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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



THE LAW OF THE SEA
MARINE BIOLOGICAL DIVERSITY OF AREAS BEYOND NATIONAL
JURISDICTION (BBNJ)

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THE LAW OF THE SEA

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I. Background

A. AALCO and the Law of the Sea

1. The necessity to develop a treaty-based regime for ocean governance was overwhelmingly felt by the international community by the middle of the twentieth century. Pursuant to this, a series of United Nations conferences on the law of the sea were convened in 1958, 1960 and 1973-1982. A number of treaty agreements were produced, and the Third Conference in Montego Bay, Jamaica culminated in the adoption, in 1982, of a comprehensive treaty instrument, the United Nations Convention on the Law of Sea (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 and serves as “one of the most comprehensive” international legal instruments on the subject matter.³

2. The implementing agreements of the UNCLOS, *viz.*, the 1994 Agreement relating to the implementation of Part XI of UNCLOS and the 1995 United Nations Fish Stocks Agreement entered into force on 28 July 1996 and on 11 December 2001 respectively. 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 remains the framework within which a third implementing agreement- an international legally binding instrument (ILBI) under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) is presently being negotiated.

3. The tryst of the Asian-African Legal Consultative Organization (AALCO) with the legal regime of 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

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.

Ceylon (now Sri Lanka) and India) and “Law of the Territorial Sea” (raised by Ceylon).⁴But 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 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. New concepts such as the Exclusive Economic Zone (EEZ), Archipelago States and Rights of Land Locked States were developed and deliberated upon 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. As of 28 May 2021, 168 states have ratified the UNCLOS.⁷ Forty-two AALCO Member States figure in that list.⁸ 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

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.*

⁶*Ibid.*

⁷The 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 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 (page last updated on 28 May 2021).

⁸These Member States and their dates of ratification 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), Philippines (8 May 1984), Egypt (26 August 1983) and Ghana (7 June 1983); *Ibid.*

AALCO Secretariat for the Organization's Annual Sessions have continuously been reporting on the progress of work in the International Seabed Authority (ISA),⁹ 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. 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, and to further peruse the interlink of the law of the sea with other concerns, e.g., those pertaining to the environment, exploitation of mineral resources, etc.

B. An Introduction to the Topic

6. The engagement of AALCO with the subject of the Law of the Sea has perhaps been, in recent times, the most intense on the topic of marine biodiversity. The importance of BBNJ cannot be overemphasized: it provides a wealth of resources and services, including seafood and raw materials, genetic and medicinal resources, air purification, climate regulation, and habitat and cultural services.¹⁰ AALCO 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. The salient topic for focused deliberation at the Fifty-Ninth Annual Session of AALCO is conservation and sustainable use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ). The brief seeks to capture the pertinence of the topic with respect to the interests and concerns of the AALCO Member States, and takes a stock of the key issues and emerging concerns in charting a new treaty regime for governing of BBNJ under the auspices of the UNCLOS.

⁹A MoU was entered into between AALCO and ISA during the Fifty-Seventh Annual Session of AALCO in 2018.

¹⁰Global Ocean Commission (2014), *From Decline to Recovery: A Rescue Package for the Global Ocean*, at 5-6, http://www.some.ox.ac.uk/wp-content/uploads/2016/03/GOC_report_2015.July_2.pdf.

8. The timeliness of the topic accrues from the steady broadening of the spectrum of threats to marine resources and biodiversity from established and emerging human uses¹¹ in the vast areas of the ocean beyond national jurisdiction (ABNJ).¹² The threats include pollution (in all its forms), overfishing and intensified aquaculture, shipping and expansion of global maritime trade, deep seabed mining, ocean warming, ocean acidification, and numerous emerging uses of the oceans, which include bio prospecting, geo-engineering, energy development, and climate change mitigation efforts, such as seabed sequestration of carbon dioxide and ocean fertilisation, among others.¹³

9. The relevance of the topic to the AALCO Member States is affirmed by their participation at the Intergovernmental Conference on an ILBI under the UNCLOS on the conservation and sustainable use of BBNJ (IGC). Inclusion of this topic as an agenda item in the Fifty-Ninth Annual Session of AALCO presents to AALCO the opportunity, *firstly*, to be a forum for inspiring debates and discussions on the topic from an Asian-African perspective by inviting its constituent Member States to share their legal and socio-political views on the topics; and *secondly*, to strive to contribute to the treaty-making process under the UNCLOS by constituting and setting in motion the envisaged AALCO Open-ended Working Group on BBNJ, an undertaking disrupted by the occurrence of the COVID-19 pandemic.

10. AALCO recognizes the need for exchange of views, experiences and information on conservation and sustainable use of marine biodiversity. In view of this, during the Fifty-Seventh Annual Session of AALCO, held in Tokyo on 8-12 October 2018, one of the proposals before the Plenary under the Agenda Item “Law of the Sea” was towards the establishment of an Open-ended Working Group on BBNJ under the auspices of AALCO. The proposal was expressly seconded by three Member States, *viz.*, the Republic of Indonesia,¹⁴ the United Republic of Tanzania¹⁵ and the Kingdom of Thailand,¹⁶ and opposed

¹¹H. Scheiber (2011), “Economic Uses of the Oceans and the Impacts on Marine Environments: Past Trends and Challenges Ahead”, in D. Vidas and P. J. Schei (eds.), *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues*, Leiden: Martinus Nijhoff, 65-97, 65-66.

¹²Herein, areas beyond national jurisdiction (ABNJ) refers to all those areas of the high seas water column seawards of the outer limit of coastal States’ Exclusive Economic Zones (EEZs) and all those areas of the seabed beyond the edge of coastal States’ continental margins.

¹³Kristine Dalaker Kraabel (2019), “The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach” in Myron H. Nordquist and John Norton Moore (eds.), *The Marine Environment and United Nations Sustainable Development Goal 14*, Centre for Oceans Law and Policy: Brill Nijhoff, 137-172, 140-41.

¹⁴ Draft Verbatim Record of Discussions, Fifty-Seventh Annual Session of AALCO 2018 at http://www.aalco.int/Final%20Verbatim%20Record_Fifty%20Seventh%20Annual%20Session%202018.pdf, 191.

by none. Thus mandated, terms of reference have been drafted by the Secretariat, and comments received thereupon from four Member States, *viz.*, Kenya, Japan, Malaysia and the People's Republic of China.

II. Deliberation on the Topic at the Fifty-Eighth Annual Session of AALCO in 2019

11. During the Fifty-Eighth Annual Session of AALCO, held in Dar es Salaam, the United Republic of Tanzania on 21-25 October 2019, the Secretary-General of AALCO, while delivering the introductory remarks on the agenda item "The Law of the Sea", traced the antiquity and fundamentals of engagement of AALCO with the regime. It was stated that the Secretariat's reports furnish a backdrop to the topics proposed for deliberation, one of which was BBNJ. The Member States were encouraged to discuss the topic taking into account the pending constitution of the AALCO open-ended Working Group on BBNJ, whose terms of reference had been finalized. It was pointed out that the Secretariat proposed to shortly nominate the Chairperson, Vice Chairperson and the Rapporteur of the Working Group for approval of Liaison Officers on behalf of the Member States.

12. Captain Ibrahim Mbiu Bendera, as an expert from the United Republic of Tanzania, in his presentation highlighted, *inter alia*, different aspects of the regulation of BBNJ. The inadequacy of the existing legal framework in addressing the issues of nascent genesis, pertinence or awareness, *vis-à-vis* conservation and sustainable use of BBNJ, and the need for an ILBI on the topic was extensively discussed. The international efforts to create a legally binding instrument for the conservation and sustainable use of BBNJ as a supplementary agreement to the UNCLOS- the vision and the landmarks attained- were illustrated in detail, and it was recommended that the AALCO Member States ought to utilize the IGC meetings to discuss various matters in the draft of the ILBI.

13. Thereafter, the President of the Fifty-Eighth Annual Session of AALCO, H.E. Amb. Dr. Augustine P. Mahiga opened the floor for comments by Member States and observers. The following delegations presented their statements on the topic of BBNJ in the agenda item: the Republic of Indonesia, the Republic of India, the Republic of Korea, the United

¹⁵*Id.* at 200.

¹⁶*Id.* at 213.

Republic of Tanzania, the Republic of Kenya, Japan, the Islamic Republic of Iran, the Sultanate of Oman, the Socialist Republic of Viet Nam and the People's Republic of China.

14. The delegate of the Republic of Indonesia registered appreciation for the work being done by the IGC Secretariat in preparation of the zero draft of the ILBI, and welcomed the then ongoing process taking place in the third session of the IGC. Several issues were highlighted as worthy of discussion and negotiation by State Parties.

15. *Firstly*, it was suggested that the scope of Marine Genetic Resources (MGR) should be formulated in future agreements, and fish should be considered as a source of MGR. There is also a need for further discussions whether derivatives of MGR will become one of the objects of the BBNJ provisions, especially in relations with access and benefit sharing. *Secondly*, on the issue of capacity-building and transfer of marine technology, Indonesia encourages the establishment of mandatory mechanism for capacity-building and transfer of marine technology. With regard to the mechanism for benefit sharing, it should cover the monetary scheme and non-monetary benefit. *Thirdly*, concerning Area-Based Management Tools (ABMT) and Environmental Impact Assessment (EIA), belief was expressed in favour of adoption of adjacency principle in this provision. *Fourthly*, Indonesia is of the view that archipelagic states have special characteristics and therefore should be prioritized in the benefit sharing scheme and capacity-building.

16. Accentuating the necessity of having a legal regime on BBNJ that would not only boost conservation efforts but also augment scientific investment on the exploration of innumerable species from ABNJ region before they become extinct, the delegate of the Republic of India highlighted the State's participation in the negotiations all through including in the recently concluded third IGC on the instrument. On the issue of MGRs, including sharing of benefits, the Indian delegation expressed the view that the scope of the instrument must cover every aspect of the MGRs in the Area and high seas without prejudice to the relevant provisions of the UNCLOS and other relevant instruments, and that it is desirable to regulate access to MGR without prejudice to the regime on Marine scientific research provided under the UNCLOS.

17. The Indian delegation also observed that there should be a monitoring mechanism to establish traceability of MGR for meaningful sharing of benefits. As regards the objectives

of benefit sharing, support was recorded for the application of the principle of Common Heritage of Mankind as the underlying principle of benefit sharing. On the issue of benefit sharing modalities, it was noted that sharing of benefit shall be done at different stages. As regards EIA, the UNCLOS provides guidance in part XII of the Convention particularly under Articles 192, 204, 205 and 206. The desirability of having a minimum threshold of impact based on ocean-based/ sound scientific principles as the basis for the EIA studies was stressed. It was also mentioned that EIA activities carried out by the proponent State and report submitted by them ought to be reviewed by a competent scientific and technical body, and cue might be taken from the EIA regime provided in the Madrid Protocol on Environmental Protection to the Antarctic Treaty and the International Seabed Authority.

18. On the topic of ABMTs, including MPAs, the Indian delegation stated that there is a need for institutional mechanism to coordinate ABMTs, on the basis of a sound science-based approach, ecosystem uniqueness, application of precautionary principle, transparency and accountability and due regard to coastal States involved in the process. Procedure to establish due diligence in identification of ABMTs and MPAs, consultation process through regional cooperation and institutional mechanism for final adoption are important components that need to be discussed. On Capacity-building and Transfer of Technology, the Indian delegation noted that capacity-building should be need-based and country driven. As regards the AALCO Open-ended Working Group on BBNJ, the Indian delegation advised that working group could be a forum for deliberations and capacity-building exercises and it should avoid any duplication of the process underway at the United Nations.

19. The delegate of the Republic of Korea, while lauding the work of the Division for Oceans Affairs and the Law of the Sea of the Office of Legal Affairs of the UN on the zero draft, emphasized that in order to promulgate a legally binding instrument that can be widely accepted and contribute substantially to the conservation and sustainable use of BBNJ, the international community needs to work together to come up with an instrument that is feasible and practical while not undermining the existing regime of the law of the sea, as already agreed upon. The Republic of Korea expressed willingness to actively engage in the current IGC with other States and stakeholders to build upon the draft text and expand the common ground for discussions on key BBNJ issues.

20. The delegate of the United Republic of Tanzania deliberated on the increasing vulnerability of the ABNJ to human activities. The delegate expressed the view that indirect negative impacts of the ABNJ fishing, industrialization and pollution, communicated via oceanographic, cultural and ecological connectivity to the coastal waters of the developing countries should be of concern to all AALCO Member States and others. From this perspective, three recommendations were made. *Firstly*, AALCO Member States should support the ongoing UN negotiations to establish an ILBI to ensure that sectoral activities in ABNJ are managed equitably. *Secondly*, AALCO Member States should support the position of G77 Group and China and African Group in ensuring that developed countries enable developing countries on capacity-building, transfer of technology and funding in order to utilize the area equitably. *Thirdly*, AALCO Member States should work together and identify the areas of the ABNJ that are in the most urgent need of protection on the grounds of the strength of their potential downstream impacts on the coastal populations.

21. The delegate of the Republic of Kenya reiterated that progress made in regulation of exploration and exploitation of marine resources should be in consonance with the strengthening of the institution that is expected to participate in the commercial exploitation of these resources for the benefit of the rest of all parties. Such appropriation would be in line with the principle of ensuring that the benefits accruing from these activities benefit not a few but mankind as a whole. The AALCO Secretariat was appreciated for establishing the Open-ended Working Group on BBNJ and it was noted that Kenya looked forward to working closely with the group which would serve as the forum where Member States can articulate their positions on the topic.

22. While attaching great importance to the role played by the IGC, the delegate of Japan highlighted certain noteworthy key elements. *First*, as confirmed in the related UN resolutions, implementing agreement on BBNJ should be fully consistent with the UNCLOS. *Second*, it should not undermine relevant global, regional and sectoral bodies, but rather, it should cooperate with them. *Third*, conservation and sustainable use of BBNJ should be effective and universal for the benefit of the international community as a whole; for this, science based discussions are essential.

23. The delegate of the Islamic Republic of Iran observed that the continuous consideration of the topic by AALCO could contribute to the existing discussion on the law

of the sea issues currently on the agenda of the international forums. On the issue of access and benefit sharing, and the possible role of intellectual property in this regard, it was suggested that the IGC should utilize the guiding principles put forward by CBD and the Nagoya Protocol on Access and Benefit-sharing, namely prior informed consent (PIC) as well as fair and equitable benefit sharing. With respect to transfer of technology, the new instrument should define general obligations in promoting cooperation to develop capacity and transfer of marine technology while recognizing the special needs of developing countries.

24. It was underlined that the success of the new instrument in conservation and sustainable use of BBNJ depends on effective participation of all countries and this goal is not feasible without effective capacity-building and transfer of marine technology. They are closely linked and they are both fundamental to remove imbalances between countries so as to enable developing countries to access and benefit from BBNJ. Needless to say that effective capacity-building and technology transfer requires institutional capacity, concrete legally binding obligations while recognizing the special needs of developing countries and sustained and adequate funding. Thus, all countries, including all AALCO Member States, have a shared responsibility toward protecting seas, conservation, sustainable use and sharing equitable benefit deriving from BBNJ.

25. The delegate of the Sultanate of Oman stated that AALCO has an active role to play in, *inter alia*, preservation of biodiversity in marine areas not subject to the national jurisdiction of the coastal State, and to make the voices of Member States heard on these important issues on international forums.

26. The delegate of the Socialist Republic of Viet Nam apprised the meeting of the importance the State attaches to deliberations on the law of the sea at multilateral fora with a view to understanding and ensuring better compliance with the UNCLOS. Viet Nam has been actively participating in the IGC since its preparatory meeting. It was suggested, firstly, that the definition of technology and transfer of marine technology should be drafted broadly to the interest of developing countries. Capacity-building and transfer of marine technology should be mandatory and linked with the access to MGRs and exploitation activities. Secondly, Viet Nam reiterated its consistent position that MGRs in areas beyond national jurisdiction shall be considered as “common heritage of mankind”, and therefore, the

“freedom of high seas” regime should not apply to access *in situ* to MGRs. Benefits from BBNJ should be shared in an equitable manner.

27. Terming the negotiation to draft ILBI under the auspices of the UN as one of the most important international rules-making process in the field of the Law of the Sea, the delegate of the People’s Republic of China noted that the topics identified in the package agreement included in the resolution of the General Assembly in 2011 should be advanced as a whole in a package. The regulation of access to MGRs and safeguarding the freedom of the high seas, the sharing of benefits, respecting the intellectual property rights and the rights of marine genetic material holders ought to be balanced. Area-based management tools should focus on marine biodiversity while maintaining a reasonable balance between the conservation and sustainable use. The threshold to trigger EIA should be consistent with UNCLOS and be state-driven. China attaches great importance to capacity building and transfer of marine technology to developing countries. It was recommended that AALCO Member States should enhance coordination on issues concerning BBNJ, and contribute to this important rules-making process in the area of the law of the sea.

III. Ongoing Developments on the Theme

A. The Progress so far towards drafting an ILBI

28. Perceiving the urgency of the issue of conservation and sustainable use of BBNJ, and discerning the gaps in the UNCLOS to comprehensively deal with the issue, realization had dawned on the international community more than a decade ago that an ILBI under the UNCLOS on the conservation and sustainable use of BBNJ needed to be expeditiously negotiated. The UNCLOS established in Part XII an expansive framework for protection and preservation of the marine environment, the provisions whereof were designed to cover all areas of ocean space including ABNJ. Article 192 of the UNCLOS, unlimited in geographical scope, obliges States to protect and preserve the marine environment. The complementary relationship between the UNCLOS and other conventions on protection and preservation of

the marine environment was taken note of,¹⁷ thereby anticipating and encouraging the ongoing reconciliation between the UNCLOS and other relevant conventions.

29. However, implementing governance structures to support an integrated system of environmental protection for ABNJ, including conservation of marine biodiversity, has always posed considerable challenges in terms of scale and consistency between the two separate trajectories of the law of the sea and international marine environmental law.¹⁸ Moreover, modern conservation norms, such as EIA, MPAs, marine spatial planning and development mechanisms such as technology transfer and capacity-building are inadequately addressed in the extant legal and institutional framework for ABNJ.¹⁹ The insufficiency in addressing the issues of nascent genesis, pertinence or awareness has been attributed to the inability to foresee their relevance at the time of adoption of the UNCLOS.²⁰ For example, problems that have either arisen since its ratification, such as exploitation of MGRs, or worsened since the treaty's completion in 1982, such as marine pollution, were not addressed.²¹ These gaps were also ascribed to the fact that the provisions and definitions were not specific enough for States to be certain of the treaty's meaning at the time of the UNCLOS, such as the application of the common heritage of mankind.²²

30. Negotiating a multi-lateral regime is a multi-tiered and multi-step process that evolves after a concerted period of negotiations. In 2015, the UNGA Resolution 69/ 292²³ to establish an ILBI on the conservation and sustainable use of BBNJ provided that negotiations to develop the new ILBI ought to address the four elements of a package deal agreed by States in 2011. These elements comprise of MGRs including questions on the sharing of benefits;

¹⁷ Article 237 UNCLOS.

¹⁸Robin Warner (2018), "Oceans of Opportunity and Challenge: Towards a Stronger Governance Framework for Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction", *Asia-Pacific Journal of Ocean Law and Policy*, 3: 157, 159.

¹⁹ D. Freestone (2009), "Modern Principles of High Seas Governance: The Legal Underpinnings", *International Environmental Policy and Law*, 39:44.

²⁰TullioScovazzi (2016), "The negotiations for a binding instrument on the conservation and sustainable use of marine biological diversity beyond national jurisdiction", *Marine Policy* 70:188-191.

²¹ Rachel Tiller and E. Nyman (2018), "Ocean plastics and the BBNJ treaty-is plastic frightening enough to insert itself into the BBNJ treaty, or do we need to wait for a treaty of its own?", *Journal of Environmental Studies and Sciences*, 8 (4): 411- 415.

²² Rachel Tiller *et. al.* (2019), "The once and future treaty: Towards a new regime for biodiversity in areas beyond national jurisdiction", *Marine Policy*, 99: 239- 242, 239.

²³ United Nations General Assembly, Development 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, resolution adopted by the General Assembly on 19 June 2015, GA Res 69/292, 69th sess. Agenda Item 7, at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/187/55/PDF/N1518755.pdf?OpenElement>.

measures such as ABMTs, including MPAs; EIAs; and capacity-building and the transfer of marine technology. It is noteworthy that Resolution 69/292 also stipulated that the process to develop the ILBI ought not to undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.²⁴

31. The Preparatory Committee (PrepCom) was established vide resolution 69/292 of 19 June 2015, pursuant to the recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ which met nine times from 2006 to 2015. A major impetus to the establishment of the Working Group came from the United Nations Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) which has discussed a wide range of oceans issues since its inception in 1999.²⁵ The four sessions of the meetings of the PrepCom held in 2016 and 2017 identified additional cross-cutting issues for consideration including definitions, scope of the instrument, relationship of the instrument to other instruments and frameworks, institutional arrangements, compliance, responsibility and liability, dispute settlement and final clauses.²⁶ In its Report of 31 July 2017,²⁷ the PrepCom recommended to the General Assembly elements (contained in Sections A and B of its Report) for consideration with a view to the development of a draft text of the ILBI. While section A included non-exclusive elements that generated convergence among most delegations, section B highlighted some of the main issues on which there was divergence of views.²⁸

32. Thus, more than a decade of international discussion on BBNJ culminated in United Nations General Assembly (UNGA) Resolution 72/249 of 24 December 2017,²⁹ whereby the

²⁴Paragraph 3 of the Resolution.

²⁵UNGA, *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).

²⁶Preparatory Committee established by General Assembly resolution 69/292: Development 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, *Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee*, http://www.un.org/depts/los/biodiversity/prepcom_files/IWGs_Indictive_Issues_and_Questions.pdf.

²⁷Report of the Preparatory Committee established by General Assembly resolution 69/292: Development 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, at <https://undocs.org/A/AC.287/2017/PC.4/2>.

²⁸A/AC.287/2017/PC.4/2, at pages 7-17.

²⁹United Nations General Assembly, 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, resolution adopted on 24 December 2017, GA res 72/ 249, seventy-second session, agenda item 77, at <https://undocs.org/en/a/res/72/249>.

General Assembly decided to convene an IGC, under the auspices of the United Nations, to consider the recommendations of the PrepCom. The Conference held a three-day organizational meeting in New York, from 16 to 18 April 2018, to discuss organizational matters, including the process for the preparation of the zero draft of the ILBI. The IGC has been scheduled to meet in four sessions. The first session was convened from 4 to 17 September 2018; the second session from 25 March to 5 April 2019; and the third session from 19 to 30 August 2019. The fourth session was scheduled to take place from 23 March to 3 April 2020. However, in light of the situation concerning COVID-19, by Decision 74/543 of 11 March 2020, the General Assembly decided to postpone the fourth session of the conference to the earliest possible available date to be decided by the General Assembly.³⁰

33. Ms. Rena Lee of Singapore has been nominated as President-designate of the Conference by the President of the General Assembly, and 15 Vice-Presidents have been elected to the Bureau of the Conference from Algeria, the Bahamas, Belgium, Brazil, Bulgaria, Canada, China, Japan, Mauritius, Mexico, the Federated States of Micronesia, Morocco, Poland, the Russian Federation and the United States of America at the first session.³¹

34. The draft text of an agreement 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 was released in June 2019 to “facilitate further progress in the negotiations”.³² The draft, the content of which is “without prejudice to the position of any delegation on any of the matters referred to therein and does not preclude consideration of matters not included in the document”,³³ defines relevant terms, lays down the objective and application of the Agreement, and acknowledges the relationship between this Agreement and the Convention and other existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. Part II of the draft Agreement pertains to MGRs, including questions on the sharing of benefits and Intellectual Property Rights; Part

³⁰UNGA, A/74/L.41, Draft decision submitted by the President of the General Assembly Intergovernmental conference on 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, 9 March 2020.

³¹Officers, IGC on BBNJ, at <https://www.un.org/bbnj/content/officers>.

³²Note by the President, Draft text of an agreement 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, A/CONF.232/2019/6, at <https://undocs.org/en/a/conf.232/2019/6>.

³³*Ibid.*

III pertains to Measures such as ABMTs, including MPAs; Part IV to EIAs; and Part V to Capacity Building and Transfer of Marine Technology. Part VI enshrines the institutional arrangements and Part VII the financial resources and mechanism. The procedures for settlement of disputes are laid down in Part IX.

35. The promising role that international cooperation and coordination could play in the scheme has been emphasized throughout the draft. Procedures to conduct monitoring and review have been set forth recurrently. The process of drafting the first-ever treaty addressing BBNJ entered a new phase on 19 August 2019 as Member States began text-based deliberations, with a view to reaching an agreement by the first half of 2020.³⁴

36. Thereafter, in response to the invitation by the President of the Conference in her Note of 18 November 2019,³⁵ textual proposals on the President's revised draft text of the treaty were submitted by delegations by 20 February 2020, for consideration at the fourth session of the IGC. A compilation of proposals received by that deadline has been published by the Secretariat of the Conference.³⁶

37. Vide a letter dated 10 September 2020,³⁷ the President had underlined the need to continue to work during the intersessional period, to maintain the momentum of the process. In line with consultations held with various delegations earlier the same year, as well as with the facilitators of the informal Working Groups, and the bureau of the Conference, she has set out the broad schedule for an intersessional work programme.³⁸ The intersessional work programme is designed to assist delegations to enhance their understanding of the issues and the views of different delegations. It is pertinent to note that the programme is not intended to be a substitute for the negotiations, which will resume during the fourth session. The intersessional work had been set in motion from 14 September 2020, and was concluded on

³⁴UN, Meetings Coverage and Press Releases, Delegates Begin Text-Based Deliberations for First-Ever Treaty on Managing Marine Biodiversity beyond National Jurisdiction Areas, at Start of Conference Session, 19 August 2019, at <https://www.un.org/press/en/2019/sea2108.doc.htm>

³⁵ A/CONF.232/2020/3, Note by the President, Revised draft text of an agreement 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.

³⁶ Textual Proposals Compilation, 28 Feb 2020 at https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_-_28_feb_2020.pdf; Textual Proposals Compilation, 15 April 2020, at https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf.

³⁷Letter dated 10 September 2020, at https://www.un.org/bbnj/sites/www.un.org.bbnj/files/intersessional_work_-_bbnj_president_letter_to_delegations.pdf

³⁸*Ibid.*

19 March 2021. The areas of discussion in the intersessional work were EIAs; MGRs, including questions on the sharing of benefits; measures such as ABMTs, including MPAs; capacity-building and the transfer of marine technology; and cross-cutting issues.

38. Owing to the exigencies posed by the COVID-19 pandemic, the General Assembly, vide its Resolution 75/239 of 31 December 2020,³⁹ had requested the Secretary-General to convene the fourth session of the IGC from 16 to 27 August 2021. However, noting with concern the continued situation concerning COVID-19, and heeding to a letter by the President of the IGC dated 4 June 2021,⁴⁰ the General Assembly has decided in its decision 75/570 dated 9 June 2021 to postpone the fourth session of the conference to the earliest possible available date in 2022, preferably during the first half of the year.⁴¹ The General Assembly, in its decision, has requested the Secretary-General to convene the fourth session of the conference, with full conference services, including documentation, as required, for a duration of 10 days, on the dates to be determined by the Secretary-General of the UN, in consultation with the President of the IGC; and to provide the necessary support and services for online discussions to be convened by the President of the IGC in 2021.⁴²

B. Engagement of AALCO Member States in the Sessions of the IGC

39. All three sessions have perceived extensive participation from the Member States of the UN, parties to the UNCLOS, members of the specialized agencies of the UN, organizations that have received a standing invitation to participate as observers in the sessions and the work of the General Assembly, United Nations funds, programmes, bodies and offices, and other intergovernmental organizations and non-governmental organizations.

40. The Member States of AALCO and the G-77 have been well represented at the sessions.⁴³ 32 Member States of AALCO attended the first substantive session,⁴⁴ and 36

³⁹ A/RES/75/239, Resolution adopted by the General Assembly on 31 December 2020 on Oceans and the Law of the Sea, at <https://undocs.org/en/A/RES/75/239>.

⁴⁰ Letter dated 4 June 2021 by Ms. Rena Lee, President of the BBNJ IGC, at https://www.un.org/bbnj/sites/www.un.org.bbnj/files/igc-4_-_letter_to_delegations.pdf

⁴¹ A/75/L.96, Draft Decision dated 9 June 2021, at <https://www.undocs.org/en/A/75/L.96>

⁴² *Ibid.*

⁴³ Lists of Participants, at <https://undocs.org/en/A/CONF.232/2018/INF.3>; <https://undocs.org/a/conf.232/2019/inf.3/rev.2>; and <https://undocs.org/A/CONF.232/2019/INF/5/Rev.1>.

Member States attended the second substantive session.⁴⁵The third substantive session was attended by 33 Member States of AALCO.⁴⁶ AALCO, being an organization that has received a standing invitation to participate as an observer in the sessions and the work of the General Assembly, was represented by Dr. Roy S. Lee, Permanent Observer of AALCO to the UN at the substantive sessions.

41. In response to the invitation by the President of the Conference in her Note of 18 November 2019, textual proposals on the President's revised draft text of the treaty were submitted by 9 AALCO Member States, namely, Indonesia, Japan, Kenya, Pakistan, the Philippines, the Republic of Korea, Senegal, South Africa and Turkey.⁴⁷

IV. Recommendations from the Secretariat

42. The ILBI promises to be “one of the most significant developments in UNCLOS for over 20 years”.⁴⁸ AALCO commends the role that the Member States have been playing in negotiating this implementing agreement, and urges them to continue to voice their concerns during the negotiation preceding the finalization of the text of ILBI. AALCO Member States should coordinate efforts on all aspects pertaining to BBNJ and work towards strengthening the law of the sea framework at the international level.

43. AALCO has finalized the Terms of Reference for the establishment of AALCO Open-ended Working Group on BBNJ, pursuant to the decision on the same during the 57th Annual Session. Due to the pandemic situation, the process of setting in motion the Working Group has received a setback. The Secretariat assures the Member States that it shall shortly

⁴⁴The first session was attended by Bangladesh, Brunei Darussalam, People's Republic of China, Cyprus, Egypt, Republic of the Gambia, Ghana, India, Indonesia, Islamic Republic of Iran, Iraq, Japan, Kenya, Lebanon, Malaysia, Mauritius, Myanmar, Nepal, Nigeria, Oman, Philippines, Republic of Korea, Saudi Arabia, Sierra Leone, Singapore, South Africa, Sri Lanka, Sudan, Thailand, Turkey, United Republic of Tanzania, Socialist Republic of Viet Nam.

⁴⁵ In addition to the aforementioned Member States, Cameroon, Kuwait, Mongolia and the State of Palestine attended the second substantive session.

⁴⁶Libya, Senegal, Uganda and Yemen were the new participants in a substantive session of IGC. Brunei Darussalam, Republic of the Gambia, India, Kenya, Lebanon, Mongolia and the State of Palestine did not attend the third substantive session.

⁴⁷*Supra* note 36.

⁴⁸Kahlil Hassanali (2018), “Approaching the implementing agreement to UNCLOS on biodiversity in ABNJ: Exploring favorable outcomes for CARICOM”, *Marine Policy* 98: 92-96.

nominate the Chairperson, Vice Chairperson and the Rapporteur of the Working Group for approval of Liaison Officers on behalf of the Member States.

44. The Secretariat proposes that the Working Group should immediately commence its responsibilities after the approval of the Chairperson, Vice Chairperson and the Rapporteur by Liaison Officers on behalf of the Member States.