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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

THE LAW OF THE SEA

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THE LAW OF THE SEA

1. BACKGROUND

1. The meticulous efforts of the international community to negotiate a comprehensive legal instrument that regulates the seas came to fruition on 10 December 1982 when the Third United Nations Conference on the Law of the Sea in Montego Bay, Jamaica, successfully agreed on the United Nations Convention on the Law of the Sea 1982 (hereafter UNCLOS). The Convention came into force on 16 November 1994, twelve months after the deposit of the sixtieth instrument of ratification with the Secretary-General of the United Nations. The UNCLOS, often considered as "the constitution of the sea",[1] provides "a framework within which most uses of the seas are located"[2] as well as serves as "one of the most comprehensive" international legal instruments on the subject matter.[3]

2. One of the UNCLOS' implementing agreements, namely the 1994 Agreement relating to the implementation of Part XI of UNCLOS, was adopted on 28 July 1994 and entered into force on 28 July 1996. The other implementing agreement, the 1995 United Nations Fish Stocks Agreement was opened for signature on 4 December 1995 and entered into force on 11 December 2001. Together with the UNCLOS, these agreements set up a comprehensive legal framework for the regulation of a wide range of activities in the oceans. The symbiotic regime galvanized by the UNCLOS propagates the notion that the ocean spaces are closely related and function as a global commons. This indicates that it is the responsibility of all States to abide by the universally accepted norms regulating the ocean spaces.

3. The dawn of Asian-African Legal Consultative Organization's (AALCO) tryst with the law of the sea began in 1957. Two issues of the law were brought onto its work table at its very first session, namely, "Law relating to the Regime of the High Seas including Questions relating to the rights to seabed and subsoil in open sea" (raised by Ceylon (now Sri Lanka) and India) and "Law of the Territorial Sea" (raised by Ceylon).[4] But it was a bit late in the date for the Organization to make any impact on the Geneva Conference on the Law of the Sea, slated for 1958.[5] However, AALCO played a very important role, particularly during 1968-1982, in facilitating effective Asian-African participation in the international negotiations triggered by Maltese

[1] Jing Geng (2012), "The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS", *Utrecht Journal for International and European Law*, 28/74: 22, 23.
[2] R. R. Churchill and A. V. Lowe (1999), *The Law of Sea*, Manchester: Manchester University Press, 24.
[3] Donald R. Rothwell and Tim Stephens (2010), *The International Law of the Sea*, Melbourne: Hart Publishing, 14.
[4] V.S. Mani (2007), "Exclusive Economic Zone: AALCO's Tribute to the Modern Law of the Sea", in *Fifty Years of AALCO : Commemorative Essays in International Law*, AALCO Secretariat, New Delhi, 41-61, 42.
[5] Ibid.

Ambassador Arvid Pardo's 'earth-shaking' speech at the UN General Assembly in 1967.[6]

4. It may be recalled that the agenda item "The Law of the Sea" was taken up for consideration by AALCO at the initiative of the Government of Indonesia in 1970. Since then, it has consistently been considered as one of the crucial components of the agenda at each of the Organization's Annual Sessions. AALCO can take reasonable pride in the fact that new concepts such as the Exclusive Economic Zone (EEZ), Archipelago States and Rights of Land Locked States developed in AALCO's Annual Sessions. These concepts were later codified in the UNCLOS.

5. Since the adoption of the Convention in 1982, AALCO's Work Programme was oriented towards assisting Member States in their bid towards becoming functioning signatories to UNCLOS. With the entry into force of the UNCLOS in 1994, institutions envisaged by the legal regime began taking shape. The AALCO Secretariat prepared studies monitoring these developments. Further, the documents emanating from the AALCO Secretariat for the Organization's Annual Sessions have continuously been reporting on the progress of work in the International Seabed Authority (ISA), the International Tribunal for the Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), the Meeting of States Parties to the UNCLOS and other related developments.

6. In consonance with the United Nation's activities on the law of sea, AALCO has provided impetus to ongoing contemporary works on the subject matter. It has successfully deliberated at the *UMT- AALCO Legal Expert Meeting on Law of The Sea* on the topic *"Marine Biodiversity Within And Beyond National Jurisdiction: Legal Issues And Challenges"* on 24 August 2015, which added more clarity to and promoted a more concrete understanding of key issues among Member States. In pursuance of the mandate received from the resolution adopted on the law of the sea at the Fifty-Fourth Annual Session, the Secretariat had prepared a Special Study entitled "*Marine Biodiversity beyond National Jurisdiction: An Asian-African Perspective*".

7. It would therefore be appropriate to note that, in order to adequately respond to the rapidly evolving challenges in International Law, AALCO has remained steadfast in its efforts to decipher the nascent issues vis-à-vis the law of the seas, as well as to peruse the interlink of the law of the sea with other concerns, e.g., those pertaining to the environment, exploitation of mineral resources, etc.

8. As of 3 April 2018, 168 states have ratified the UNCLOS.[7] Forty-one AALCO Member States figure in that list. These Member States and their dates of ratification

[6] Ibid.

[7] The state of Azerbaijan is the 168th State Party to have ratified the UNCLOS on 16 June 2016; UN, Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions

are as follows: State of Palestine (2 January 2015), Thailand (15 May 2011), Qatar (9 December 2002), Bangladesh (27 July 2001), Nepal (2 November 1998), South Africa (23 December 1997), Pakistan (26 February 1997), Brunei Darussalam (5 November 1996), Malaysia (14 October 1996), Mongolia (13 August 1996), Japan (20 June 1996), China (7 June 1996), Myanmar (21 May 1996), Saudi Arabia (24 April 1996), Republic of Korea (29 January 1996), Jordan (27 November 1995), India (29 June 1995), Lebanon (5 January 1995), Sierra Leone (12 December 1994), Singapore (17 November 1994), Mauritius (4 November 1994), Viet Nam (25 July 1994), Sri Lanka (19 July 1994), Uganda (9 November 1990), Oman (17 August 1989), Somalia (24 July 1989), Kenya (2 March 1989), Cyprus (12 December 1988), Yemen (21 July 1987), Nigeria (14 August 1986), Kuwait (2 May 1986), Indonesia (3 February 1986), Cameroon (19 November 1985), United Republic of Tanzania (30 September 1985), Iraq (30 July 1985), Bahrain (30 May 1985), Sudan (23 January 1985), Senegal (25 October 1984), Gambia (22 May 1984), Egypt (26 August 1983) and Ghana (7 June 1983).[8]

9. This Brief explores four salient topics. Pondering upon such topics may not only be of immense relevance for the AALCO Member States, but may also present to AALCO the opportunity to be a forum for inspiring debates and discussions on such topics by inviting its constituent Member States to share their legal and socio-political views on the topics.

10. The topics for focused deliberation at the Fifty-Seventh Annual Session of AALCO are enumerated hereafter. The *first* topic delves into AALCO's role in hailing the legal regime pertaining to the EEZ. The evolution of the regime has been chalked and the issue of fishing management in the EEZ discussed. The *second* topic pertains to the nuances of exploitation of mineral resources in deep seabed under the scheme of the upcoming ISA regulations. The *third* topic focuses on a normative discussion on the mandates, function and jurisdiction of the ITLOS and analyses a classic prompt release case before the forum; and the *fourth* topic gauges the possibility of charting a new treaty regime for the governing of marine biodiversity beyond national jurisdiction. Recommendations of the Secretariat have been annexed to the end of each part, wherever deemed necessary.

to The Convention and the Related Agreements: The United Nations Convention on the Law of the Sea of 10 December 1982, at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

[8] Ibid.

2. DEVELOPMENT OF THE EXCLUSIVE ECONOMIC ZONE REGIME

I. Introduction

11. The regime of the EEZ is one of the greatest novelties of the UNCLOS. EEZ is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the UNCLOS.[9] The EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[10]

12. The main characteristic of the EEZ regime is the fact that the coastal state does not exercise sovereignty in its entire zone, but only some sovereign rights such as exploration, exploitation, conservation and resource management.[11] The jurisdiction of the coastal state is about the rise and use of the artificial installations, research into the sea, as well as protection of the marine environment.[12] Between freedom of navigation and the immediate interests of the coastal state, priority is given to the coastal State.[13] In exercising its rights and performing its duties under this Convention in the EEZ, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.[14]

13. The EEZ has been a "zone of tension between coastal State control and maritime State use of the sea", and the juridical innovation of EEZ brought with it a "battle for control" between the rights of the coastal State and the maritime use claims of foreign States.[15] As noted by Galdorisi and Kaufman:

> "Like the transformation of a river's fresh flowing water into that of the salty sea, the transition from territorial seas to high seas is not abrupt. There is no clear and bright line, but rather a region where the sea absorbs and dilutes the silty residue of sovereign ground, gradually replacing its fresh, muddy, provincial brown with salt and clear blue water freedom. Currents carrying elements of coastal State sovereignty and jurisdiction converge and combine in the EEZ with those containing freedoms of navigation and associated uses in favor of all States, swirling and twisting in sometimes competing directions. The

[9] Part V, UNCLOS; UNCLOS Article 55.
[10] UNCLOS Article 57.
[11] UNCLOS Article 56.
[12] L. Juda (1986), "The exclusive Economic Zone: Compatibility of National Claims and the UN Convention of the Law of the Sea", *Ocean Development and International Law Journal*, 16: 1, 58.
[13] Natalie Klein (2005), *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 65.
[14] Id at 23.
[15] George V. Galdorisi and Alan Kaufman (2002), "Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict," *California Western International Law Journal*, 32 (2): 253-301, 257.

> EEZ is, in a juridical sense, brackish, murky and treacherous water; a 188 mile-wide band of turbulent ocean separating the territorial sea from the high seas in which competing desires for control and use meet, mix and merge."[16]

14. The exclusive coastal state rights over the living and non-living natural resources within the zone are tempered by a recognition of equity for the rights of neighbouring developing landlocked and shelf-locked states as also the traditional high seas freedoms of other states- except, of course, those relating to resources.[17] The EEZ, thus, is a functionally structured zone that partakes of the exclusive economic interests of the coastal state, yet recognizing the traditional uses of the high seas other than resource exploitation.[18] Thus, the EEZ partakes of elements of both the concepts of a sovereignty zone and traditional high seas, and is therefore of *sui generis* character.[19]

15. During the negotiation of the UNCLOS, AALCO's contribution in expounding the legal norms pertaining to the EEZ, archipelago states and rights of land locked states is well known at the international level. In this part of the Brief, the evolution of the regime on EEZ in the scheme of UNCLOS has been cursorily dealt with.

16. A pertinent issue vis-à-vis the EEZ is the responsibility to combat illegal fishing in the EEZ. Therefore, this part of the Brief proposes to delve into the issue in some detail by referring to a recent advisory opinion by the ITLOS.

II. Evolution of the Concept of the EEZ

17. A proposal on the EEZ was formally put forth for the first time at AALCC's Colombo Session held in 1971. A refined version was presented at the 1972 Lagos Session. Finally Kenya submitted *"Draft Articles on the EEZ"* at the 1972 Geneva Session of the UN Seabed Committee.[20]

18. The Kenyan proposal asserted the coastal state's right to determine the limits of its jurisdiction over its adjacent sea beyond its twelve-mile territorial sea taking into account geographical, geological, biological, ecological, economic, natural and security factors. This included its right to establish an exclusive jurisdictional zone to exercise its sovereign right over both living and non-living resources for the purpose

[16] Ibid.
[17] V.S. Mani (2007), "Exclusive Economic Zone: AALCO's Tribute to the Modern Law of the Sea", in *Fifty Years of AALCO : Commemorative Essays in International Law,* AALCO Secretariat, New Delhi, 41-61, 60.
[18] Ibid.
[19] Ibid.
[20] See for an overview of the role of AALCO in relation to EEZ, V.S. Mani (2007), "Exclusive Economic Zone: AALCO's Tribute to the Modern Law of the Sea", in *Fifty Years of AALCO : Commemorative Essays in International Law,* AALCO Secretariat, New Delhi, 41-61.

of exploration, exploitation, preservation and prevention of pollution. It was also stipulated that such a zone should in no case extend beyond 200 miles from the coast, even while taking into account the requirements, if any, of the region. The zone would, however, be subject to the high seas regime, in other respects.[21]

19. The concept evoked deep interest from most of the world's states, whether coastal or non-coastal, developed or developing.[22] It got the political support from numerous countries that it became almost impossible to be able to conclude an international agreement that did not include a 200 nautical mile limit of national jurisdiction.[23] By the time of the fifth session of UNCLOS in 1976 the concept of EEZ had almost become part of customary law and states such as Mexico, Norway, Canada, Iceland and the European Community had established economic zones or fisheries jurisdiction extending to 200 miles from the coast by adopting national laws.[24]

20. Thus, the idea of EEZ is almost as antique as the idea of a consolidated and comprehensive regime on oceans under the UNCLOS.

III. Management of Fisheries in the EEZ

21. Collectively, EEZs cover only 35% of the total ocean area but contain around 90% of the world's fish stocks,[25] including species that are attractive to operators, due to their economic value. Illegal, Unreported and Unregulated (IUU) fishing activities taking place in the EEZ have direct detrimental impacts on the domestic economies that ought to benefit from the economic potential of such stock.[26]

22. The protection of the resources of the EEZ and their interlinked environments is entrusted to coastal States under international law, which is a reflection of the sovereign rights they hold for the exploration and exploitation of the EEZ's economic potential.[27] Where stocks are transboundary, meaning they occur in part outside of the EEZ, due to migratory patterns or habitat geography, their good management requires

[21] Id. at 58-59.
[22] The Latin American States gathered over their own brand of EEZ, namely the "Patrimonial Sea". See Jorge Castaneda (1972), "The Concept of Patrimonial Sea in International Law", *IJIL*, 12: 535- 42.
[23] S. Pandiaraj, "The Establishment of AALCO and its Contributions" 14 at http://www.aalco.int/ Establishment%20of%20AALCO%20and%20Its%20Contributions%20%20PANDIARAJ.pdf.
[24] Om Prakash Sharma, (1993), "Enforcement Jurisdiction in the Exclusive Economic Zone-The Indian Experience", *Ocean Development and International Law*, 24(2): 155-178, 155-56.
[25] Mercedes Rosello (2016), "Illegal, Unreported and Unregulated Fishing Control in the Exclusive Economic Zone: a Brief Appraisal of Regulatory Deficits and Accountability Strategies", *Croatian International Relations Review* 22(75): 39-68, 46; see also, R. Barnes (2006), "The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?", in D. Freestone, R. Barnes and D. Ong (eds.) *The Law of the Sea: Progress And Prospects*, Oxford University Press, 233.
[26] Rosello, ibid.
[27] UNCLOS Article 56.1. (a) and (b).

cooperation, either with other States or through participation in Regional Fishery Management Organizations (RFMOs) or similar bodies.[28]

23. Despite the fact that the implementation of the conservation provisions contained in parts V and XII of the UNCLOS is important for the development of IUU fishing control measures in the EEZ, compliance can, in many cases, be considered deficient.[29] Observance of the conservation obligations of the UNCLOS is an inherent part of the exercise of the sovereign rights assigned by the Convention to coastal States in respect of the utilization of their EEZ.[30] The implication of the Part V provisions is that coastal States must make sure that the living resources of the EEZ are not subjected to overexploitation and are maintained at sustainable levels.[31]

24. The conservation provisions, especially the responsibility dimension thereof, of the UNCLOS have been given some additional specificity by the ITLOS in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission.*[32] On April 2, 2015, the ITLOS rendered an advisory opinion on the rights and obligations of flag states and coastal states regarding IUU fishing within the EEZ, the opinion having been requested by the Sub-regional Fisheries Commission (SRFC), an intergovernmental organization composed of seven West African states.[33] After finding unanimously that it had jurisdiction to entertain the SRFC request,[34] the Tribunal explained that the coastal state bears "primary responsibility" under UNCLOS for the conservation and management of living resources within the EEZ, which includes taking "necessary measures to prevent, deter and eliminate IUU fishing".[35] Flag states, however, have "the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the [EEZs] of the SRFC Member States".[36] The Tribunal described this responsibility as an obligation of due diligence- an obligation of conduct, not of result.[37] It is pertinent to note that the Tribunal declined to prescribe detailed guidance on what due diligence requires but held that flag states must adopt "enforcement mechanisms to monitor and secure

[28] UNCLOS Article 118.
[29] R. Churchill (2012), "The Persisting Problem of Non-Compliance with the Law of the Sea Convention: Disorder in the Oceans", *International Journal of Marine and Coastal Law*, 27 (4): 813, 813.
[30] UNCLOS Articles 56, 61, 193.
[31] UNCLOS Articles 56.1(b) (iii) and 61.
[32] Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC), Case No. 21, Advisory Opinion (ITLOS Apr. 2, 2015), at http://www.itlos.org/cases/list-of-cases/case-no-21/.
[33] The SRFC member states of Cape Verde, the Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, and Sierra Leone are parties to a multilateral agreement called the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources Within the Maritime Areas Under Jurisdiction of the Member States of the Sub-regional Fisheries Commission (SRFC), 2012 that regulates fishing activities within their EEZ.
[34] Paragraph 69.
[35] Paragraph 106.
[36] Paragraph 124.
[37] The Tribunal inferred this obligation from various UNCLOS provisions: Articles 58(3); 62 (4); 94; 192; Paras. 120-22.

compliance" with their regulations to prevent IUU fishing.[38] Additionally, the flag state has an obligation to investigate reported instances of IUU fishing, a point emphasized by the SRFC.[39]

25. The second question pertained to the liability of the flag state for IUU fishing activities. The Tribunal noted that the liability of the flag state "arises from its failure to comply with its 'due diligence' obligations concerning IUU fishing activities" by such vessels.[40] Thus, a flag state may be held liable only if it has not taken "all necessary and appropriate measures" to ensure that the vessels flying its flag are not engaging in IUU fishing activities.[41]

26. The third question addressed liability in situations in which a fishing license is issued to a vessel pursuant to a fisheries access agreement between a coastal state and a flag state or between a coastal state and an "international agency." *First,* the Tribunal stated that the due diligence obligation of the flag state continues to apply when a vessel is licensed within the framework of a fisheries access agreement between the coastal state and the flag state. *Second,* the Tribunal turned to situations involving an "international agency," which the Tribunal understood to mean an "international organization".[42] The Tribunal held that in the absence of provisions to the contrary, "the obligations of the flag State become the obligations of the international organization",[43] thereby bestowing upon the international organization concerned a due diligence obligation to ensure that vessels flagged by its member states do not engage in IUU fishing within the framework of a fisheries access agreement.

27. The fourth and final question, on the coastal state's rights and obligations in ensuring the sustainable management of migratory species and shared stocks, especially small pelagic species and tuna, was prompted by the failure of SRFC member states to coordinate their policies in this regard.[44] The Tribunal focused its response on UNCLOS Articles 63(1) and 64(1), and held that SRFC member states are obliged to cooperate in the sustainable management of shared stocks, including highly migratory stocks.[45] This obligation requires ensuring that such stocks are "not endangered by over-exploitation" and that conservation and management measures are based on the "best scientific evidence available" or, where the evidence is "insufficient," that those measures be guided by the precautionary approach.[46]

[38] Michael A. Becker (2015), "Request For An Advisory Opinion Submitted By The Sub-Regional Fisheries Commission (SRFC). Case No. 21", 109 *Am. J. Int'l L.*851- 58, 854.
[39] Paragraph 139.
[40] Paragraph 146.
[41] Paragraph 148.
[42] Paragraph 152.
[43] Paragraph 172.
[44] Paragraph 177.
[45] Paragraphs 197 and 203.
[46] Paragraph 208.

3. EXPLOITATION OF THE MINERAL RESOURCES IN THE AREA

I. Introduction

28. UNCLOS 1982 established that the Area, defined as the seabed and subsoil beyond the limits of national jurisdiction, and its resources are the common heritage of humankind.[47] Such "resources" have been defined as all solid, liquid, or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules. Pursuant to the idea of a common heritage regime,[48] UNCLOS provides that no state can claim or exercise sovereignty or sovereign rights over any part of the Area or its resources; activities in the Area must be carried out for the benefit of humankind as a whole, irrespective of the geographical location of states, taking into particular consideration developing states' interests and needs; the Area and its resources are open to use exclusively for peaceful purposes by all states, whether coastal or land-locked, without discrimination; and financial and other economic benefits derived from activities in the Area must be equitably shared on a non-discriminatory basis. The Agreement relating to the implementation of UNCLOS Part XI (the Area) was adopted on 28 July 1994 and entered into force on 28 July 1996.

29. The ISA was established as an autonomous institution under UNCLOS Part XI and the 1994 Implementing Agreement to organize and control activities in the Area, particularly with a view to administering the resources of the Area. The Authority, based in Kingston, Jamaica, came into existence on 16 November 1994 and became fully operational in 1996. Among other things, the ISA is mandated to provide for the necessary measures to ensure the effective protection for the marine environment from harmful effects, which may arise from mining activities in the Area.[49]

30. The ISA has been developing the "Mining Code"[50] pertaining to prospecting, exploration and exploitation of marine minerals in the Area. To date, the Authority has issued Regulations on Prospecting and Exploration for Polymetallic Nodules (adopted on 13 July 2000, updated on 25 July 2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides (adopted on 7 May 2010); and Regulations on

[47] UNCLOS Article 136.
[48] UNCLOS Article 150.
[49] UNCLOS Articles 145 and 209.
[50] The Mining Code has been defined thus:

> "…a collective term for the regulations, recommendations, and related decisions that sets out the detailed rules, regulations, and procedures for prospecting, exploration, and exploitation of deep seabed minerals in the Area. The Mining Code thus represents the manifestation of the ISA's interpretation of its environmental mandate under the [UNCLOS] and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (IA),3 in line with developments in international law, including the need to apply the precautionary principle."

Aline L. Jaeckel (2017), The International Seabed Authority and the Precautionary Principle *Balancing Deep Seabed Mineral Mining and Marine Environmental Protection,* Boston, London: Brill Nijhoff, 142-43.

Prospecting and Exploration for Cobalt- Rich Ferromanganese Crusts (adopted on 27 July 2012). The regulations include the forms necessary to apply for exploration rights, as well as standard terms of exploration contracts; and are complemented by the ISA Legal and Technical Commission (LTC) recommendations for the guidance of contractors on assessing the environmental impacts of exploration. The ISA is in the process of developing regulations on the exploitation of mineral resources in the deep seabed. At the first part of the 24th annual session of the ISA, which consisted of a meeting of the ISA Council convening from 5-9 March 2018 in Kingston, Jamaica, followed by a meeting of the ISA LTC from 12-23 March, the draft regulations constituted the main item for discussion.

II. International Seabed Authority and Draft Regulations on Exploitation of Mineral Resources in the Area

31. In addition to the existing instruments that form part of the Mining Code, mentioned above, preliminary work on the first regulations for the exploitation of seafloor minerals commenced in 2011.[51] In carrying out the task of developing this comprehensive framework for the commercial-scale exploitation of minerals, the ISA issued a work plan for the formulation of the exploitation regulations[52] and commissioned a technical scoping study that provides a comparative analysis of the core features of land-based mineral mining frameworks.[53] In 2014, the ISA also conducted an initial stakeholder survey to seek input regarding the development of the Mining Code.[54] In March 2015, taking into account the survey responses, the ISA published a first draft framework for the regulation of exploitation activities in the Area[55] as well as a Discussion Paper on the Development and Implementation of a Payment Mechanism in the Area.[56] Stakeholder feedback on both documents was invited and a revised draft framework was published in July 2015.[57] Stakeholder input was also invited for a first working draft of the exploitation regulations, which was released in July 2016.[58]
32. It is pertinent to note that from the outset, it was clear that environmental protection measures will be "amongst the most important elements of such a framework"[59] for

[51] ISA, ISBA/17/C/21 (21 July 2011), paragraph 20.
[52] ISA, ISBA/18/C/4 (25 April 2012).
[53] Allen L. Clark, Jennifer Cook Clark, and Sam Pintz (2013), Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, Technical Study No. 11: ISA.
[54] ISA, Developing a Regulatory Framework for Mineral Exploitation in the Area: Stakeholder Engagement (February 2014).
[55] ISA, ISBA/Cons/2015/1 (March 2015).
[56] Ibid.
[57] ISA, Developing a Regulatory Framework for Deep Sea Mineral Exploitation in the Area: Draft Framework, High Level Issues and Action Plan, Version II, (15 July 2015) at https://www.isa.org.jm/files/documents/EN/OffDocs/Rev_RegFramework_ActionPlan_14072015.pdf.
[58] ISA, Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders (July 2016), at https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf
[59] ISBA/18/C/4 (n. 67), paragraph 5.

the exploitation of minerals. While mineral exploration work can pose serious environmental risks,[60] particularly because it includes test mining, the most serious environmental impacts are expected to occur during exploitation work.[61] Indeed the 2013 ISA Technical Study argued that "there will be a need for ISA to develop a separate set of environmental regulations governing mining."[62]

33. Given that the development of exploitation regulations will require some time yet, but the first 15 years exploration contracts expired in 2016, the ISA has adopted *Procedures and Criteria for the Extension of an Approved Plan of Work for Exploration*.[63] These allow extensions of exploration contracts of no more than five years, provided the contractor can demonstrate that for reasons beyond his control he was rendered unable to complete the exploration work, or that the prevailing economic circumstances do not justify proceeding to the exploitation stage.[64] Moreover, the contractor must submit the data and results obtained during exploration work, including a table summarising all environmental baseline data collected in accordance with the *EIA Recommendations*, which is then reviewed by the Legal and Technical Commission.[65] In July 2016, the first six exploration contracts, which expired in 2016, were extended for 5 years.

34. It has been suggested that under the present circumstances, when the regime is yet in its developing stages, certain measures ought to be taken in order to ensure consistency and avoid fragmentation. The developing exploitation regime should:

> "(i) strategically draw on existing regimes parallel to deep seabed mining with the intention that good practices can be replicated and bad experiences avoided; (ii) adopt a spatial planning perspective to ensure that the integrity of the seabed is preserved from various deep seabed exploitation activities; (iii) incorporate and give effect to the responsibilities and obligations of States sponsoring deep seabed mining activities as spelled out by the Seabed Dispute Chamber; and (iv) align conservation standards within and beyond areas under national jurisdiction."[66]

[60] ISA, ISBA/19/LTC/8 (1 March 2013), paragraph 9.
[61] This was reflected in discussions in the Legal and Technical Commission for the development of the Sulphides and Crusts Exploration Regulations: "While environmental considerations were discussed at length, there was agreement that greater attention is required when granting exploitation licenses rather than when granting exploration licenses and that, as such, some of the more critical questions could be addressed at a later date"; ISA, ISBA/10/C/4 (28 May 2004), paragraph 15.
[62] Allen L. Clark, Jennifer Cook Clark, and Sam Pintz (2013), Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, Technical Study No. 11: ISA, 33.
[63] ISA, ISBA/21/C/19 (23 July 2015).
[64] Ibid., appendix I.
[65] Ibid., annex paragraph 9, appendix I.
[66] Till Markus and Pradeep Singh (2016), "Promoting Consistency in the Deep Seabed: Addressing Regulatory Dimensions in Designing the International Seabed Authority's Exploitation Code", *Review of European Community & International Environmental Law* 25 (3): 347, 361-62.

35. Two mechanisms which could aid promote consistency and effectiveness have been identified and solicit mention herein. *First*, the ISA should develop a transparency regime and, *second*, it should provide an international forum for future issues related to deep seabed mining such as, for example, the regulation of processing of minerals.[67]

III. Recommendations of the AALCO Secretariat

36. Considering the significance of the issue of exploitation of mineral resources in the Area for the AALCO Member States, the Members may take note of the following recommendations:

    1. **Scope of engagement of the AALCO Member States with the ISA:** The AALCO Member States may effectively engage with the ISA on two fronts: *firstly*, in the quest to develop Regional Environment Management Plans (REMPs) coherently, collaboratively, and transparently whilst striving to include high-quality data; and *secondly*, in further developing the draft exploitation regulations. Certain factors which ought to feature in the second point of engagement include, *inter alia*, incorporation of a benefit-sharing mechanism, to reflect the common heritage principle; an appropriate payment mechanism; engaging in action-oriented and result-based deliberations; aligning with the spirit of UNCLOS, the common heritage principle, the Rio+20 outcome, and the 2030 Agenda; minimizing risks, given the uncertainties surrounding deep-seabed mining; ensuring transparency, cooperation with various bodies and stakeholders; developing countries' full participation, including in benefit-sharing; balancing and safeguarding interests, including those of contractors; balancing benefits to humankind, sponsoring states' interests, and contractors' rights and obligations; giving more weight to best available scientific information to enhance marine environmental protection; and restructuring the ISA Secretariat to address future challenges.

    2. **AALCO as the appropriate forum to coalesce the opinion of the AALCO Member States on the issues pertaining to exploitation of mineral resources in the Area:** In March 2018 Alfonso Ascencio-Herrera, ISA Legal Counsel and Deputy to the Secretary-General, introduced a draft memorandum of understanding (MoU) with AALCO,[68] which was supported by the African Group, China, and Japan.[69] The MoU, which was approved, falls under the forms of cooperation envisaged under UNCLOS Article 169. In view of this development,

[67] Ibid.
[68] ISA, ISBA/24/C/7
[69] Summary of The Twenty-Fourth Annual Session of The International Seabed Authority (First Part): 5-9 March 2018, *Earth Negotiations Bulletin*, 25 (157) at: http://enb.iisd.org/oceans/isa/2018/.

AALCO may emerge, if the Member States deem fit, as the appropriate forum to coalesce the opinion of the AALCO Member States on topics requiring present attention, e.g., the topic on exploitation of mineral resources in the deep seabed, taking into consideration the unique interests of the Member States, and could also convey the same to the ISA.

4. DEVELOPMENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS)

I. Introduction

37. Article 279 of the UNCLOS asserts that it is the obligation of all state parties to settle disputes by the peaceful means indicated in Article 33(1)[70] of the Charter of the United Nations, and in accordance with Article 2 (3)[71] of the Charter.[72] Following a resolution of several conflicting perspectives, after much negotiation and creative[73] legal work, Part XV of the UNCLOS came into being, which incorporated within the main text of a major multilateral treaty, comprehensive, and in some cases, compulsory judicial settlement mechanisms, rather than relegating compulsory dispute settlement to an optional protocol. According to Article 287, States Parties may choose between four fora: the ITLOS, the ICJ, arbitration, or special arbitration before panel of experts.[74]

38. The first Meeting of the Parties to the UNCLOS occurred on 22 November 1994 in New York, wherein the Parties agreed to defer the first election of the members of the Tribunal to 1 August 1996. On the appointed date, the first 21 Judges were elected by the fifth Meeting of States Parties to the Convention. On 5 October 1996, in Hamburg, the Judges elected the first President of the Tribunal (Thomas A. Mensah of Ghana) and Vice-President (Rüdiger Wolfrum of Germany). Thereafter, on 18 October 1996, Hamburg, the ceremonial inauguration of the Tribunal took place in the presence of the then Secretary-General of the United Nations, Dr Boutros Boutros-Ghali.[75]

39. The ITLOS was conceived to contribute to the mission of UNCLOS to "promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."[76] Focussing on the ITLOS, this part of the

[70] Article 33 (1) of the Charter of the UN states: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

[71] Article 2 (3) of the Charter of the UN states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

[72] UNCLOS Article 279 states: "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter."

[73] The flexible system of access to the procedures was devised by Professor Riphagen, known as the Montreux Formula; M Nordquist, S. Rosenne and L. Sohn (eds.) (1989), *UN Convention on the Law of the Sea 1982: A Commentary*, Vol 5, Netherlands: Martinus Nijhoff Publishers, 8-9.

[74] See generally Natalie Klein (2005), *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press.

[75] The Tribunal, History, at https://www.itlos.org/en/the-tribunal/history/.

[76] Preamble, UNCLOS.

Brief seeks to delve into a normative discussion on the mandate, function and jurisdiction of the Tribunal. Perceiving that in the list of cases considered by the Tribunal cases deciding on prompt release of vessels and crew figure the maximum number of times, a classic case on prompt release- the M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea) has been perused in brief thereafter.

II. Mandate, Function and Jurisdiction of the ITLOS

40. The ITLOS is an independent judicial body established by the UNCLOS to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal is composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.

41. The ITLOS has been conceived as a quick and efficient specialized tribunal, along with judges who possess acknowledged expertise.[77] On 2 October 2017 the Tribunal elected Judge Jin-Hyun Paik as President of the Tribunal for the period 2017-2020 and Judge David Joseph Attard as Vice-President of the Tribunal for the period 2017-2020.

42. Article 287 of the UNCLOS, noted above, adduces the option to choose between four third-party fora to which recourse could be had when informal mechanisms failed to resolve a dispute. During the negotiation phase, some states favored the ICJ,[78] some others favored arbitration,[79] or special arbitration,[80] and some others favoured the establishment of a new Law of the Sea Tribunal.[81]

43. The UNCLOS and the Statute of the ITLOS (Annex VI of UNCLOS) contain provisions, relating to access to the Tribunal and its jurisdiction, that illustrate the wide ambit of the mandate of the ITLOS. The Tribunal has jurisdiction to deal with disputes (contentious jurisdiction) and legal questions (advisory jurisdiction) submitted to it.

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[77] Jonathan I. Charney (1996), "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", *American Journal of International Law*, 90: 69, 70.

[78] States such as Japan and Sweden argued that the ICJ's docket was not overly full, that it had successfully dealt with several law of the sea cases, and that a proliferation of tribunals might undercut the development of a uniform jurisprudence on law of the sea issues; M Nordquist, S. Rosenne and L. Sohn (eds.) (1989), *UN Convention on the Law of the Sea 1982: A Commentary*, Vol 5, Netherlands: Martinus Nijhoff Publishers, paragraph 287.1 at 41.

[79] States like France and UK criticized the rigidity of standing tribunals and noting that arbitral tribunals could conduct their business expeditiously. Ibid.

[80] The Soviet Union and the Eastern European States favoured the "special arbitration" approach, which provided special procedures for navigation, fisheries, pollution, and marine scientific research disputes. These states stressed the technical nature of many law of the sea disputes, arguing that experts nominated by technically competent organizations, such as the International Maritime Organization, should be the decision makers; Ibid.

[81] Several African and Latin American States; See Ibid.

44. Vis-à-vis contentious jurisdiction, the Tribunal has jurisdiction over all disputes concerning the interpretation or application of the Convention[82] and the Agreement relating to the Implementation of Part XI of the Convention. Limitations on and exceptions to applicability of the compulsory procedures entailing binding decisions[83] are contained in Articles 297 and 298 of the Convention. Those exceptions comprise: (1) general exceptions applicable to all parties, namely disputes concerning coastal State fisheries management in the EEZ and coastal State authorization of research in the EEZ (Article 297); and (2) disputes relating to maritime boundary delimitation, military activities, law enforcements and matters being dealt with by the Security Council which States may choose to exclude from settlement under section 2 of Part XV (Article 298). Article 297 and declarations made under Article 298 of the Convention do not, however, prevent parties from agreeing to submit to the Tribunal a dispute otherwise excluded from the Tribunal's jurisdiction under these provisions.[84]

45. Till date, 39 state parties have made declarations under Article 298.[85] These states are Algeria, Angola, Argentina, Australia, Belarus, Canada, Cabo Verde, Chile, China, Cuba, Democratic Republic of Congo, Denmark, Ecuador, Egypt, Equatorial Guinea, France, Gabon, Greece, Guinea-Bissau, Iceland, Italy, Kenya, Mexico, Montenegro, Nicaragua, Norway, Palau, Portugal, Republic of Korea, Russian Federation, Saudi Arabia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom of Great Britain and Northern Ireland, and Uruguay. 6 AALCO Member States figure in that list. These states are China, Egypt, Kenya, Republic of Korea, Saudi Arabia and Thailand.

46. Under Article 288, paragraph 2, of the Convention, the Tribunal has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention which is submitted to it in accordance with the agreement. Under Article 21 of the Statute, the jurisdiction of the Tribunal includes all matters specifically provided for in any agreement, other than the Convention, which confers jurisdiction on the Tribunal. To date, a number of multilateral agreements have been concluded which confer jurisdiction on the Tribunal.[86]

47. Pursuant to Article 22 of the Statute, any dispute concerning the interpretation or application of a treaty or convention already in force and relating to the subject-matter covered by the Convention may, if all the Parties to such agreement so agree, be submitted to the Tribunal in accordance with the agreement.

[82] UNCLOS Article 288, paragraph 1; Statute of the ITLOS, Article 21.
[83] UNCLOS Part XV, Section 2
[84] Article 299 UNCLOS.
[85] Declarations made by States Parties under article 298, at https://www.itlos.org/en/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/.
[86] International Agreements conferring Jurisdiction on the Tribunal, at https://www.itlos.org/en/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/.

48. In the event of a dispute as to whether the Tribunal has jurisdiction, the matter shall be settled by decision of the Tribunal.[87]

49. If a dispute has been duly submitted to the Tribunal and if the Tribunal considers that prima facie it has jurisdiction under Part XV or Part XI, Section 5, of the Convention, the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.[88] The Tribunal may also prescribe provisional measures in the case covered by Article 290, paragraph 5, of the Convention. Under this provision, pending the constitution of an arbitral tribunal to which a dispute is being submitted and if, within two weeks from the date of a request for provisional measures, the parties do not agree to submit the request to another court or tribunal, the Tribunal may prescribe provisional measures if it considers that prima facie the arbitral tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires.

50. The Tribunal has jurisdiction to entertain an application for the prompt release of a detained vessel or its crew in accordance with the provisions of Article 292 of the Convention. This Article provides that where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to the Tribunal if, within 10 days from the time of detention, the parties have not agreed to submit it to another court or tribunal.[89] The application for release may be made only by or on behalf of the flag State of the vessel.[90]

51. The Seabed Disputes Chamber is competent to give an advisory opinion on legal questions arising within the scope of the activities of the Assembly or Council of the International Seabed Authority.[91] The Tribunal may also give an advisory opinion on a legal question if this is provided for by "an international agreement related to the purposes of the Convention".[92]

52. The first case, the M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, was submitted to the Tribunal on 13 November 1997. To date, twenty-five cases have been submitted to the Tribunal. The AALCO Member States

[87] UNCLOS, Article 288, paragraph 4; Rules of the Tribunal, Article 58.
[88] UNCLOS, Article 290, paragraph 1; Statute, Article 25, paragraph 1.
[89] UNCLOS, Article 292, paragraph 1.
[90] UNCLOS, Article 292, paragraph 2.
[91] UNCLOS Article 191.
[92] Rules of the Tribunal, Article 138.

have engaged with the Tribunal in several cases.[93] The trend of settlement of disputes by the Tribunal may be presented in a tabular format as follows:

Case No.	**Name of the Case**	**Date of receipt of application at the ITLOS**	**Category**	**Jurisdiction**
1	*The M/V "SAIGA" Case (Saint Vincent and the Grenadines* v. *Guinea),* Judgment of 4 December 1997	13 November 1997	Prompt Release [arrest of the "M/V Saiga"- its cargo and crew detained in Conakry, Guinea]	Contentious Case
2	*The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea),* Judgment of 1 July 1999 Incidental Proceedings: Provisional Measures (Order of 11 March 1998)	Request for the prescription of provisional measures: 13 January 1998; first round of written pleadings on the merits (the substance) filed on 16 October 1998	Decision on merits [dispute concerning the arrest off the coast of West Africa by Guinea of the oil tanker Saiga flying the flag of Saint Vincent and the Grenadines; issues included the freedom of navigation and other internationally lawful uses of the seas, the enforcement of customs laws, re-fuelling (bunkering) vessels at sea, and the right of hot pursuit]	Contentious Case
3	*Southern Bluefin Tuna Case (New*	Australia and New Zealand	Provisional Measures [conservation and management	Contentious Case

[93] Southern Bluefin Tuna Cases (*New Zealand* v. *Japan*; *Australia* v. *Japan*), Provisional Measures (1999); The "Chaisiri Reefer 2" Case (*Panama* v. *Yemen*), Prompt Release (2001); Case concerning Land Reclamation by Singapore in and around the Straits of Johor (*Malaysia* v. *Singapor*e), Provisional Measures (2003); The "Hoshinmaru" Case (*Japan* v. *Russian Federation*), Prompt Release (2007); The "Tomimaru" Case (*Japan* v. *Russian Federation*), Prompt Release (2007); Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (*Bangladesh/Myanmar*) (2011); The "ARA Libertad" Case (*Argentina* v. *Ghana),* Provisional Measures (2012); Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (*Ghana/Côte d'Ivoire*) (2017); The "Enrica Lexie" Incident (*Italy* v. *India*), Provisional Measures (2015).

	Zealand v. *Japan),* Order of 27 August 1999	together filed request on 30 July 1999	of Southern Bluefin Tuna; interim injunction to the unilateral experimental fishing of Southern Bluefin Tuna by Japan]	
4	*Southern Bluefin Tuna Case* *(Australia* v. *Japan),* Order of 27 August 1999	Australia and New Zealand together filed request on 30 July 1999	Provisional Measures [conservation and management of Southern Bluefin Tuna; interim injunction to the unilateral experimental fishing of Southern Bluefin Tuna by Japan]	Contentious Case
5	*The "Camouco" Case (Panama* v. *France),* Judgment of 7 February 2000	17 January 2000	Prompt Release [arrest of the fishing vessel Camouco, flying the Panamanian flag, in September 1999 by a French frigate allegedly for unlawful fishing in the EEZ of Crozet (French Southern and Antarctic Territories)]	Contentious Case
6	*The "Monte Confurco" Case* *(Seychelles* v. *France),* Judgment of 18 December 2000	27 November 2000	Prompt Release [the fishing vessel MFV "Monte Confurco", flying the flag of the Seychelles, was arrested by a French frigate for alleged violation of fishery laws and failure to announce the entry of the vessel into the EEZ of the Kerguelen Islands]	Contentious Case
8	*The "Grand Prince" Case (Belize* v. *France),* Judgment of 20 April 2001	21 March 2001	Prompt Release [the "Grand Prince", flying the flag of Belize, was arrested by the French authorities in the EEZ of the Kerguelen Islands in the French Southern and Antarctic Territories on 26 December 2000, being accused	Contentious Case

			of illegal fishing in the Kerguelen EEZ]	
10	*The MOX Plant Case (Ireland* v. *United Kingdom),* Order of 3 December 2001	9 November 2001	Provisional Measures [the dispute concerned the MOX plant, located at Sellafield, Cumbria, the international movement of radioactive materials, and the protection of the marine environment of the Irish Sea]	Contentious Case
11	*The "Volga" Case (Russian Federation* v. *Australia),* Judgment of 23 December 2002	2 December 2002	Prompt Release [the arrest of the Volga, a vessel flying the flag of the Russian Federation, and three members of its crew, for alleged illegal fishing in the Australian fishing zone]	Contentious Case
12	*Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore),* Order of 8 October 2003	5 September 2003	Provisional Measures [the dispute concerned land reclamation activities carried out by Singapore which allegedly impinge upon Malaysia's rights in and around the Straits of Johor, which separate the island of Singapore from Malaysia]	Contentious Case
13	*The "Juno Trader" Case (Saint Vincent and the Grenadines* v. *Guinea-Bissau),* Judgment of 18 December 2004	19 November 2004	Prompt Release [the arrest of Juno Trader, a reefer vessel flying the flag of Saint Vincent and the Grenadines, and 19 members of its crew, for the alleged infringement of national legislation on fishing in the maritime waters of Guinea-Bissau]	Contentious Case
14	*The "Hoshinmaru" Case (Japan* v. *Russian*	6 July 2007	Prompt Release	Contentious

	Federation), Judgment of 6 August 2007		[the arrest of the 88th Hoshinmaru and of 17 members of its crew for alleged violations of Russian fisheries legislation on 1 June 2007]	Case
15	*The "Tomimaru" Case (Japan* v. *Russian Federation)*, Judgment of 6 August 2007	6 July 2007	Prompt Release [the arrest of the 53rd Tomimaru for alleged violations of Russian fisheries legislation on 31 October 2006]	Contentious Case
16	*Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012	14 December 2009	Decision on merits [maritime delimitation]	Contentious Case
17	*Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011	14 May 2010	Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area	Request for Advisory Opinion submitted to the Seabed Disputes Chamber
18	*The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Judgment of 28 May 2013 Incidental Proceedings: Provisional Measures (Order of 23 December 2010)	Application instituting proceedings before the Tribunal, including a request for provisional measures: 24 November 2010	Decision on merits [alleged violations of Spain's historical patrimony or marine environment laws; two aspects were looked into: one involving the detention of the vessel and the persons connected therewith and the other concerning the treatment of these persons]	Contentious Case
19	*The M/V "Virginia G"*	4 July 2011	Decision on merits	Contentious

	Case (Panama/Guinea-Bissau), Judgment of 14 April 2014		[claim of reparation for the damages suffered during detention by the oil tanker Virginia G, submitted by Panama, carrying out refuelling operations for fishing vessels in the exclusive economic zone of Guinea-Bissau]	Case
20	*The "ARA Libertad" Case (Argentina* v. *Ghana)*, Order of 15 December 2012	14 November 2012	Provisional Measures [Argentina sought the prescription of the provisional measure that Ghana unconditionally enable the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana and to be resupplied to that end]	Contentious Case
21	*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015	28 March 2013	Obligations and liabilities of the flag State in cases IUU fishing activities are conducted within the EEZ of third party States; the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest]	Request for an Advisory Opinion
22	*The Arctic Sunrise Case (Kingdom of the Netherlands* v. *Russian Federation)*, Order of 22 November 2013	21 October 2013	Provisional Measures [dispute concerned the arrest and detention of the vessel Arctic Sunrise, flying the flag of the Netherlands, an icebreaker operated by Greenpeace International, and its crew by authorities of the Russian Federation]	Contentious Case
23	*Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte*	12 January 2015; Request for	Decision on merits [maritime delimitation]	Contentious Case

	d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017 Incidental Proceedings: Provisional Measures (Order of 25 April 2015)	prescription of provisional measures: 27 February 2015		
24	*The "Enrica Lexie" Incident (Italy v. India)*, Order of 24 August 2015	21 July 2015	Provisional Measures [request for prescription of provisional measures that India refrain from taking or enforcing any judicial or administrative measures against Italian Marines and lifting of restrictions on the liberty, security and movement of the Marines]	Contentious Case
25	*The MV "Norstar" Case (Panama v. Italy);* ongoing Incidental Proceedings: Preliminary Objections (Judgment of 4 November 2016)	17 December 2015	Pending case [Dispute concerning arrest and detention of the M/V Norstar, a Panamanian-flagged vessel: the right to freedom of navigation] 10 September 2018 has been fixed as the date for opening of oral proceedings vide an Order dated 20 July 2018	Contentious Case

53. 2 of the 25 cases were terminated at the request of the parties before ITLOS weighed in on the merits of the cases. These cases were as follows:

Case No.	**Name of the Case**	**Date of receipt of application at the ITLOS**	**Category**	**Jurisdiction**
7	*Case concerning the Conservation and*	20 December	Decision on merits	Contentious

	Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile / European Union) [Via an order of 16 December 2009, the case was removed from the List of cases acting upon the Parties' joint request]	2000	[conservation and sustainable exploitation of swordfish stocks]	Case
9	*The "Chaisiri Reefer 2" Case (Panama* v. *Yemen)* [Case removed from Tribunal's list via an order of 13 July 2001, following an agreement between the parties]	3 July 2001	Prompt Release [the Chaisiri Reefer 2 was arrested for alleged violation of fishery laws on 3 May 2001 by Yemeni coastguard officials while leaving the port of Mukalla (Yemen), bound for Thailand]	Contentious Case

54. 9 of the 25 cases considered by the Tribunal have been prompt release cases, and 7 have pertained to the prescription of provisional measures. In 6 cases the Tribunal has looked into the merits of the case, and 3 such cases have involved the prescription of a provisional measure preceding the ruling on substance. In 2 cases, advisory opinions were rendered.

55. The Tribunal is open to States Parties to the Convention, i.e., States and international organizations which are parties to the Convention. It is also open to entities other than States Parties, i.e., States or intergovernmental organizations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" under Article 20 of the Statute of the ITLOS.[94]

56. Under Article 287, thirty-three states have explicitly accepted any ITLOS jurisdiction beyond the default jurisdiction of the tribunal, which covers disputes arising over the

[94] UNCLOS' definition of "state parties" under Article 1 (2) (2) is not limited to states, but includes other entities entitled to become parties to the Convention, such as territories with full internal self-governance and international organizations with treaty-making competence. Under Article 291 (2), the Convention's third-party dispute settlement mechanisms are also "open to entities other than States Parties," but "only as specifically provided for" in the Convention. Such entities include the International Seabed Authority and natural and juridical persons.

exploration and exploitation of seabed minerals and provisional measures while an arbitral tribunal is being formed and all prompt release cases.[95] Out of these, seven states provide exclusive jurisdiction to ITLOS to resolve Law of the Sea related disputes.[96] One AALCO Member State figures among those seven states.[97]

57. In some cases, ITLOS's power to adjudicate disputes is limited to particular subject matters.[98] Seventeen states have assigned to ITLOS either exclusive jurisdiction or priority jurisdiction.[99]

III. Analysis of a Prompt Release Case before the ITLOS

58. On 4 December 1997, the ITLOS delivered its first Judgment in the M/V "SAIGA" case.[100] The M/V "SAIGA" was an oil tanker flying the flag of Saint Vincent and the Grenadines. At the time of the incident which gave rise to the dispute, it was chartered to a shipping company registered in Switzerland and was operating as a bunkering vessel supplying fuel oil to fishing vessels and other vessels off the coast of Guinea in West Africa.[101]

59. Early in the morning of 27 October 1997, the M/V "SAIGA" crossed the maritime boundary between Guinea and Guinea Bissau and entered the EEZ of Guinea, approximately 32 nm from the Guinean island of Alcatraz.[102] Later the same day, between approximately 0400 and 1400 hours, it supplied gas oil to three fishing vessels "in all likelihood within the contiguous zone of Guinea".[103] It was first spotted by Guinean radar at 0400 hour on the following day, 28 October 1997,[104] and after a pursuit, arrested by Guinean Customs patrol boats later that day "at a point south of the maritime boundary of the exclusive economic zone of Guinea".[105] Guinea sought

[95] See generally Anastasia Telesetsky (2018), "The International Tribunal for the Law of the Sea", in Nienke Grossman, Harlan Grant Cohen and Andreas Føllesdal (eds.), *Legitimacy and International Courts*, Cambridge University Press, 181.
[96] Declarations of States Parties under Article 287, available at https://www.itlos.org/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/.
[97] Ibid.; Exclusive jurisdiction has been provided by Angola, Fiji, Madagascar, St. Vincent and the Grenadines, Switzerland, Tanzania, and Uruguay, of which only Tanzania is an AALCO Member State.
[98] For example, Bangladesh's Declaration on Article 287 jurisdiction; Ibid. See also, Chie Kojima (2016), "Implementation of the United Nations Law of the Sea Convention in Japan" in Seokwoo Lee and Warwick Gullett (eds.), *Asia-Pacific and the Implementation of the Law of the Sea: Regional Legislative and Policy Approaches to the Law of the Sea Convention*, Leiden, Boston: Brill Nijhoff, 34-52, 50.
[99] Even though thirty-three states have accepted the possibility of ITLOS jurisdiction, unless both parties to a given dispute have selected ITLOS dispute settlement in their Article 287 declarations or have opted voluntarily for an ITLOS decision, ITLOS will not be able to hear a case. Instead, an arbitration panel will be convened under Annex VII of UNCLOS; see Article 287(5), UNCLOS.
[100] *The M/V "SAIGA" Case (Saint Vincent and the Grenadines* v. *Guinea)*, Prompt Release, at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_1/published/C1-J-4_Dec_97.pdf
[101] Judgment, 1997, paragraphs 26 and 28.
[102] Id, paragraph 29.
[103] Id, paragraph 61.
[104] Id, paragraph 61.
[105] Id, paragraph 30.

to justify the arrest outside its EEZ on the ground that the bunkering had taken place in its contiguous zone contrary to its customs legislation and that the arrest followed an exercise of Guinea's right of hot pursuit.[106] It was noted in the Judgment that the arguments put forward to support this contention were "not tenable, even *prima facie*".[107]

60. However, the Tribunal's task was not to decide whether the arrest was lawful but whether the detention of the vessel and crew following the arrest was in violation of the provisions of the UNCLOS on prompt release.

61. In the course of the arrest, two crew members of the M/V "SAIGA" were injured. The tanker was taken to Conakry, Guinea, where the vessel and its crew were detained. Subsequently, two injured crew members were allowed to leave and the cargo was discharged on the orders of the local authorities in Conakry.[108] No bond or other financial security was requested by the Guinean authorities for the release of the vessel and its crew, or offered by Saint Vincent and the Grenadines.[109]

62. On 13 November 1997, Saint Vincent and the Grenadines instituted proceedings against Guinea under Article 292 of the UNCLOS, calling for the immediate release of the vessel, her cargo and crew.[110] Exactly three weeks later, on 4 December 1997, the Tribunal, acting with the rapidity required by the UNCLOS and the Rules of the Tribunal,[111] delivered its Judgment ordering the prompt release of the vessel and its crew from detention in Conakry and requiring Saint Vincent and the Grenadines to deposit US $ 400000, in addition to the already discharged cargo of gas oil, as a security for the release.[112]

[106] Id, paragraph 60.
[107] Id, paragraph 61.
[108] Id, paragraph 30.
[109] Id, paragraph 31.
[110] Id, paragraph 23.
[111] UNCLOS Article 292(3) and Rules of the Tribunal, Article 112.
[112] Judgment, 1997, paragraphs 86(3)-(5).

5. MARINE BIODIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION

I. Introduction

63. The UNCLOS embodies the principle of customary international law which states that the high sea beyond national jurisdiction is a global commons and therefore all states have a right to freedom of navigation within the high seas.[113] The UNCLOS also recognizes a need to discharge stipulated international responsibilities such as the protection of the environment.[114]The general obligation to protect marine biodiversity stems from Article 192.[115] Freedom to fish is also restricted by the obligation to protect living resources of the high seas as embodied in Article 118. The obligation arising from 118 has been comprehensively codified in the 1995 Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock (Fish Stocks Agreement) and related conservation and management measures.[116]Articles 63 and 64 which talk about the management of highly migrating and straddling stocks and Section 2 of Part VII, dealing with conservation and management of the living resources of the high seas (Articles 116 to 120) foster co-operation between states for the safeguarding of marine biodiversity. Article 194 mandates states to take all necessary measures to protect and preserve the marine environment. They must also ensure that activities within their jurisdiction do no harm to the marine biodiversity beyond national jurisdiction. Further, it articulates Principle 21 of the Stockholm Declaration in Paragraph 2.[117]

64. In 1992, the United Nations Conference on Environment and Development (UNCED) adopted the Rio Declaration, which also recognized the symbiosis between Principle 21 of the 1972 Stockholm Declaration and UNCLOS Article 194 in its Principle 2 of The Declaration. [118] The International Court of Justice has demarcated this as a fundamental principle of international environmental law.[119] The precautionary approach was also recognized by the Rio Declaration as a significant tool in the annals of modern environmental law.[120] In essence, this means that in instances of threats of serious or irreversible damage lead to potentially grave concerns, a lack of

[113] Malcolm Shaw (2012), *International Law*, Cambridge University Press, 6th edn.
[114] D. Freestone (2009), "Modern Principles of High Seas Governance: The Legal Underpinnings", *International Environmental Policy and Law*, 39: 44.
[115] Ibid.
[116] 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Article 6.
[117] L. Bonkourt (2007), "Principles of International Environmental Law: Precautionary Principle", *Review International Environmental Law*, 7: 3.
[118] UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.
[119] *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) [1997] ICJ Rep. 7.
[120] Report of The United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF.151/26 (vol. I)

full scientific certainty regarding these threats cannot be used to shirk responsibility for the prevention of environmental damage.[121] The UNCED also adopted Agenda 21[122] which is an action plan that still serves as the edifice of environmental law implementation. This framework was endorsed and further developed by the Plan of Implementation adopted by the World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002.[123] All these principles apply for the preservation of marine biodiversity though they are yet to be explicitly enshrined in the UNCLOS.[124]

65. Conservation techniques such as environmental impact assessment (EIA), marine protected areas (MPAs), marine spatial planning and development mechanisms such as technology transfer and capacity building have not yet been incorporated into the UNCLOS regime.[125] Part XI demarcates the deep seabed beyond national jurisdiction as the "common heritage of mankind." A supranational organisation called the International Seabed Authority (ISA) is in charge of regulating this space.[126] Article 145 of UNCLOS bestows the ISA with a responsibility to protect the environment from damage which may be caused by activities by states or private entities. In that regard, the ISA codifies rules and regulations for numerous potentially hazardous activities such as drilling, excavation and disposal of waste. Ideally, states should incorporate these guidelines into their municipal legislation.

II. Global Environmental Law Applicable to Marine Biodiversity

66. The high seas are also subject to a number of biodiversity related convention - the most significant of which is the Convention on Biological Diversity (CBD). The CBD was created with three overarching goals - the conservation of biodiversity, the fair and equitable sharing of the benefits arising from exploitation of living resources and capacity building in this regard.[127] Article 4, for example stipulates obligations regarding processes and activities within the national jurisdiction of states that may have an impact on biodiversity. Parties to the treaty are further required to cooperate either with each other or under the aegis of international or supranational organisations to maintain biological diversity beyond national jurisdiction. States are obligated to sustainably use these components.[128]

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[121] AALCO Secretariat, "The Law of The Sea", AALCO54/BEIJING/2015/SD/S/2.
[122] U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).
[123] A/CONF.199/20.
[124] D. Freestone (2009), "Modern Principles of High Seas Governance: The Legal Underpinnings", *International Environmental Policy and Law*, 39: 44, 44.
[125] L. Reeve, A Rulska-Domino, and K Gjerde (2012), "The Future of High Seas Marine Protected Areas", *Ocean Yearbook*, 26: 265, 268.
[126] Rudiger Wolfrum (2014), "The Contribution of the Regulations of the International Seabed Authority to the Progressive Development of International Environmental law", in Michael. W. Lodge and Myron. N. Nordquist, *Peaceful Order in the World's Oceans*, Brill Nijhoff Publishers: Leiden, 241.
[127] Convention on Biological Diversity, Article 1.
[128] Marie-Claude Boisvert (2009), *Establishment of High Seas Marine Protected Areas: Towards an Implementing Agreement*, University of Toronto.

67. Various principles of global environmental law have been extended to the realm of the high seas.[129] Even though the precautionary principle has long been recognized as a fundamental principle of global environmental law, it was not codified or concretized in any form till the arrival of the 1995 UN Fish Stocks Agreement (FSA).[130] This treaty concretely cemented this principle by specifically mandating the use of the precautionary approach in assessment and management of straddling fish stocks. This encourages the development of pro-active conservation measures thereby turning precautionary fisheries management into a key engine for the conservation of marine biodiversity at large.[131] Since coming of the FSA**,** new Regional Fisheries Management Organizations (RFMOs) have come up which incorporate the requirements of the FSA code into their workings.[132]

68. As illustrated by the *Southern Bluefin Tuna* cases, however, implementing this principle poses several challenges. The case was fundamentally premised on a "clash of precautions" between Australia and New Zealand on one side and Japan on the other. Australia and New Zealand argued that scientific uncertainty regarding impact of Japan's proposed experimental fishing program should prevent the program from being implemented as per the precautionary approach, while Japan claimed that scientific uncertainty regarding stock status and lack of information regarding appropriate conservation measures meant that it should go ahead as planned.[133] The ITLOS held that the parties "*should act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna*."[134] Notwithstanding this judgment, fish stocks are still exploited.

69. **Gaps in Implementation**

The previous section highlighted the catena of provisions in international environmental law read with the law of the sea that seeks to solve the problem of conserving marine biological diversity and mandates steps on state parties to achieve the same. At the same time there has been an inadequate compliance measures for detection of misfeasance, which means that state parties have violated such

[129] *Ibid.*
[130] D. Freestone (1989), "Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement" in E. Hey. (1989), *The Regime for the Exploitation of Transboundary Marine Fisheries: The United Nations Law of the Sea Convention Cooperation between States,* Dodrecht: Martinus Nijihoff.
[131] L.A. Kimball (1995), "The Biodiversity Convention: How to make it work", *Vand.J. Transnat'l .L,*28: 763.
[132] S. Hart, *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction.* IUCN, Marine Series No. 4 (Gland, Switzerland, IUCN, 2008) at 1, 3.
[133] *Southern Bluefin Tuna* (*New Zealand* v. *Japan*; *Australia* v. *Japan*), Provisional Measures Order of 27 August 1999, International Tribunal for the Law of the Sea; www.itios.org. See generally, D. Freestone (1999), "Caution or Precaution: 'A Rose by Any Other Name...?'", *Yearbook of International Environmental Law*, 10: 25-32.
[134] Ibid.

obligations with impunity.[135] In order to remedy the situation, we need to first answer a key question. Are the normative regulations in this sphere enough or does the problem lie in inadequate enforcement? One of the main issues is a division of obligations between the seabed and the water column. If organisms are present on both the seabed and water column, it is still unclear which legal regime should apply. Second, institutional mechanisms should be brought in place to resolve disputes and enforce compliance measures. While the ISA has this role *de jure*, it does not have the power to implement its decisions. The third problem lies in enmeshing a symbiosis between fisheries management and other mechanisms within the law of the seas framework and its reconciliation and coherent application in line with the other provisions of the UNCLOS and principles of global environmental law. Instruments that seek to protect marine biodiversity should also attempt to protect marine genetic resources and account for the sensitivities on that front while carving out regulations on that front.[136] Bioprospecting is another emerging development which has hitherto remained unaddressed. It needs to be determined how marine scientific research can be evolved to also address concerns raised through bioprospecting.

III. Ongoing Initiatives

a. BBNJ Working Group

70. States and international initiatives alike have united to address the concerns raised in the previous sections. The political edifice of these efforts has been the Marine Biodiversity in Areas Beyond National Jurisdiction (BBNJ) Working Group that was set up by the United Nations General Assembly in 2004. [137]The CBD has also embarked on various technical and scientific initiatives regarding EIA including the augmentation of ecologically and biologically significant areas (EBSAs) in the oceans.[138] It has also underscored various regional initiatives with regional stakeholders to ensure that states take a keen role in maintaining biodiversity within proximity to their territorial regions.[139] The search for a new institutional framework came from the United Nations Informal Consultative process on Oceans and the Law of the Sea (UNICPOLOS) which co-ordinated discourse on a lot of issues since its

[135] Rosemary Rayfuse (2012), "Precaution and the Protection of Marine Biodiversity in Areas Beyond National Jurisdiction", *Int'l J. Marine & Coastal L.*, 27: 773.
[136] Rudiger Wolfrum (2014), "The Contribution of the Regulations of the International Seabed Authority to the Progressive Development of International Environmental law", in Michael. W. Lodge and Myron. N. Nordquist, *Peaceful Order in the World's Oceans*, Brill Nijhoff Publishers: Leiden, 241.
[137] UNGA, Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, 5th Meeting, UN Doc A/59/122 (2004).
[138] Rudiger Wolfrum (2014), "The Contribution of the Regulations of the International Seabed Authority to the Progressive Development of International Environmental law", in Michael. W. Lodge and Myron. N. Nordquist, *Peaceful Order in the World's Oceans*, Brill Nijhoff Publishers: Leiden, 241.
[139] S. Hart, *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction.* IUCN, Marine Series No. 4 (Gland, Switzerland, IUCN, 2008) at 1, 3.

creation in 1999. At its fifth meeting in 2004,[140] it deliberated on the new uses of the oceans emerging due to increased technological advancements. It was at this meeting that the BBNJ Working Group was created. The BBNJ in turn took cognizance of a set of universal principles. Core features among these include the precautionary and ecosystem approaches compulsory environmental impact assessment.[141] States that participated in the Working Group have endorsed the need for greater global and regional protection while also recognizing the key role that sectoral and regional organizations play in this regard.[142] Participating members marked out destructive fishing as the single largest threat to marine biodiversity and recommended measures of curbing this.

71. The states disagreed, however on the status of marine genetic resources and on the access and benefit sharing of these resources. Despite there being broad consensus on the principles governing exploitation of these resources, there has been a severe lack of consensus on the institutional framework governing their use. There has also been consensus on the need to move towards a new treaty regime regulating this space although there has been no consensus on the parameters which this treaty regime would operate under.[143] This was also re-affirmed at the Rio+20 summit where they said that this regime must progress under the aegis of the law of the sea.[144]

72. This was also further endorsed by the UNGA who included this to the sixth working group of the BBNJ in 2013. At this meeting, the Working Group vowed to establish a process that would seek to determine the scope, feasibility and parameters of this group. After meeting twice, the Working Group clearly charted out what they termed as "the package", which laid out the parameters for the treaty mechanism and included provisions on marine genetic resources, benefit sharing, area based management tools which included Marine Protected Areas, mandatory Environmental Impact assessment and capacity building through the transfer of marine technology.[145]

73. In terms of benefit sharing, a suggestion that cropped up was the creation of a body that would regulate this phenomenon.[146] Other suggestions included the

[140] Robin M. Warner (2015), "National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea" in Donald R. Rothwell, Alex G. Oude Elferink, Karen N.Scott, Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 765.
[141] UNGA, Report of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction, UN Doc A/63/79 (2008), Annex I.
[142] C. Joyner (1995), "Biodiversity in the Marine Environment: Resource Implication for the Law of the Sea", *Vanderbilt Journal of Transnational Law*, 28:.672-79.
[143] UNGA, Letter from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, 66th session, UN Doc A/66/119 (2011) Annex, Section 1.
[144] UNGA Res 66/288 (27 July 2012).
[145] UNGA, "Letter Dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly", A/69/780, Sixty-ninth Session (13 Feb 2015).
[146]Robin M. Warner (2015), "National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea" in Donald R. Rothwell, Alex G. Oude Elferink, Karen N.Scott, Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 765.

differentiation between monetary and non-monetary benefit sharing in order to further delineate capacity building in an equitable manner. The Working Group also recommended that the General Assembly should establish a working group that would work out the different components of this treaty regime.[147] Such a group was set up by the UNGA and it should end its work by the seventy-second session of the UNGA in 2017.

74. Two core features of this law making process have been transparency and accountability. The BBNJ Working Group has worked hard to ensure that this process is inclusive for all and the sensitive nature of all state's concerns has been addressed. Further, any regulation of a global commons necessarily requires co-operation not just from state parties but also from other stakeholders through the aegis of regional and sectoral initiatives. In light of these objectives, the resolution mandates that the preparatory committee should be opened-up to both member states and preparatory agencies. The dialogue should incorporate the views of a wide range of stakeholders including civil society groups, international organisations, international institutions and a wide range of states.[148]

b. Summary: Prep Comm 3: 27 Mar-7 April 2017

75. At its 29th meeting on 27 March 2017, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel made a statement. The Preparatory Committee adopted the agenda as contained in document A/AC.287/2017/PC.3/1 and agreed to proceed on the basis of the proposed programme of work contained in document A/AC.287/2017/PC.3/L.2.28.

76. The Preparatory Committee held nine plenary meetings at its third session. Representatives from 147 Member States of the United Nations, two non-Member States, five United Nations funds and programmes, bodies and offices, four United Nations specialized agencies and related organizations, 14 intergovernmental organizations, and 19 non-governmental organizations attended the session.

77. The Co-Chair of the Ad Hoc Working Group of the Whole on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects, introduced the advance and unedited text of the Technical Abstract of the First Global Integrated Marine Assessment on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, under item 7 "Other matters". The plenary sessions considered: marine

[147] "UN General Assembly Adopts Resolution to Develop New Marine Biodiversity Treaty for the High Seas and Beyond", (June 19, 2015, High Seas Alliance), *at* http://highseasalliance.org/content/un-general-assembly-adopts-resolution-develop-new-marine-biodiversity-treaty-high-seas-and

[148] L. De La Fayette (2009), "A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources: Beyond the limits of National Jurisdiction", *Int'l Journal of Marine and Coastal Law*, 24: 221-280.

genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments; capacity building and the transfer of marine technology; and cross-cutting issues.

78. In Plenary session 1 on marine genetic resources and benefit sharing: following issues were discussed: 1) Guiding Principles, 2) Access and Benefit-Sharing and 3) Scope and Definitions. In Plenary Session 2 on Area Based Management Tools, following issues were discussed: 1) Objectives of ABMTs, including MPAs; 2) Definitions of ABMTs, including MPAs, and other relevant terms; 3) Processes for proposing and identifying ABMTs, including MPAs, and associated decision-making; and 4) Guiding principles and approaches. In Plenary Session 3 on Environmental Impact Assessment, following issues were discussed: 1) Geographical scope of EIAs; 2) Trigger for EIAs; 3) Procedural steps; 4) Governance; and 5) Strategic environmental assessments and other issues. In Plenary Session 4 on Capacity building and technology transfer, following issues were discussed: 1) Objectives and guiding principles for capacity-building and transfer of marine technology; 2)Types and modalities for capacity-building and transfer of marine technology, including issues relating to a clearing-house mechanism and funding; 3) Monitoring, review and follow-up; 4) Scope; and 5) Design and structure. In Plenary Session 5 on cross-cutting issues, following issues were taken up: Scope and relationship with UNCLOS and other instruments; Institutional arrangements; Review, monitoring and compliance; Responsibility and liability; Dispute settlement; Final elements; and Objectives and guiding principles and approaches.

79. In accordance with the roadmap discussed and approved by the plenary, following the third session, the Chair prepared an overview of the third session. The Chair also prepared indicative suggestions to assist the Preparatory Committee established by resolution 69/292 in developing recommendations to the General Assembly on the elements of a draft text of an international legally binding legal instrument.

80. In relation to marine genetic resources, including questions on the sharing of benefits, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including those relating to guiding principles and scope, as well as access and benefit-sharing modalities, including the different benefits that may be had at various stages, who might be required to share benefits, who might the beneficiaries be, and how might the shared benefits be used; issues relating to monitoring the utilization of marine genetic resources, including issues related to traceability; and what kind of institutional arrangements might be required to administer an access and benefit-sharing regime.

81. With regard to measures such as area-based management tools (ABMTs), including marine protected areas (MPAs), the Chair encouraged further consideration of the issues identified in the Facilitator's oral report, including additional consideration of

the subcategories of ABMTs, other than MPAs, as well as the relevant decision-making process and institutional set up for the establishment of ABMTs, including MPAs, taking into account the different approaches that have been put forward and the proposed allocation of roles and responsibilities within each approach, including how to deal with existing regional and sectoral measures. In relation to environmental impact assessments, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including how to address transboundary impacts; the form and substance of guidance on operationalizing article 206 of UNCLOS, in particular as regards thresholds, and the relationship with existing regulations; issues related to governance, including the degree to which the process should be conducted by States or be "internationalized"; and whether strategic environmental assessments should be included.

82. On capacity-building and the transfer of marine technology, the Chair encouraged further consideration of the issues identified in the Facilitator's oral report, including on: whether there is a need to specify the types of capacity-building and transfer of marine technology in an international instrument and, if there is such a need, the modalities for doing so; the terms and conditions for transfer of marine technology; the form and content of a clearing-house mechanism; issues relating to funding; and whether capacity-building and transfer of marine technology should be mainstreamed across the various topics of the package in an international instrument included in a dedicated section with links to other sections of the instrument.

83. With regard to cross-cutting issues, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including on how guiding principles and approaches could be featured in an international instrument and how they might be applied in the context of the various elements of the package, as well as on issues relating to institutional arrangements, while acknowledging that further in-depth discussion on some aspects thereof and on a number of the other cross-cutting issues, including review, monitoring and compliance, responsibility and liability as well as dispute settlement, is also dependent on gaining greater clarity on the substantive elements of an international instrument.

84. Overall, they recommended that it would be useful to consider the interlinkages between the various topics of the package, including with a view to ensuring coherence and identifying how they mutually support one another. Finally, the Chair encouraged delegations to consider the various proposals and approaches put forward in relation to the various issues discussed by the Preparatory Committee in order to identify constructive ways forward on the issues that require further consideration.

c. Summary: 4th Prep Comm: 10th-21st July, 2017

85. Key Recommendations:

1. That the elements contained in Sections A and B below be considered with a view to the development of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Sections A and B do not reflect consensus. Section A includes nonexclusive elements that generated convergence among most delegations. Section B highlights some of the main issues on which there is divergence of views. Sections A and B are for reference purposes because they do not reflect all options discussed. Both sections are without prejudice to the position of States during the negotiations.

2. To take a decision, as soon as possible, on the convening of an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument under the Convention.

3. Treaty elements within section A that have been broadly agreed upon include the preambular elements, then moving on to the definitional issues and the relationship between other relevant regional and global frameworks. Part III lays out the principles and approaches to the conservation and sustainable use of marine biodiversity, which includes the equitable use of marine genetic resources.

4. In Section B, with regard to the common heritage of mankind and the freedom of the high seas, further discussions are required. With regard to marine genetic resources, including the question of the sharing of benefits, further discussions are required on whether the instrument should regulate access to marine genetic resources; the nature of these resources; what benefits should be shared; whether to address intellectual property rights; and whether to provide for the monitoring of the utilization of marine genetic resources of areas beyond national jurisdiction.

5. With regard to measures such as area-based management tools, including marine protected areas, further discussions are required on the most appropriate decision-making and institutional set up, with a view to enhancing cooperation and coordination, while avoiding undermining existing legal instruments and frameworks and the mandates of regional and/or sectoral bodies. With regard to environmental impact assessments, further discussions are required on the degree to which the process should be conducted by States or be “internationalized”, as well as on whether the instrument should address strategic environmental impact assessments.

6. With regard to capacity-building and the transfer of marine technology, further discussions are required on the terms and conditions for the transfer of marine technology. Further discussions are required on institutional arrangements and the relationship between the institutions established under an international instrument and relevant global, regional and sectoral bodies. A related issue that would also

require further attention is how to address monitoring, review and compliance. With respect to funding, further discussions are required on the scope of the financial resources required and whether a financial mechanism should be established. Further discussions are also required on settlement of disputes and responsibility and liability.

d. CBD Initiatives

86. The CBD has also been at the forefront of many processes regulating marine biodiversity. In 2008, the Ninth Meeting of the Conference of Parties (COP 9) of the CBD, various scientific criteria were recorded. These include: 1) uniqueness/rarity; 2) significance/ importance for survival of species; 3) significance in terms of declining species and/or habitats; 4) vulnerability, fragility, sensitivity, or slow recovery from damage; 5) relevance for biological production; 6) biological diversity; and 7) naturalness.[149] They also provided specific scientific guidance for the evaluation of these claims and designation of specially protected areas.

87. At the CBD COP 11 in Hyderabad in October 2012, such areas were firmed up and a copy of this list was sent to the UN.[150] The COP of the CBD has also taken a key role in scientific research. It established an Expert Workshop on Scientific and Technical Elements of the CBD EIA Guidelines which zeroed in on ABNJ in November 2009.[151] This highlighted some of the pragmatic and governmental oriented concerns to implementing the treaty regime in this regard. These included: 1) distance between the impact of the activity and state; 2) The exorbitant costs of EIA, monitoring, surveillance and other activities; and 3) the willingness of states to undertake capacity building measures in a wholesome manner.[152] The salient features of this path in terms of the way forward1) the different legal framework for the various components of the ABNJ—high seas (Part VII of the UNCLOS) and deep seabed beyond national jurisdiction—the Area (Part XI of the UNCLOS and 1994 Implementation Agreement); 2) the varying institutional framework for ABNJ including the need to foster co-operation between various stakeholders-state and non-state actors; 3) A recognition of the different capacities of states, thereby, leading to a differential compliance standard with inter alia, EIA obligations.[153] The tenth meeting of the COP

[149] Robin M. Warner (2015), "National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea" in Donald R. Rothwell, Alex G. Oude Elferink, Karen N.Scott, Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 764.
[150] CBD, *Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/11/35 (2012) Annex, Decision XI/17.
[151] Ibid.
[152] Robin M. Warner (2015), "National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea" in Donald R. Rothwell, Alex G. Oude Elferink, Karen N.Scott, Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 764.
[153] E. Hey. (1989), *The Regime for the Exploitation of Transboundary Marine Fisheries: The United Nations Law of the Sea Convention Cooperation between States*, Dodrecht: Martinus Nijihoff.

adopted these guidelines and put them in as working procedures.[154] The Guidelines applied to all marine and coastal areas and thereby underpinned the need for the nexus between all sets of actors involved in preserving the oceans as a necessary pre-requisite for the preservation of marine biodiversity.[155]

IV. Recommendations of the AALCO Secretariat

88. A perusal of the existing legal regime on marine biodiversity in areas beyond national jurisdiction has led the AALCO Secretariat to deduce the following recommendations for the Member States to kindly consider:

1. **The need to establish a Working Group on the BBNJ:** The Member States may kindly consider the need to establish a Working Group on the BBNJ.

2. **Working with the United Nations Preparatory Committee towards drafting a new treaty:** The present treaty negotiation process is a positive move towards carving out a lex *specialis* regime that is able to customise itself for the preservation of marine biodiversity beyond national jurisdiction. As AALCO has done in the past with other UNCLOS negotiations, it is imperative that AALCO and AALCO Member States continue to put forward the voices of Asian-African states and their unique socio-economic positions on the same. In particular, with regard to the ongoing debate on marine protected areas, AALCO Member States are required to be careful to ensure that protections guaranteed to developing economies such as International Intellectual Property rights law are not eroded when devising this new regime.

3. **Developing regional and sectoral conservation mechanisms:** Sectoral implementation is based on the premise of flag state responsibility although independent contractors are also subjects of these regulations. In terms of practical implementation, however, such entities are a long way towards complying with each of the regulations contained in the sectoral guidelines and once activities such as deep seabed mining become even more commercially viable, political pressure may be imposed for the modification of these regulations. The development of co-operative mechanisms that monitor compliance and enforce the wide array of instruments would increase the effectiveness of this sectoral framework. While it has taken great strides forward in the absence of an overarching treaty regime that encapsulates the principles developed by the

[154] S. Hart, *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction.* IUCN, Marine Series No. 4 (Gland, Switzerland, IUCN, 2008) at 1, 3.

[155] Robin M. Warner (2015), "National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea" in Donald R. Rothwell, Alex G. Oude Elferink, Karen N.Scott, Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 769.

maritime transportation or deep seabed mining sector, it is unlikely that sectoral regulation alone can preserve MBBNJ. AALCO Member States are required to co-operate with each other and develop institutional and dispute settlement mechanisms.

4. **An integrated approach to scientific diplomacy and governance utilising the global scientific community:** The co-ordination between states and formal organizations comprising of experts has been a crucial development in the present era of globalisation and technological advancement that has precipitated a semiotic relationship between technical expertise and its legal regulation. Utilising "science for diplomacy" could offer a unifying focus in the development of expertise in this area and strengthening international and regional alliances among the scientific community of various member states. It could also foster an inter-disciplinary exchange between civil servants, lawyers and the scientific community. International science cooperation is a duty and a necessity because the challenges of advancing scientific knowledge of BBNJ are beyond the capacity of any one nation, scientific discipline or international organisation to address alone. For international science cooperation to happen, however, requires "top-down" national support and international coordination as well as "bottom-up" scientist–scientist collaborations. This will be affected by the policy and legal frameworks within which science is conducted and sustained. The international science cooperation that underpins science diplomacy could happen serendipitously or be promoted strategically. The potential outcomes of such initiatives would affect science include strengthened international cooperation and collaboration in marine science and technology, requirements for sharing data and information resulting from scientific research (e.g. as part of technology transfer or benefit sharing of marine genetic resources in ABNJ). These issues cannot be considered in isolation in the context of BBNJ alone but for a holistic approach in the region. AALCO should attempt to help such forums which encourage dialogue and co-operation bearing this in mind.