even today. He added that today we are better prepared and thus, must lead the negotiations from the front. He then went on to convey that conferences like these are vital in filling the vacuum of technical, legal and diplomatic skills. He called for trumping ‘ocean blindness’ with a more proactive and sustainable marine resource management.

Concluding Remarks

Prof. Leïla Choukrone highlighted the realistic call for a knowledge-based, fair, inclusive and sustainable blue economy. She appreciated the various perspectives and thanked the participants.

Prof. James Nedumpara stressed on the need to overcome ‘ocean blindness’ and the need for informed policy to manage blue resources. He thanked the dignitaries and the participants for their research and views on the theme.

⁴⁰ Former High Commissioner of India in Mauritius.

The vote of thanks was delivered by **Mr. Anupal Dasgupta**⁴¹ calling the conference to a close.



Anupal Dasgupta, Rapporteur*

**Report prepared by me with inputs from Aparna Bhattacharya, Apoorva Vishnoi & Smriti Bhaskar.*

⁴¹ Joint Secretary, SAIELN.