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**ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**



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**THE LAW OF THE SEA**

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# **THE LAW OF THE SEA**

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## **I. INTRODUCTION**

### **A. AALCO and The Law of the Sea**

1. AALCO has historically been an important platform for Asian and African States for fostering legal cooperation and dialogue on matters of pertaining to law of the sea. While the topic “The Law of the Sea” was formally introduced in the agenda of AALCO in 1970 at the initiative of the Republic of Indonesia, AALCO had started its engagement with the topic in 1957 in its very first Annual Session. Two issues of the topic were brought on the work table on the topic, namely, “Law relating to the Regime of the High Seas including Questions relating to the rights to seabed and subsoil in open sea” (referred by Ceylon, now Sri Lanka and India) and the “Law of the Territorial Sea” (referred by Sri Lanka). However, on account of time exigencies, AALCO’s influence on the 1958 Geneva Conference on the Law of the Sea was limited. In the following years, AALCO played a pivotal role especially from 1968-1982 by facilitating meaningful participation from Asian and African countries in the international negotiations that followed Maltese Ambassador Arvid Pardo’s famous speech at the United Nations General Assembly in 1967 for the creation of a global legal instrument for regulating the world’s seas oceans.

2. Ever since 1970, the topic has played a prominent role in the agenda of AALCO and taken up regularly in its Annual Sessions. New concepts such as Exclusive Economic Zone (EEZ), Archipelagic States and the Rights of Land Locked States were developed and deliberated upon in AALCO’s Annual Sessions and were subsequently codified in the United Nations Convention on the Law of the Sea (UNCLOS).

3. Since the adoption of UNCLOS in 1982, AALCO’s Work Programme focussed its efforts in assisting Member States to become parties to UNCLOS. As on date, 170 parties have ratified UNCLOS of which forty-two are AALCO Member States. With the entry into force of UNCLOS

in 1994, new institutions envisaged by the legal regime have taken shape and these developments have been closely followed by AALCO.

4. Furthermore, AALCO has been continuously reporting on developments taking place in the International Tribunal on the Law of the Sea (ITLOS), the International Seabed Authority (ISA), the Commission on the Limits of the Continental Shelf (CLCS), the Meeting of State Parties to the UNCLOS and other related developments. In recent times, AALCO's engagement has been most intense on the topic of marine biodiversity, including AALCO's deliberations 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. In pursuance of the mandate received from the resolution adopted on the Law 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*".

5. Going forward, AALCO remains committed to further exploring new and emerging dimensions of the topic while updating Member States on developments happening in conventional realms of the topic. In this regard, it is the endeavour of the Secretariat to explore the interface of the discipline with other areas e.g., those pertaining to the environment and exploitation of mineral resources among others.

## **B. Deliberations at the Sixty-First Annual Session of AALCO**

6. The topic was introduced by Mr Jun Yamada, the Deputy Secretary-General of AALCO. In his statement, Mr Yamada spoke of the history of deliberations on the Law of the Sea in AALCO Annual Sessions. He highlighted AALCO's contributions to concepts like the Exclusive Economic Zone and the rights of landlocked States which was later incorporated into UNCLOS. The Deputy Secretary-General gave a summary of the focus points of the topic for the Sixty-First Annual Session, which include the Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ), known as the High Seas Treaty, and combating Illegal,

Unreported, and Unregulated (IUU) fishing. Mr Yamada stressed the need for regional cooperation among Asian and African nations to tackle challenges facing sustainable fisheries management.

7. Thereafter, the President of the Sixty-First Annual Session and Chair of the Meeting, H.E. Prof. Yasonna H. Laoly, Minister of Law and Human Rights, the Republic of Indonesia, opened the floor for statements. The following delegations delivered statements on the agenda item: the Republic of Indonesia, the Islamic Republic of Iran, the Kingdom of Thailand, Japan, the Republic of India, the Republic of Kenya, the Socialist Republic of Vietnam, Malaysia, the People's Republic of Bangladesh, the Republic of the Philippines, the Republic of Türkiye, the Kingdom of Bahrain, the Republic of Cyprus, the People's Republic of China, the Republic of Korea, and the Russian Federation.

8. **The Delegate of the Republic of Indonesia** expressed Indonesia's appreciation for the adoption of the BBNJ or High Seas Treaty under the United Nations Convention on Law of the Sea (UNCLOS), highlighting their early commitment as an initial signatory. Indonesia has historically demonstrated dedication to ocean conservation, being one of the pioneering nations to sign UNCLOS in 1982. The delegate urged Asian and African nations to focus on implementing the BBNJ agreement, particularly in marine genetic resources and protected areas. The delegate also addressed the issue of illegal fishing, describing it as a transnational crime with severe economic and environmental impacts. They emphasised the need for collective efforts to combat illegal fishing and proposed that AALCO conduct a comprehensive study on the issue, engaging experts to foster international cooperation and align domestic regulations with United Nations Transnational Organized Crime (UNTOC) provisions.

9. **The Delegate of the Islamic Republic of Iran** praised the President's leadership and stressed the importance of an international legal framework for conserving marine biological diversity beyond national jurisdictions. They endorsed the BBNJ agreement under UNCLOS, emphasising its role in fostering international cooperation and addressing challenges. The

delegate highlighted two key elements of the agreement: an access and benefit-sharing mechanism for marine resources and the necessity of capacity building and marine technology transfer. They noted the importance of fair access to resources and technology for developing countries and stressed that intellectual property rights should not hinder technology transfer. Additionally, the delegate called for enhanced collaboration with existing legal instruments and bodies. Addressing illegal, unreported, and unregulated fishing, they underscored its environmental, economic, and social impacts, advocating for regional and international cooperation to combat these unlawful acts effectively.

10. **The Delegate of the Kingdom of Thailand** acknowledged that Illegal, Unreported and Unregulated (IUU) fishing posed a significant threat to marine fisheries' sustainability and undermined efforts to manage fisheries, affecting security, biodiversity, and causing economic losses for coastal states. Thailand, as a coastal state, emphasised the importance of equitable use of marine resources and environmental protection. The delegate thanked AALCO for discussing this issue and shared Thailand's experience with problems such as unauthorised fishing and concealment of vessel registration. Thailand has established a national plan (NPA-IUU) aligning with international standards like UNCLOS and the Port States Measure Agreement. Efforts included reducing fishing levels, amending laws, regulating vessel inspections, and enhancing surveillance. The delegate informed that Thailand led the ASEAN Network for Combating IUU Fishing, which has been recognised by the European Union. The delegate praised the BBNJ Agreement for addressing biodiversity loss and stressed its benefits for all states, particularly developing countries. The delegate relayed that Thailand was in the process of signing the Agreement and saw AALCO's role in facilitating its implementation.

11. **The Delegate of Japan** highlighted the importance of the BBNJ Agreement for maintaining maritime order. The delegate informed that Japan notes the necessity of domestic legislation to implement the Agreement's obligations and urged countries to share their experiences in this regard. Japan also emphasised the need for thorough discussions on basic rules and institutional design for effective global implementation of the Agreement. On IUU

fishing, the delegate acknowledged it as a threat to sustainable fisheries and a complex issue involving maritime security and organised crime. Japan, as a major fishing country, has been actively addressing IUU fishing through international cooperation, compliance with conservation measures, and contributions to Regional Fisheries Management Organizations (RFMOs). Japan has also participated in discussions at international forums, chaired G7 discussions, and provided bilateral assistance. The delegate mentioned Japan's acceptance of the WTO Agreement on Fisheries Subsidies and its financial contributions to support fisheries management in developing countries. The delegate also stressed that Japan is considering Indonesia's proposal to classify IUU fishing as "serious crimes" under UNTOC, requiring careful domestic discussion and international cooperation.

12. **The Delegate of the Republic of India** appreciated the adoption of the BBNJ Agreement, viewing it as a positive step in governing marine activities beyond national jurisdictions. The delegate highlighted that India actively participated in the development process and valued the Agreement's focus on protecting marine biodiversity, accessing marine genetic resources, ensuring governance transparency, building capacity, and fostering research opportunities. The delegate stressed on the importance of the Agreement's inclusion of the common heritage of mankind principle. On IUU fishing, the delegate noted its threat to India's Blue Economy and outlined measures India has taken to prevent and control IUU fishing, including authorising the Coast Guard, implementing regulatory frameworks, and issuing biometric IDs to fishers. India supported AALCO's efforts to address IUU fishing and encouraged cooperation among member states.

13. **The Delegate of the Republic of Kenya** commended the AALCO Secretariat for its work on ocean governance and the High Seas Treaty analysis. They praised the BBNJ treaty for promoting international cooperation to protect marine life beyond national jurisdictions. The delegate informed that Kenya focused on the implementation of the treaty's core elements: Marine Genetic Resources, Area-based management tools, Environmental impact assessments, and Capacity-building and technology transfer. On IUU fishing, Kenya highlighted the need for

a collaborative approach and welcomed AALCO's call for united efforts. Kenya is reviewing its fisheries legislation to combat IUU fishing and emphasising the importance of strong monitoring systems. As a member of the High-Level Panel on Sustainable Ocean Economy, Kenya urged for innovative solutions and the elimination of harmful fisheries subsidies.

14. **The Delegate of the Socialist Republic of Vietnam** welcomed the adoption of the Agreement on marine biological diversity in areas beyond national jurisdiction. They highlighted Vietnam's early support by signing it. The delegate emphasised that this Agreement and UNCLOS form the global legal framework for maritime activities. They underscored Vietnam's commitment to combating illegal, unreported, and unregulated (IUU) fishing, citing recent national measures and expressing concern about potential economic impacts on artisanal fishing communities. The delegate advocated for cautious approaches to criminalising IUU fishing, suggesting it should only be considered as transnational organised crime when appropriate criteria are met.

15. **The Delegate of Malaysia** informed that Malaysia recognised the BBNJ Agreement's importance and praised the AALCO Member States who have signed it. The delegate stated that Malaysia aimed to sign the Agreement and is looking to continue engaging internal stakeholders. They upheld commitments under UNCLOS and aligned domestic fisheries laws with international standards. Malaysia noted AALCO's emphasis on combating IUU fishing and affirmed its commitment to domestic and international measures against illegal fishing. The delegate also appreciated Indonesia's concept note on illegal fishing as a transnational organised crime and highlighted the need for more analysis and cooperation among Member States.

16. **The Delegate of the People's Republic of Bangladesh** highlighted the significance of UNCLOS in standardising maritime claims and preventing conflicts. The delegate also commended the BBNJ Agreement as a milestone in high seas governance and stressed the need for regulations to balance economic benefits with environmental preservation. They noted Bangladesh's involvement in the BBNJ Agreement and its potential for marine development.

Addressing IUU fishing, the delegate supported regional cooperation and improved fisheries management to protect marine ecosystems and livelihoods.

17. **The Delegate of the Republic of the Philippines** welcomed the continued focus on the Law of the Sea in AALCO's work programme and commended the Secretariat's efforts. The Philippines, a founding signatory and ratifier of UNCLOS, valued AALCO's support in implementing the Convention. They highlighted UNCLOS as the primary legal framework for ocean activities and stressed its role in defining maritime rights. The delegate noted the 2016 Arbitral Award on the South China Sea as a binding resolution and praised AALCO's role in developing key concepts in UNCLOS. They also acknowledged participation in the BBNJ Agreement and planned regional workshops to support its implementation. Additionally, they urged AALCO to address the link between UNCLOS and climate change and emphasised their ongoing commitment to international law and collaboration with AALCO.

18. **The Delegate of the Republic of Türkiye** noted the importance of the BBNJ Agreement in regulating maritime biodiversity beyond national jurisdiction and mentioned Türkiye's active participation in its negotiations. Although Türkiye had not signed the Agreement due to ongoing internal evaluations and disputes over maritime boundaries in the Aegean Sea, they appreciated AALCO's report on the Agreement. On IUU fishing, the delegate highlighted its impact on global fish stocks and Türkiye's readiness to contribute to international efforts, despite not being a party to UNCLOS. Türkiye supported FAO's work and regional fisheries organisations and agreed with the AALCO Secretariat on using advanced technologies to combat IUU fishing.

19. **The Delegate of the Kingdom of Bahrain** acknowledged the role of UNCLOS in regulating maritime rights and responsibilities. Bahrain, as an island state, recognised the complex challenges of maritime affairs, including piracy, human rights at sea, and environmental issues. They supported the recent High Seas Treaty and emphasised its importance as a key extension of UNCLOS. The delegate also stressed the need to combat illegal, unreported, and unregulated fishing and called for active participation in discussions to support global

sustainability goals. They concluded by advocating for cooperative efforts from Asian-African nations to address ocean challenges.

20. **The Delegate of the Republic of Cyprus** highlighted Cyprus's adherence to the UNCLOS for all maritime activities. The delegate welcomed the BBNJ Agreement as a success for the UN and multilateralism, noting Cyprus's active participation and signing of the Agreement in September 2023. They mentioned Cyprus's bilateral agreements with neighbouring countries on Exclusive Economic Zones, all in accordance with UNCLOS, and affirmed Cyprus's commitment to exploring and exploiting natural resources within its EEZ for the benefit of its citizens.

21. **The Delegate of the People's Republic of China** acknowledged AALCO's key role in developing the Law of the Sea. China welcomed the BBNJ Agreement, signed in September, as a milestone in international maritime law and a triumph for developing countries. The delegate stated that China supported the agreement's principles and hoped for a balance between the conservation and use of marine resources. They stressed respect for territorial sovereignty and maritime rights. On IUU fishing, China outlined its commitment to managing fisheries, combating IUU fishing, and promoting international cooperation. They called for closer collaboration and compliance with existing rules. The delegate reiterated China's position against the South China Sea Arbitration and affirmed China's adherence to UNCLOS and general international law.

22. **The Delegate of the Republic of Korea** thanked AALCO Member States for their active participation in the BBNJ Agreement negotiations, leading to its adoption in June. The delegate noted that human activities like fishing, mining, and deep-sea bio-prospecting have impacted areas beyond national jurisdiction, highlighting the need for concerted marine ecosystem protection. As a country surrounded by oceans, the Republic of Korea expressed its intention to sign and ratify the BBNJ Agreement soon and to update domestic laws for effective implementation.



23. **The Delegate of the Russian Federation** noted the importance of understanding the positions of developing countries in Asia and Africa regarding the BBNJ Agreement. While commending the efforts of those involved, the Delegate expressed concerns about remaining shortcomings in the Agreement, particularly regarding marine protected areas and financing for scientific research. The Delegate highlighted Russia's experience in fisheries management and its active role in combating illegal, unreported, and unregulated fishing. Russia ratified the Agreement on Port State Measures in 2021 and is engaged in enhancing bilateral agreements and domestic measures to address IUU fishing. The Delegate welcomed the opportunity to participate in the discussion and foster cooperation with developing countries.

#### **C. Topics for Focussed Deliberations at the Sixty-Second Annual Session**

24. Pursuant to the proposal received from the Kingdom of Thailand (Note Verbale No.0801/656 dated 26 July 2024) to include an additional substantive agenda item 'The Law of the Sea' on the agenda for the Sixty-Second Annual Session, the AALCO Secretariat has prepared this brief with a focus on 4 specific aspects of law of the sea as highlighted in the explanatory note (see ANNEX-1) provided by the Kingdom of Thailand. These are as follows:

1. **Issues related to the ITLOS Advisory Opinion on the Request submitted by the Commission of Small Island States on Climate Change and International Law**
2. **Issues related to challenges and best practices in implementing UNCLOS provisions:**
  - a. The regulation of marine scientific research in the Exclusive Economic Zone (EEZ)
  - b. Enhancing participation of AALCO Member States in activities the Area (International Seabed)

3. **Issues related to Maritime Security and Safety**
4. **Issues related to the sustainable use of marine resources, particularly, in relation to the BBNJ Agreement**

## **II. ISSUES RELATED TO THE ITLOS ADVISORY OPINION ON THE REQUEST SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW (COSIS)**

25. The link between ocean health and climatic variations is well acknowledged. Anthropogenic carbon emission activities contributing to climate change on land have their impact on oceans and can be seen through fallouts like sea-level rise, ocean acidification and alterations in ocean temperatures leading to significant damage to ocean ecosystems. The ocean is also a major carbon sink absorbing upto 90% of the excess heat in the atmosphere. The threat to marine ecosystems caused by climate change in the oceans seriously threatens the very existence of many communities, particularly low-lying island States. These island States realising the magnitude of the harm caused by climate change on ocean health are looking to international law to address existential threats facing them.

26. On 12 December 2022, the Commission of Small Island States on Climate Change and International Law (COSIS), composed of six States from the Caribbean and Pacific, made a request to ITLOS to clarify, through an advisory opinion, the specific environmental obligations of State parties to UNCLOS concerning climate change impacts on oceans, including ocean warming, sea level rise, and ocean acidification. The request sought to clarify the obligations of UNCLOS State Parties under the treaty to mitigate marine environmental harm on account of GHG emissions in the present without focusing on the issue of past or historic liability.

27. The two legal questions were as follows:

What are the specific obligations of State Parties to the UNCLOS, including under Part XII:

- (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
- (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

On 21 May 2024, the International Tribunal on the Law of the Sea (ITLOS) issued an advisory opinion on climate change and law of the sea. This was the first occasion when the Court examined the interrelationship between climate change and the obligations of States to respond to climate change in the context of marine environmental protection within the framework of the UNCLOS. In doing so, it also became the first international judicial body to render an advisory opinion on climate change.

28. The advisory opinion concluded that State Parties to the UNCLOS are under specific legal obligations to prevent, reduce and control greenhouse gas (GHG) emissions that adversely affect the marine environment under the treaty. This obligation is one of conduct and requires States Parties to act with strict due diligence obligations and flows from their obligations assumed under Part XII of UNCLOS that pertains to the protection of the marine environment. By doing so, it clarified the scope and obligations of State parties to the UNCLOS with respect to climate change noting that they are required to take “all necessary measures” to reduce, prevent and control marine pollution caused by climate change and conduct environmental impact assessments to monitor public and private activity such that the deleterious impact of anthropogenic GHG emissions is reduced to the maximum extent possible.

29. Some of the key highlights of the judgment are as follows:

## **The scope of marine pollution:**

30. The first question that required redressal was whether anthropogenic GHG emissions fall within the meaning of the definition of ‘pollution of the marine environment for the purposes of the UNLCOS regime. The Court observed that GHG emissions are a substance of energy which is introduced by humans directly or indirectly into the marine environment causing multiple adverse impacts on the oceans like ocean acidification and ocean warming in addition to significant harm to ocean ecosystems. It was noted that such effects were documented scientifically and widely acknowledged by States<sup>1</sup>. By arriving at such a finding, the Court held that parties to the UNCLOS are under a legal obligation under Article 194 of the treaty to take ‘all necessary measures’ with a view to controlling existing marine pollution from GHG emissions and ‘eventually preventing such pollution from occurring at all’<sup>2</sup>. By implication this

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<sup>1</sup> Para 75.

<sup>2</sup> Article 194 of UNCLOS:

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

meant that all GHG emissions having the potential to pollute the oceans be they land-based or ocean based constitute ‘marine pollution’ that must be mitigated, controlled and ultimately eradicated within the meaning of Article 194 of UNCLOS. In other words, all man-made GHG emissions susceptible to adversely harm the health of oceans constitute ‘marine pollution’ facing a prohibition under Article 194.

**UNCLOS State Parties under a legal obligation to take ‘all necessary measures’ to mitigate GHG emissions for the protection of the marine environment:**

31. The tribunal found that under article 194, paragraph 1 of UNCLOS, “States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection<sup>3</sup>”. However, the obligation to take all necessary measures comes with a certain margin of discretion which is to be interpreted narrowly and objectively on a case-to-case basis.

**Other key findings:**

32. States are under a strict due diligence obligation to protect the marine environment from the deleterious impacts of anthropogenic GHG emissions. This requires States to put in place a national system to regulate polluting activities and to exercise vigilance to ensure the effectiveness of that system<sup>4</sup>. The exact content of the due diligence obligation is influenced by several factors, including “scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved”<sup>5</sup>. The tribunal found that, in the context

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5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

<sup>3</sup> Para 243.

<sup>4</sup> Para 235.

<sup>5</sup> Para 239.

of GHG emissions, the due diligence standard “is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions”<sup>6</sup>.

33. The obligations on States to protect the marine environment from the impact of anthropogenic GHG emissions under the framework of the UNCLOS is independent from obligations flowing from other international agreements like the Paris Agreement. Since protection of the marine environment is a key objective of UNLCOS, the obligations contained in this framework apply independently. However, the obligations under Part XII of UNCLOS while independent do complement the Paris Agreement obligations to stay within the 1.5 degrees threshold<sup>7</sup>.

34. States are expected to follow the best available scientific guidance available while exercising their margin of discretion on possible courses of action that may have an impact on the protection of marine environment. In this context, it noted that the work of the IPCC constituted a leading voice on the scientific dimensions of climate change and a scientific consensus to the same exists<sup>8</sup>. In other words, while scientific certainty may provide States a clear-cut objective standard of assessment, in the absence of such certainty, States should apply the precautionary approach while dealing with this issue. It held that in the matter of marine pollution arising from anthropogenic GHG emissions, the precautionary approach is highly relevant given that serious and irreparable harm to the environment may be caused to the marine environment by such emissions.

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<sup>6</sup> Para 243.

<sup>7</sup> ‘The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter’ (Para 223).

<sup>8</sup> Para 208.

### **Significance of the Advisory Opinion:**

35. By rendering the advisory opinion clarifying the obligations of States to protect the marine environment from the harmful effects of climate change, the Court has highlighted the progressive character of the UNCLOS. As a treaty ratified by 170 parties, UNCLOS is the overarching global framework convention on all matters pertaining to the Law of the Sea in international law and policy.

36. The advisory opinion highlights the reality that the obligations assumed by States at the time of framing the convention and its coming into force were intended to cover emerging threats facing the oceans as and when they emerge in light of contemporary scientific understanding of threats. To this extent, the advisory opinion has brought the UNLCOS to the forefront of global efforts to tackle the dangers posed by climate change as being one of international law's strongest responses to this crisis specifically so in the realm of marine environment protection. The advisory opinion is also expected to lay the foundations of future advisory opinions to be delivered by the International Court of Justice and the Inter-American Court of Human Rights on this subject in the near future.

## **II. ISSUES RELATED TO CHALLENGES AND BEST PRACTICES IN IMPLEMENTING UNCLOS PROVISIONS:**

- **The regulation of Marine Scientific Research in the Exclusive Economic Zone (EEZ)**

37. The right of all States to conduct Marine Scientific Research is codified in UNLCOS. Despite covering 70% of earth's surface, relatively little is known about the oceans in terms of scientific knowledge. Bathymetry, oceanology, oceanography, marine geoscience and other areas of ocean science are hugely important for humanity to understand the nature and extent of harm anthropogenic activity can be caused to oceans in general and marine ecosystems in

particular. It is only with a fairly accurate scientific understanding of these threats and challenges that law and policy can be formulated to better protect the world's oceans. However, given the territorial demarcation of ocean space and rights allocated to coastal States as per the framework of UNCLOS, the conduct of scientific research in the oceans is subject to legal restrictions imposed by the convention.

38. Part XIII of UNCLOS deals with marine scientific research. Article 238 explicitly protects this right in the interest of scientific and technological progress of mankind<sup>9</sup>. Additionally, Article 239 imposes an obligation on States and competent international organizations to facilitate the development and conduct of marine scientific research<sup>10</sup>. However, despite the same, the term 'Marine Scientific Research' is not defined by UNCLOS and this has created considerable differences of opinion on the meaning and nature of marine scientific research. It is clear that in the normal course States may conduct research in the Exclusive Economic Zone (EEZ) of another State subject to such activity not impinging on the rights of the coastal State as highlighted in Article 246 (2). The following are the general legal requirements stipulated by UNCLOS for the conduct of marine scientific research:

1. The research must be conducted exclusively for peaceful purposes<sup>11</sup>.
2. The research should be conducted with appropriate scientific methods compatible with the convention<sup>12</sup>.
3. The research should not interfere with other legitimate uses of the sea<sup>13</sup>.
4. The research should be consistent with the legal obligation under UNCLOS to preserve and protect the marine environment<sup>14</sup>.

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<sup>9</sup> Article 238:

All States, irrespective of their geological location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.

<sup>10</sup> Article 239:

States and competent international organizations shall promote and facilitate the development and conduct of marine scientific research in accordance with this Convention.

<sup>11</sup> Article 240.

<sup>12</sup> Article 240.

<sup>13</sup> Article 240.

<sup>14</sup> Article 240.



39. Coastal States are generally expected to grant permission for the conduct of peaceful and scientifically legitimate marine research endeavours in the normal course. However, permission to conduct marine scientific research in the EEZ may be denied in the following instances:

1. The research involves exploitation of living or non-living marine resources<sup>15</sup>.
2. The research involves drilling on the continental shelf or the use of explosive or other harmful substances<sup>16</sup>.
3. The research involves the construction, operation or use of artificial islands, installations or structures<sup>17</sup>.
4. Inaccurate, incomplete or wrongful information given to the coastal State on the specific particulars of the research<sup>18</sup>. Information to be shared with the coastal State in this regard may include particulars pertaining to nature and objective of the project, the methods and means, including the names, tonnage, type and class of vessels and equipment to be used, the precise geographical area, the dates of first arrival or deployment of vessels or equipment and the final departure date, the sponsoring institute its director and person in charge's names and the extent to which the coastal State may participate in the project.
5. The research involves an area where exploration is shortly about to commence<sup>19</sup>.

### **Marine Scientific Research in the EEZ: Way Ahead**

40. It is clear that the provisions of UNCLOS afford clarity with respect to the conduct of marine scientific research. The obligations of Coastal States and those intending to engage in marine scientific research has been clearly spelled out. However, despite the same there are a few emerging challenges which need to be addressed. Chiefly, with the advancement of modern technology, it is becoming increasingly difficult for coastal States to properly monitor the actual

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<sup>15</sup> Article 246 (5) (a).

<sup>16</sup> Article 246 (5) (b).

<sup>17</sup> Article 246 (5) (c).

<sup>18</sup> Article 246 (5) (d).

<sup>19</sup> Article 246 (6).

conduct of marine scientific research in the EEZ. In this regard, it is imperative that there should be an understanding between the State of the researcher and the coastal State on the exact contours of the research including the mode and manner of the research in a way that both scientific freedom and sovereignty are respected by all concerned parties.

41. An additional challenge facing marine scientific research is the obligation to protect the marine environment during the conduct of the research. Experts have pointed out the ecological impact of scientific research in the oceans may be the same as shipping<sup>20</sup> and hence there needs to be strict check on research activities that may lead to damage to marine ecosystems. In this regard, it is requested that Member States may kindly share their domestic legislations or policy details regulating marine scientific research in the EEZ especially those that seeks to protect the marine environment from the harmful impacts of such research.

- **Enhancing participation of AALCO Member States in activities in the Area (mineral resource exploitation)**

42. The International Seabed Authority (ISA) under the UNCLOS is duty bound to promote the conduct of marine scientific research in the international seabed area with a view to increase the participation of developing States in deep sea exploration and research programmes. It is the organization designated under UNCLOS to monitor all mineral resource related activities in the international seabed area (hereinafter, the “Area”) under the supervision of State Parties<sup>21</sup>. It is believed that the international seabed with its rich and diversified biodiversity covers 54% of the world’s oceans and is a large depository of minerals found on the sea floor. Despite the same,

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<sup>20</sup> Anna Maria Hubert, ‘The New Paradox in Marine Scientific Research: Regulating the Potential Environmental Impacts of Conducting Ocean Science’ < Ocean Development & International Law, 42:329-355, 2011> accessed 4 August 2024.

<sup>21</sup> The International Seabed Authority (ISA) is an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. In accordance with Article 156(2) of UNCLOS, all States Parties to UNCLOS are ipso facto members of ISA.

knowledge of the seabed is sparse and limited and the ISA seeks to remedy this gap of scholarship and facilitate research in ocean science with a focus on the role of developing States.

43. In this framework, the promotion of deep-sea literacy in all States is a fundamental voluntary commitment of the ISA recognizing the principle of common heritage of mankind and its applicability to the Area based on the understanding that just like the oceans, the mineral resources on the sea bed are also a shared global resource of the international community. The promotion of deep-sea literacy is one of the 8 voluntary commitments of the ISA with the aim of increasing and diversifying participation in the research activities of the Area. The duty of the ISA to facilitate the participation of developing States in research activities as mandated by UNCLOS is recognized in the ISA Strategic Plan for 2019-2023. This seeks to give effect to the objective of UNCLOS to promote and encourage the transfer of technology to developing States<sup>22</sup> in addition to ensuring the expansion of opportunities for activities in the Area<sup>23</sup>. Specifically, Strategic Direction 5 (Build Capacity for developing States) and Strategic Direction 6 (Ensure fully integrated participation by developing States) of the Strategic Plan are aimed to enhancing the participation of all States in the activities of the Area.

44. In the year 2020, the ISA assisted developing States particularly geographically disadvantaged States, least developed countries, Small Island developing States and landlocked developing countries in identifying their research needs in the context of the Area. In doing so, it sought to give effect to SDG Target 14.a which emphasizes the importance of developing research capacity in developing countries<sup>24</sup>.

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<sup>22</sup> Articles 144, 273 and 274 of UNCLOS.

<sup>23</sup> Article 148.

<sup>24</sup> Target 14.a.-Increase scientific knowledge, develop research capacity and transfer marine technology, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology, in order to improve ocean health and to enhance the contribution of marine biodiversity to the development of developing countries, in particular Small Island developing States and least developed countries.

45. Suggestions of the AALCO Secretariat to increase the participation of AALCO Member States in deep-seabed activities:

- AALCO Member States should take maximum advantage of the **International Seabed Authority Endowment Fund for Marine Scientific Research** which grants awards to enable scientists and technicians from developing countries to participate in relevant programmes through activities including research fellowships and training placements. The Authority has fostered a network of cooperating groups and institutions in order to provide opportunities for this kind of collaborative research and training and 18 participants from developing countries have so far benefitted from Endowment Fund awards.
- AALCO Member States should actively participate in the **Assembly** of the ISA as the Assembly is one of the principal organs empowered to established general policies. Once adopted by the Council, the Assembly approves the rules, regulations and procedures that ISA may establish from time to time, governing prospecting, exploration and exploitation in the Area.
- AALCO Member States should actively participate in the **Council** of the ISA. The Council as the executive organ of the ISA establishes specific policies in conformity with UNCLOS and the general policies set by the Assembly. It supervises and coordinates the implementation of the deep seabed mining regime established by UNCLOS to promote and regulate exploration for and exploitation of deep-sea minerals by States, corporations and other entities<sup>25</sup>. Under this system, no such activity may legally take place until contracts between each interested entity and ISA have been signed<sup>26</sup>. The Council's task is to draw up the terms of contracts, approve contract applications, oversee implementation of the contracts, and establish environmental and other standards<sup>27</sup>.

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<sup>25</sup> Structure and Mandate of the Council, International Seabed Authority < <https://www.isa.org.jm/structure-and-mandate/> > accessed 4 August 2024.

<sup>26</sup> *ibid.*

<sup>27</sup> *Council* (n 5).

- AALCO Member States should actively participate in the **Enterprise** of the ISA. The Enterprise performs the task of monitoring and review of trends and developments relating to deep seabed mining activities, including regular analysis of world metal market conditions and metal prices, trends and prospects<sup>28</sup>. It also assesses the results of the conduct of marine scientific research with respect to activities in the Area, with particular emphasis on research related to the environmental impact of activities in the Area and the available data relating to prospecting and exploration, including the criteria for such activities<sup>29</sup>.

### **III. ISSUES RELATED TO MARITIME SECURITY AND SAFETY**

46. Maritime security and safety encompass a range of issues critical to the protection of vessels, ports, and the maritime environment. These issues are influenced by various factors, including piracy, armed robbery, illegal immigration, environmental threats, and regulatory frameworks.

#### **Piracy and Armed Robbery**

47. Piracy remains a significant concern, particularly in regions like the Gulf of Guinea, which accounts for a large percentage of maritime kidnappings globally. While the number of hijackings has decreased, incidents of armed robbery at sea persist, particularly in Southeast Asia and the Indian Ocean. The International Maritime Organization (IMO) has been proactive in addressing these threats through international cooperation and capacity-building initiatives, such as the Code of Conduct for the repression of piracy in West and Central Africa.<sup>30</sup>

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<sup>28</sup> The Enterprise, International Seabed Authority < <https://www.isa.org.jm/organs/the-enterprise/> > accessed 4 August 2024.

<sup>29</sup> Ibid.

<sup>30</sup> IMO, “Maritime Security”, [www.imo.org/en/MediaCentre/HotTopics/Pages/piracy-default.aspx](http://www.imo.org/en/MediaCentre/HotTopics/Pages/piracy-default.aspx), accessed 5 August 2024.

48. The topic “Prevention and repression of piracy and armed robbery at sea” was added to the programme of the International Law Commission (ILC) at its Seventy-third session in 2022.<sup>31</sup> In their first report submitted prior to the Seventy-fourth session in 2023, the Special Rapporteur addressed the historical, socio-economic and legal aspects of the topic, including an analysis of the international law applicable to piracy and armed robbery at sea and the shortcomings thereof. At the Seventy-fifth session of the ILC, the Special Rapporteur submitted their second report on the topic wherein the state practice relating to piracy and armed robbery at sea was examined. The Rapporteur concluded that the existing state practice lacked the generality, consistency, and uniformity needed for codification.<sup>32</sup>

49. So far, the Special Rapporteur has submitted seven draft articles on piracy for consideration by the ILC, aiming to refine and codify international norms and practices related to combating piracy and armed robbery at sea. The Second Report also underscores the importance of a collaborative international approach and the need for continuous updates to legal frameworks to adapt to new challenges.

**Text of the draft articles and commentaries provisionally adopted by the Commission at its seventy-fourth Session (2023) and presented at the seventy-fifth Session (2024)**

1. The text of the draft articles thereto provisionally adopted by the International Law Commission at its seventy-fourth session is reproduced below.

Article 1

Scope

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<sup>31</sup>At its 3582nd meeting, on 17 May 2022 (Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10), para. 239). The topic had been included in the long-term programme of work of the Commission during its seventy-first session (2019), on the basis of the proposal contained in annex C to the report of the Commission (Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10), para. 290 (b)).

<sup>32</sup> ILC Second Report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770.

The present draft articles apply to the prevention and repression of piracy and armed robbery at sea.

## Article 2

### Definition of piracy

1. Piracy consists of any of the following acts:
  - (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
    - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
    - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
  - (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
  - (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)
2. Paragraph 1 shall be read in conjunction with the provisions of article 58, paragraph 2, of the United Nations Convention on the Law of the Sea.

## Article 3

### Definition of armed robbery at sea

Armed robbery at sea consists of any of the following acts:

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).

## Article 4

### General obligations

1. Each State has the obligation to cooperate to the fullest possible extent in the prevention and repression of piracy on the high seas or in any other place outside the jurisdiction of a State.
2. Each State undertakes to prevent and to repress piracy and armed robbery at sea, which are crimes under international law, whether or not committed in time of armed conflict.
3. No circumstances of any kind whatsoever may be invoked as a justification of piracy or armed robbery at sea.

## Article 5

### Obligation of prevention

Each State undertakes to prevent and to repress piracy and armed robbery at sea, in conformity with international law, through:

- (a) Effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction and on the high seas; and
- (b) Cooperation with other States, competent intergovernmental organizations, and, as appropriate, other organizations or non-State actors with an interest in the safety of maritime navigation.

## Article 6

### Criminalization under national law

1. Each State shall take the necessary measures to ensure that piracy and armed robbery at sea constitute criminal offences.
2. Each State shall take the necessary measures to ensure that the following acts are criminal offences:
  - (a) Committing acts of piracy or armed robbery at sea;
  - (b) Attempting to commit such crimes; and
  - (c) Ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such crimes.



3. Each State shall also take the necessary measures to ensure that financiers, sponsors, superiors or other persons giving orders are criminally responsible for acts of piracy and armed robbery at sea committed by their subordinates.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person performing an official function is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations and that they shall be punishable by appropriate penalties, taking into account their grave nature.

## Article 7

### Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

(a) When the offence is committed in a territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in a territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

## **Exercise of National Jurisdiction under Treaties or Customary International Law on Piracy**

50. National jurisdiction over piracy is grounded in both treaty law and customary international law. States exercise jurisdiction through their domestic laws which criminalize acts of piracy, in compliance with international obligations. The UNCLOS and various United Nations Security Council (UNSC) resolutions play a pivotal role in shaping these obligations.

51. The UNCLOS is the major international convention that provides a comprehensive framework for the suppression of piracy, allowing States to seize pirate ships and arrest individuals on the high seas, and subject them to their national laws.<sup>33</sup> UNCLOS provides that States have the legal basis to prosecute and penalize pirates. There are several UNSC resolutions that emphasise the necessity of national legal frameworks to combat piracy. For instance, the Security Council has urged States, particularly those in piracy-prone regions like the Gulf of Guinea and off the coast of Somalia, to adopt legislation criminalizing piracy and to prosecute or extradite offenders.<sup>34</sup>

52. Customary international law also supports the exercise of universal jurisdiction over piracy, a principle allowing any State to prosecute pirates irrespective of their nationality or the location of the crime. This principle is crucial because piracy typically occurs in international waters, beyond any single state's jurisdiction.<sup>35</sup>

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<sup>33</sup> UNCLOS, Articles 101 to 107.

<sup>34</sup> UNSC Resolution 2634 (2022).

<sup>35</sup> ILC Second Report on prevention and repression of piracy and armed robbery at sea, A/CN.4/770.

## **Regional and International Cooperation on Maritime Piracy**

53. Effective suppression of piracy and armed robbery at sea requires extensive cooperation among States and international organisations. This includes information sharing, operational coordination, and mutual legal assistance. Initiatives by organisations like the International Maritime Organization, the United Nations Office on Drugs and Crimes (UNODC), and regional bodies such as ECOWAS facilitate the harmonisation of laws and collaborative efforts to combat maritime crime. The interplay between international norms and domestic implementation underscores the comprehensive legal approach needed to address piracy and armed robbery at sea effectively.

- **Illegal Migration, Human Trafficking and Safety of Navigation**

54. Unsafe mixed migration at sea poses security challenges, particularly in regions affected by conflict and poverty. The Mediterranean Sea, for example, has seen a rise in dangerous crossings, leading to humanitarian crises and increased scrutiny of maritime borders. This situation also raises legal and ethical issues for coastal States regarding the treatment of migrants and the prevention of human trafficking.

55. To ensure safe navigation, several multilateral conventions have been adopted under the auspices of the United Nations. These conventions have called on States to enhance international cooperation to address certain maritime crimes. Among them are the Organized Crime Convention and its Protocol against the Smuggling of Migrants by Land, Sea and Air,<sup>36</sup> which also addresses the repression of maritime piracy as a form of transnational organised crime. The Protocol mandates that migrants shall not become liable to criminal prosecution<sup>37</sup> ensuring that

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<sup>36</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, Treaty Series, vol. 2241, No. 39574, p. 480.

<sup>37</sup> Article 5 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

migrants are given humane treatment and that the security of the vessel or its cargo is not endangered.<sup>38</sup>

56. The Organized Crime Convention, although primarily targeting transnational organised crime, includes provisions relevant to combating maritime piracy. It defines transnational organised crime with three elements: crimes committed in more than one country (transnationality), involvement of an organised criminal group (organisation), and activities for private ends (economic or financial purpose).<sup>39</sup> Some groups of maritime pirates can be classified as transnational criminal organisations, particularly when their actions cross national borders.

57. The Organized Crime Convention, although primarily targeting transnational organised crime, includes provisions relevant to combating maritime piracy. It defines transnational organised crime with three elements: crimes committed in more than one country (transnationality), involvement of an organised criminal group (organisation), and activities for private ends (economic or financial purpose). Some groups of maritime pirates can be classified as transnational criminal organisations, particularly when their actions cross national borders.

58. Similar to Article 100 of the UNCLOS, the Organized Crime Convention promotes international cooperation to fight transnational organised crime, including maritime piracy. Additionally, the Organized Crime Convention offers mechanisms for judicial cooperation, extradition, and mutual assistance in criminal matters among States parties. In contrast, Article 100 of UNCLOS does not provide substantive or procedural guidelines for cooperation against piracy and armed robbery at sea, leaving this responsibility to States and regional or multilateral international organisations.

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<sup>38</sup> Article 9 of Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>39</sup> United Nations Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air.

- **International Legal Framework on Illegal, Unreported and Unregulated (IUU) Fishing**

59. Illegal, Unreported and Unregulated (IUU) fishing threatens marine ecosystems and fisheries sustainability. It accounts for up to 26 million tonnes of fish annually<sup>40</sup>, undermining conservation efforts and causing significant financial losses, estimated at USD 23.5 billion annually.<sup>41</sup> This practice affects coastal States, leading to revenue loss, reduced employment, and food insecurity. Developing countries struggle with inadequate resources for Monitoring, Control, and Surveillance (MCS). With 10-12% of the global population reliant on fisheries<sup>42</sup>, IUU fishing disrupts livelihoods and food supplies, necessitating urgent regional cooperation to address this issue and ensure sustainable marine resource management.

60. UNCLOS is the primary framework governing ocean activities and nations' maritime rights and responsibilities. It permits fishing in international waters but obligates nations to collaborate in preserving marine life. UNCLOS sets the foundation for managing deep-sea fishing and protecting marine resources in areas beyond national jurisdiction (ABNJ).<sup>43</sup> A key principle of the UNCLOS is 'flag State jurisdiction,' requiring countries to maintain a significant connection with vessels flying their flag and oversee administrative, technical, and social matters. However, the UNCLOS does not directly manage marine fisheries. Instead, subsequent mandatory and voluntary agreements have established management systems for fisheries, notably through Regional Fisheries Management Organizations and Arrangements (RFMO/As).

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<sup>40</sup> Food and Agriculture Organization of the United Nations 'Illegal, Unreported and Unregulated (IUU) fishing' (FAO, 2023) <https://www.fao.org/iuu-fishing/en/>.

<sup>41</sup> North Atlantic Fisheries Intelligence Group and INTERPOL. (2017). Chasing Red Herrings: Flags of Convenience and the Impact on Fisheries Crime Law Enforcement. (NA-FIG: Oslo).

<sup>42</sup> North Atlantic Fisheries Intelligence Group and INTERPOL. (2017). Chasing Red Herrings: Flags of Convenience and the Impact on Fisheries Crime Law Enforcement. (NA-FIG: Oslo).

<sup>43</sup> Lenel, S. 2020. Monitoring, control, and surveillance of deep-sea fisheries in areas beyond national jurisdiction. Rome, FAO. <https://doi.org/10.4060/ca7320en>.

61. The Agreement on Port State Measures (PSMA) is a legally binding instrument addressing IUU fishing. Adopted in 2009 and effective from 2016, PSMA prevents vessels involved in IUU fishing from exploiting ports and unloading illicit catches. This reduces the incentive for such activities and blocks illegal fishery products from entering markets. PSMA's effective implementation is crucial for sustainable marine resource management, acting as a gatekeeper against IUU fishing vessels.<sup>44</sup> It supports the United Nations Sustainable Development Goals (SDGs), particularly SDG 14, which aims to eradicate IUU fishing and end financial incentives supporting these practices.

#### **IV. ISSUES RELATED TO THE SUSTAINABLE USE OF MARINE RESOURCES PARTICULARLY, IN RELATION TO THE BBNJ AGREEMENT**

62. The 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, (hereinafter referred to as the Treaty or “the BBNJ”), was adopted on 19 June 2023. The BBNJ covers four main issues:

1. marine genetic resources, including the fair and equitable sharing of benefits,
2. measures such as area-based management tools, including marine protected areas,
3. environmental impact assessments,
4. capacity-building and the transfer of marine technology.

63. The sustainable use of marine resources is a complex issue, particularly in the context of the BBNJ. The Treaty aims for the promotion of conserving and sustainably using marine biological diversity. Implementing legislation for the BBNJ and adhering to the principle of the

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<sup>44</sup> Food and Agriculture Organization of the United Nations, Illegal, Unreported and Unregulated (IUU) fishing, Agreement on Port State Measures (PSMA), (FAO, 2023) <<https://www.fao.org/iuu-fishing/international-framework/psma/en/>>.

common heritage of humankind are crucial components in addressing these issues. The Treaty will facilitate the achievement of Sustainable Development Goal 14 and fulfil Target 3 of the Kunming-Montreal Global Biodiversity Framework, aiming to protect at least 30% of the world's seas by 2030.<sup>45</sup> Its implementation will also expedite progress on various other Sustainable Development Goals (SDGs), as emphasised by global leaders in the declaration 'Our ocean, our future: call to action' during the first UN Ocean Conference.<sup>46</sup> The BBNJ highlights the crucial role of oceans in climate regulation, food security and nutrition, peace and justice, among other areas.

64. The Treaty is open for signatures by States and international organisations until 20 September 2025. Until July 2024, ninety-one States have become signatories to the treaty among which eight have ratified the treaty.<sup>47</sup> Implementing the BBNJ would require robust national and international legal cooperation. For the Treaty to be adopted meaningfully, comprehensive domestic legislation to regulate activities in the high seas will be critical. This will mean that the key principles enshrined in the Treaty should be retained in domestic legislations including the management of marine genetic resources, environmental impact assessments, and the establishment of marine protected areas.

65. Firstly, countries need to develop and enforce regulations governing the access to and use of marine genetic resources. These resources hold immense potential for scientific research and commercial applications. However, without proper regulation, there is a risk of over-exploitation and biopiracy. All national legislations should ensure fair and equitable sharing of benefits arising from the utilisation of these resources.

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<sup>45</sup> IUCN, "BBNJ Treaty: The Race for Ratification." [iucn.org/events/iucn-event/bbnj-treaty-race-ratification](https://iucn.org/events/iucn-event/bbnj-treaty-race-ratification), accessed 2 August 2024.

<sup>46</sup> Ibid.

<sup>47</sup> United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-10&chapter=21&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en), accessed 7 August 2024.

66. Secondly, Environmental Impact Assessments (EIAs) will play an essential role in ensuring sustainable use of marine resources. The Treaty mandates Environmental Impact Assessments for projects that may cause substantial pollution or significant changes to the marine environment in areas beyond national jurisdiction.<sup>48</sup> States should also establish procedures for monitoring and enforcement to ensure compliance with EIA requirements.

67. Thirdly, the creation of Marine Protected Areas (MPAs) is essential for conservation.<sup>49</sup> Implementing legislation should outline criteria and processes for the designation and management of MPAs. This includes mechanisms for stakeholder engagement, monitoring, and enforcement. MPAs can help preserve critical habitats and biodiversity hotspots.

68. The importance of a balanced approach in implementing the Treaty's obligations is crucial. While the Treaty does provide for the establishment of marine protected areas and the fair and equitable sharing of benefits from marine genetic resources, it also leaves room for national discretion in several areas. This balance between universal standards and national flexibility is crucial for the Treaty's success.

### **Common Heritage of Humankind as guiding principle for the implementation of the Treaty**

69. The principle of common heritage of humankind underpins the BBNJ. This principle asserts that certain global commons, like the high seas, should be preserved for the benefit of all humanity.<sup>50</sup> It calls for equitable sharing of resources and responsibilities. Incorporating this principle into national legislation will require a shift from exploitative practices to sustainable management. Any domestic legislations should reflect this principle by promoting cooperation and equitable resource sharing.

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<sup>48</sup> High Seas Treaty, Part IV.

<sup>49</sup> High Seas Treaty, Article 17.

<sup>50</sup> UNEP, "BBNJ- 'Common Heritage of Mankind', [www.unep.org/cep/news/blogpost/bbnj-common-heritage-mankind](http://www.unep.org/cep/news/blogpost/bbnj-common-heritage-mankind), accessed 5 August 2024.



70. Best practices regarding the fair and equitable sharing of benefits can be drawn from the domestic laws of AALCO Member States and the framework of the Convention on Biological Diversity (CBD). These practices could be applied under the BBNJ framework.

71. Several AALCO Member States<sup>51</sup> have enacted domestic laws that ensure fair and equitable benefit-sharing from the use of genetic resources. These laws often incorporate principles from the Nagoya Protocol under the CBD, which provides a legal framework for access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation.

### **Some challenges ahead**

72. Several challenges complicate the implementation of the BBNJ. Firstly, the lack of capacity in many countries to enforce regulations effectively. Developing countries often face technical and financial constraints. International cooperation and capacity-building initiatives are essential to address these gaps. The AALCO Secretariat encourages Member States to actively engage in the Capacity Building and the Transfer of Marine Technology (CB&TMT) provisions within the Treaty to ensure that the benefits of marine biodiversity are shared equitably.<sup>52</sup>

73. The BBNJ intersects with other treaties, such as the UNCLOS and the Convention on Biological Diversity (CBD). Thus, there is a need for coordination among various international bodies and agreements. Harmonising these frameworks to avoid conflicts and redundancies will be crucial. Balancing economic interests with conservation goals will be challenging. Many

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<sup>51</sup> For instance, the Republic of India's Biological Diversity Act, 2002, mandates benefit-sharing arrangements with local communities and establishes the National Biodiversity Authority to oversee compliance. The Republic of South Africa's National Environmental Management: Biodiversity Act, 2004, requires benefit-sharing agreements with indigenous communities. These are examples of some domestic laws from AALCO Member States that highlight the importance of community involvement and transparency in benefit-sharing mechanisms.

<sup>52</sup> High Seas Treaty, Part V.

countries rely on marine resources for their economies. Domestic legislation must find a middle ground that allows for sustainable use without compromising conservation efforts.

74. Lastly, Member States are encouraged to familiarise themselves with the Treaty's enforcement mechanism<sup>53</sup> including the Conference of the Parties and the Scientific and Technical Body, as understanding the roles and responsibilities of these entities will be essential for effective engagement with the Treaty.

## **VI. COMMENTS AND OBSERVATIONS BY THE AALCO SECRETARIAT**

75. The harmful impacts of climate change on the oceans and its ecosystems is a critical challenge facing the global community today. In this regard, the AALCO Secretariat welcomes the Advisory Opinion delivered by ITLOS on 21 May 2024 that lays down the interface between climate change and its impact on marine protection as a landmark contribution to international law. It is hoped that AALCO Member States will study this Advisory Opinion in detail and take all efforts to safeguard the marine environment from the deleterious impacts of climate change in accordance with the letter and spirit of the opinion.

76. The conduct of marine scientific research in the oceans is a right recognized and protected by the UNCLOS. However, this right is subject to restrictions as specified in the treaty. It is hoped that AALCO Member States will encourage the conduct of marine scientific research in their EEZs subject to the obligations to protect the marine environment and ensuring that the research so conducted is for peaceful purposes. All arrangements in this regard should be subject to the consent of both the parties involved without prejudice to either.

77. It is essential that AALCO Member States actively participate in deep sea mineral exploration in the High Seas. The AALCO Secretariat holds the universally agreed international

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<sup>53</sup> High Seas Treaty, Articles 47 and 49.

law position that the “Area” and its resources are the common heritage of mankind. In this regard, it is important that States closely follow the work of the International Seabed Authority (ISA). In particular, AALCO Member States should take maximum advantage of the International Seabed Authority Endowment Fund for Marine Scientific Research which grants awards to enable scientists and technicians from developing countries to participate in relevant programmes through activities including research fellowships and training placements. Additionally, participation in the activities of the Assembly, Council and Enterprise of the ISA are of fundamental importance for AALCO Member States.

78. Maritime piracy, armed robbery, illegal migration, human trafficking and illegal fishing pose considerable maritime security challenges to the global community. In particular, the harmful effects of these activities disproportionately fall on developing countries who may lack the resources to effectively tackle these maritime security threats. In this regard, it is essential to safeguard the oceans from these threats by concerted joint action based on the principle of consent and respect for sovereignty.

79. The 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 also known as the BBNJ adopted on 19 June 2023 is a significant milestone for international law. AALCO underscores the view that common heritage of humankind underpins the BBNJ and all States must work together to strengthen the framework of protecting marine biodiversity in areas beyond national jurisdiction in the best interests of global solidarity and cooperation. It is essential that AALCO Member States make continuous efforts to engage with efforts to better give effect to the legal provisions of the treaty.



ANNEX-1

Note Verbale and Explanatory Note from the Government of the Kingdom of Thailand

**URGENT**

No. 19001/516



**Royal Thai Embassy**

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The Royal Thai Embassy presents its compliments to the Secretariat of the Asian-African Legal Consultative Organization (AALCO), and has the honour to refer to the latter's Note No. 177/204/62AS/AALCO dated 28 June 2024, transmitting the provisional agenda for the 62<sup>nd</sup> Annual Session of AALCO and informing Member States about the inclusion of additional item on the provisional agenda.

In accordance with Article 11 (2) of AALCO Statutory Rules, the Embassy has further the honour to transmit herewith a letter by the Director-General of the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand, to the Secretary-General of AALCO, requesting for the inclusion of additional entries in the provisional agenda of the 62<sup>nd</sup> Annual Session of AALCO, including the overall theme "Advancing the Development of International Law through Asian and African Leadership" for general statements.

It would therefore be highly appreciated if the Secretariat could forward the said letter to the Secretary-General for his consideration and appropriate action in accordance with relevant provisions of AALCO Statutory Rules, and kindly inform the Embassy of the progress thereof.

The Royal Thai Embassy avails itself of this opportunity to renew to the Secretariat of AALCO the assurances of its highest consideration.



The Secretariat of the Asian-African Legal Consultative Organization,  
NEW DELHI.



No. 0801/656

Ministry of Foreign Affairs,  
Sri Ayudhya Road,  
Bangkok 10400.

26 July B.E. 2567 (2024)

*Dear Dr. Kamalinne Pinitpuvadol,*

I have the honour to refer to the upcoming 62<sup>nd</sup> Annual Session of the Asian-African Legal Consultative Organization (AALCO) that will be hosted by the Government of the Kingdom of Thailand, in collaboration with the AALCO Secretariat, in Bangkok from 9-13 September 2024. The AALCO Secretariat has, through its Note No. 177/2024/62AS/AALCO dated 28 June 2024, circulated the provisional agenda of the session and informing Member States that, in accordance with sub-rule (2) of Rule 11 of the AALCO Statutory Rules, a Member State may request for the inclusion of additional items in the provisional agenda through a letter addressed to you accompanied by an explanatory note.

In accordance with said provision of the AALCO Statutory Rules, I have further the honour to submit the request of Thailand, as an AALCO Member State and the Annual Session's host country, for the inclusion in the provisional agenda of the following entries:

1. **An overall theme** "Advancing the Development of International Law through Asian and African Leadership" for general statements;
2. **A substantive agenda item** "Law of the Sea"; and
3. **A sub-agenda item** "Recent Developments in International Law on Climate Change" under the substantive agenda item "Environment and Sustainable Development".

**Explanatory notes** for the above additional entries appear in Attachments 1-3, respectively.

His Excellency

Dr. Kamalinne Pinitpuvadol,

Secretary-General of the Asian-African Legal Consultative Organization,

**NEW DELHI.**



As explicated in greater detail in the explanatory notes, the inclusion of the above additional entries would help ensure that the discussions at the upcoming Annual Session are focused, result-oriented, and responsive to the Member States' current agendas and expectations. Such additions would also help ensure that AALCO, as an organisation, remains relevant and at the forefront of global discussions on contemporary international legal issues, in line with the Organization's mandate and progressive outlook. I, therefore, sincerely hope that the above entries would receive generous support from the AALCO Secretariat and other Member States.

In this regard, it would be greatly appreciated if you could process the above request in accordance with the AALCO Statutory Rules by including the additional entries in the provisional agenda and sending intimation in respect thereof to other Member States.

Finally, I wish to reiterate Thailand's strong support for AALCO and to assure you that we will continue to work closely with the AALCO Secretariat, as well as interested Member States, to ensure the well-coordinated preparation for and the success of the upcoming Annual Session in Thailand.

With warmest regards, I remain,

Yours sincerely,



(Suphanvasa Chotikajan Tang)

Director-General

Department of Treaties and Legal Affairs

## Law of the Sea

### *Explanatory note for additional substantive agenda item proposed by Thailand*

#### Background

1. AALCO has long served as a crucial platform for fostering legal cooperation and dialogue among its Member States. Since 1957, AALCO has engaged with the legal regime of the law of the sea and in 1970, the agenda item “Law of the Sea” was taken up for consideration by AALCO. Since then, it has consistently been considered as one of the highlights 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. Since the adoption of the UNCLOS in 1982, AALCO’s Work Programme has been oriented towards assisting Member States in their bid towards becoming functioning signatories to the Convention.
2. In the contemporary global landscape, maritime issues have gained unprecedented importance, affecting international trade, security, environmental conservation, and the sustainable use of ocean resources. Given the increasing complexities and challenges associated with maritime affairs, it is imperative that AALCO addresses the law of the sea in its upcoming Annual Session.

#### Rationale

3. The law of the sea is fundamental in regulating maritime activities, ensuring order, productivity and peaceful relations on the sea. AALCO Member States, many of which are coastal States, face numerous maritime issues that impact their economies, security, and sustainable development goals. These issues include, but are not limited to:

- **marine environmental protection:** pollution, resource exploitation, and climate change pose significant threats to marine ecosystems;
- **maritime security:** piracy, trafficking, and illegal fishing require robust legal frameworks and cooperative measures;
- **sustainable use of marine resources:** ensuring that marine resources are utilized sustainably is critical for long-term economic well-being. Fair and equitable sharing of benefits is also a cornerstone to ensure the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction

By including “Law of the Sea” the agenda, AALCO can facilitate a meaningful dialogue on these issues, encourage legal harmonisation as needed, and enhance cooperation among Member States.



## Selected issues for discussion

4. The deliberations under this agenda may include, *inter alia*, the following:

a. **Issues related to the ITLOS Advisory Opinion on the Request submitted by the Commission of Small Island States on Climate Change and International Law (COSIS) (Case No. 31)**, for example:

- whether any domestic legislation implementing UNCLOS needs amending or updating in light of the ITLOS Advisory Opinion;
- the implications of the ITLOS Advisory Opinion on international state responsibility;
- the potential use of the dispute settlement procedures under UNCLOS to adjudicate climate change issues.

b. **Issues related to challenges and best practices in implementing UNCLOS provisions**, for example:

- *The regulation of marine scientific research in the exclusive economic zone (EEZ)*: what kind of regulations have been adopted by AALCO Member States; how do they ensure compliance with UNCLOS, particularly, that marine scientific research is done exclusively for peaceful purposes, that research activities do not cause environmental harm, and that access to data, samples, and research results are provided to the coastal State;
- *Enhancing participation of AALCO Member States in activities in the Area (mineral resource exploitation)*: effective participation in the Assembly and Council which are governing organs of the International Seabed Authority (ISA); and domestic regulations to enable Member States to participate, including as sponsoring States, in the activities in the Area.

c. **Issues related to maritime security and safety**, for example:

- Perhaps particular attention could be given to the issue of piracy and robbery at sea as it is subject to the on-going work by the International Law Commission (ILC). Issues that can be addressed include: the exercise (and limits, if any) of national jurisdiction with respect to piracy; whether States have a duty to exercise such jurisdiction under either treaties or customary international law; the relationship between piracy and armed robbery at sea under international law and domestic law; and the ILC's on-going work on the draft articles on prevention and repression of piracy and armed robbery at sea;
- Other topics that would benefit from discussion on international and regional cooperation, best practices and strengthening of domestic and international legal frameworks include: human trafficking and smuggling via sea routes; safety of navigation and prevention of maritime accidents; and illegal fishing

**d. Issues related to the sustainable use of marine resources, particularly, in relation to the BBNJ Agreement, for example:**

- implementing legislation for the BBNJ Agreement;
- how the principle of common heritage of humankind should guide the implementation of the BBNJ;
- best practices with regard to fair and equitable sharing of benefits under Member States' domestic laws and the framework of the Convention on Biological Diversity (CBD) that could be applied under the BBNJ framework.

**Expected outcomes**

5. The inclusion of "Law of the Sea" in the Annual Session's agenda is not only timely but also essential for addressing the myriad challenges faced by Member States in maritime affairs. The discussions will bring greater awareness and understanding on new developments and persisting challenges in the law of the sea while the sharing of best practices will offer potential solutions and help foster cooperation. This aligns with AALCO's mission to be a vibrant forum for Asian-African cooperation in legal matters of common concern and will contribute significantly to regional and global stability, security, and sustainability.

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**ANNEX-2**

**SECRETARIAT'S DRAFT  
AALCO/RES/DFT/62/S2  
13 SEPTEMBER 2024**

**THE LAW OF THE SEA**

*The Asian-African Legal Consultative Organization at its Sixty-Second Session,*

**Having considered** the Secretariat Document No.AALCO/62/BANGKOK/2024/SD/S2,

**Welcome with appreciation,** the initiative of the Government of the Kingdom of Thailand to propose the topic “The Law of the Sea”

**Recalling** the United Nations Convention on the Law of the Sea 1982 (UNCLOS) as well as customary international law relating the management of the oceans,

**Commending** the historical role of AALCO in furthering the codification and progressive development of the Law of the Sea including the UNCLOS keeping in mind the aspirations of the Member States,

**Noting with recognition** the introductory statement of the Secretariat,

**Having followed** with great interest the deliberations on the item reflecting the views of the Member States on the agenda item “The Law of the Sea”,

**Deeply concerned** about the growing threat of climate change to the oceans and its adverse impacts on marine ecosystems, ocean chemistry and sustainable development,

**Welcoming** the Advisory Opinion rendered by the International Tribunal for the Law of the Sea (ITLOS) on the impact of climate change on marine environment protection,

**Underscoring** the importance of balancing the interests of coastal States and the scientific community conducting marine scientific research in way that research in the oceans is conducted solely for peaceful purposes and without danger to the marine environment,

**Emphasising** the need and importance of encouraging the participation of AALCO Member States in all mineral resource related activities in the international seabed area or “Area” in accordance as per the principle of common heritage of mankind,

**Recognizing** the dangers posed by maritime piracy, armed robbery, illegal migration, human trafficking and illegal fishing to maritime safety and security,

**Noting with appreciation** the importance of the 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 also known as the BBNJ adopted on 19 June 2023 as a landmark development of international law,

1. **Reaffirms** the importance of oceans as intrinsic to life on earth and a provider of key natural resources including food, medicines, biofuels and other products to mankind.
2. **Encourages** Member States to further all efforts to prevent and control Green House Gas emissions that have an adverse impact on the health of oceans;
3. **Directs** the Secretariat to continue following the progress of this topic in all international forums;

4. **Encourages** Member States to actively engage with the AALCO Secretariat by organizing capacity building programmes on Law of the Sea and calls upon Member States to offer all possible support and assistance in this regard; and
5. **Decides** to place this item on the provisional agenda of Annual Session as and when required.