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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 Law of the Sea

1. By the middle of the twentieth century, the necessity to develop a treaty-based regime for ocean governance was overwhelmingly felt by the international community. 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 as well as 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 were 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 Ceylon (now Sri Lanka) and India) and “Law of the Territorial Sea” (raised by Ceylon).⁴ But it was a bit late in the date for the Organization to make any impact on the Geneva Conference on the Law of the Sea, slated for 1958.⁵ However, AALCO played a very important role, particularly during 1968-1982, in facilitating effective Asian-African participation in the international negotiations triggered by Maltese 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

¹ Jing Geng (2012), “The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS”, *Utrecht Journal for International and European Law*, 28/74: 22, 23.

² R. R. Churchill and A. V. Lowe (1999), *The Law of Sea*, Manchester: Manchester University Press, 24.

³ Donald R. Rothwell and Tim Stephens (2010), *The International Law of the Sea*, Melbourne: Hart Publishing, 14.

⁴ V.S. Mani (2007), “Exclusive Economic Zone: AALCO’s Tribute to the Modern Law of the Sea”, in *Fifty Years of AALCO : Commemorative Essays in International Law*, AALCO Secretariat, New Delhi, 41-61, 42.

⁵Ibid.

⁶Ibid.

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 3 April 2018, 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 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, as well as to peruse the interlink of the law of the sea with other concerns, e.g., those pertaining to the environment, exploitation of mineral resources, etc.

B. An Introduction to the Topic

6. The engagement of AALCO with the subject of Law of the Sea has perhaps been, in recent times, the most intense on the topic of marine biodiversity. 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 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-Eighth Annual Session of AALCO is conservation and sustainable use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ). The brief essentially seeks to capture the pertinence of the topic with respect to the interests and concerns of the AALCO Member States, and takes a

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

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*.

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

stock of the ongoing developments under the auspices of the UNCLOS in charting a new treaty regime for governing of BBNJ. Recommendations of the Secretariat have been annexed to the end of the brief for learned consideration of the Member States.

8. That the topic is relevant to the AALCO Member States is vouched 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-Eighth Annual Session of AALCO themed “Multilateralism and International Order based on International Law” has the potential to serve twin purposes. Such inclusion not only acknowledges the strides that are being taken in the domain of ocean governance through the mechanism of concerted multilateral efforts on the part of the international community towards sustainable utilization of the planet’s resources via recourse to international law, but also presents to AALCO the opportunity to be a forum for inspiring debates and discussions on the topic from an Afro-Asian perspective by inviting its constituent Member States to share their legal and socio-political views on the topics.

9. 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 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 monoxide and ocean fertilisation, among others.¹³

10. Perceiving the urgency of the issue, 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,¹⁴ thereby anticipating and encouraging the ongoing reconciliation between the UNCLOS and other relevant conventions.

¹⁰ Global 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.

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.

¹³ Kristine 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 Article 237 UNCLOS.

11. 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 law of the sea and international marine environmental law.¹⁵ Moreover, modern conservation norms, such as environmental impact assessment (EIA), marine protected areas (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.¹⁶ 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.¹⁷ For example, problems that have either arisen since its ratification, such as exploitation of Marine Genetic Resources (MGRs), or worsened since the treaty's completion in 1982, such as marine pollution, were not addressed.¹⁸ 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 UNCLOS, such as the application of the common heritage of mankind.¹⁹

II. Deliberation at the Fifty-Seventh Annual Session of AALCO in 2018

12. During the Fifty-Seventh Annual Session of AALCO, held in Tokyo on 8-12 October 2018, 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 by the experts invited to deliberate on the Agenda Item "Law of the Sea".

13. AALCO recognizes the need for exchange of views, experiences and information on conservation and sustainable use of marine biodiversity. In view of this, 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,²⁰ the United Republic of Tanzania²¹ and the Kingdom of Thailand,²² and opposed 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 People's Republic of China.

¹⁵Robin 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.

¹⁶D Freestone (2009), "Modern Principles of High Seas Governance: The Legal Underpinnings", *International Environmental Policy and Law*, 39:44.

¹⁷Tullio Scovazzi (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.

¹⁸Rachel 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.

¹⁹Rachel 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.

²⁰ 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.

²¹ *Id.* at 200.

²² *Id.* at 213.

III. Ongoing Developments on the Theme

A. The Landmarks in the Progress towards drafting an ILBI

14. 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; measures such as area based management tools (ABMTs), including MPAs; EIAs; and capacity building and the transfer of marine technology. It is noteworthy that the 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, sectoral and regional bodies.²⁴

15. The four sessions of the meetings of the Preparatory Committee (PrepCom), established by resolution 69/292 of 19 June 2015, 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.²⁵ In its Report of 31 July 2017,²⁶ 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.²⁷

16. The establishment of the PrepCom followed the recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ (Working Group), made to the General Assembly pursuant to resolution 68/70 adopted on 9 December 2013, on the scope, parameters and feasibility of an international instrument under UNCLOS. 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. The fifth meeting of UNICPOLOS in 2004 canvassed new and emerging uses of the oceans, highlighting the risks these uses posed to conservation and sustainable use of biodiversity in ABNJ in the absence of environmental protection measures

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>.

²⁴ Paragraph 3 of the Resolution.

²⁵ 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, *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.

²⁶ Report 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>.

²⁷ A/AC.287/2017/PC.4/2, at pages 7-17.

agreed and implemented by the international community.²⁸ Recommendations from that meeting to the UNGA resulted in the establishment of the BBNJ working group which met nine times from 2006 to 2015.

17. In its recommendations, the Working Group had, *inter alia*, stressed the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, and recommended that the General Assembly decide to develop an international legally binding instrument under UNCLOS.

18. 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 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 is scheduled to take place in the first half of 2020.

19. 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.³⁰

20. 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”.³¹ 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”,³² 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 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

²⁸UNGA, *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).

²⁹ United 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>.

³⁰Officers, IGC on BBNJ, at <https://www.un.org/bbnj/content/officers>.

³¹ Note 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>.

³² *Ibid.*

arrangements and Part VII the financial resources and mechanism. The procedures for settlement of disputes are laid down in Part IX.

21. 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.

B. Deliberation in the three sessions of the IGC

22. 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.

23. The Member States of AALCO and the G-77 have been well represented at the sessions.³³ 33 Member States of AALCO attended the first substantive session,³⁴ and 37 Member States attended the second substantive session.³⁵ 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 2020.³⁶ 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 Mr. Roy S. Lee, Permanent Observer of AALCO to the UN at the substantive sessions.

24. Hereafter, an attempt has been made to capture in brief the positions taken by the Member States, at each of the Sessions of the IGC held so far, on the four cogent issues.

1. Capacity Building and Transfer of Marine Technology

25. The proposal that the new instrument ought to both develop and strengthen the capacity of the States that have a need and request help, so that they will be able to fulfill their rights and obligations under the new treaty, was considered during the deliberations at the IGC Sessions. The discussion during the negotiations centered on whether or not these transfers and capacity building measures should be mandatory or voluntary for States to participate in, and if there were to be money involved. There was divergence of opinion on the sufficiency of voluntary funding alone.

26. Developing States sought to build on the general commitment of UNCLOS by suggesting the creation of new institutions to facilitate capacity building and technology

³³Lists of Participants, at <https://undocs.org/en/A/CONF.232/2018/INF.3>; and <https://undocs.org/a/conf.232/2019/inf.3/rev.2> (as published till 11 September 2019).

³⁴The 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 Arab Emirates, United Republic of Tanzania, Socialist Republic of Viet Nam.

³⁵In addition to the aforementioned Member States, Cameroon, Kuwait, Mongolia and the State of Palestine attended the second substantive session.

³⁶UN, 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>

transfer, including a trust fund for disbursement of monetary benefits and a clearinghouse to register specific needs requests. The need for assistance to even determine the specific capacities and technologies needed was pointed out by some small island developing States. In the second session there was some movement towards including in the text of ILBI special consideration for the least developed countries and recognition of the special circumstances of Small Island developing States.³⁷

27. In the first session there was also disagreement about whether the agreement should include a list of possible technologies that could be transferred or capacities that ought to be built.³⁸ The question of obligations represented a significant obstacle to consensus building around the discussion on the development of a possible draft text. In the second session, however, there seemed to be a general movement towards inclusion in the instrument of a non-exhaustive list of broad categories of types of capacity-building and transfer of marine technology.

28. In fact, capacity building and technology transfer spilled over into debates about access and benefit sharing related to MGRs as well, and were also tied to the implementation of requirements related to marine conservation and impact assessment during the discussions. During the third session, a discussion also emerged about whether to include a concrete timeframe in the paragraph in the draft Agreement on the development of modalities, procedures and guidelines for capacity-building and the transfer of marine technology.³⁹ Further, as participants took up article 46 of the draft treaty on the various types of capacity-building and transfer of marine technology to be provided for in the new instrument, speakers deliberated whether to include a specific list of the types of capacity-building and marine technology transfer to be provided for under the new instrument.⁴⁰

2. ABMTs, including MPAs

29. The primary debate on this issue is on whether areas requiring protection through ABMTs, including MPAs, should be determined on the basis of “precautionary principle” or “precautionary approach”. It is pertinent to note that at the third session the delegations were broadly in agreement that the proposed treaty should refer to the “establishment” of such areas, rather than “designation”.⁴¹

30. There is divergence of opinion regarding the issue of whether to give primary authority over establishing ABMTs to regional and sectoral bodies or whether to invest this authority in a new or existing global organization. Scholars have suggested that lessons could be drawn from 1995 UN Fish Stocks Agreement (UNFSA), and that the establishment of MPAs under the ILBI would be particularly well served by a similar regional approach aligned with existing international agreements: a ‘hybrid’ approach. It has further been

³⁷ President’s Closing Statement, IGC Second Session, <https://undocs.org/en/a/conf.232/2019/5>

³⁸ President’s Closing Statement, IGC First Session, <https://undocs.org/en/A/CONF.232/2018/7>

³⁹ UN, Meetings Coverage and Press Releases, Delegates Consider Role of Capacity-Building, Technology Transfer, as Deliberations Continue on Treaty Governing Marine Biodiversity Beyond National Jurisdictions, 20 August 2019, at <https://www.un.org/press/en/2019/sea2110.doc.htm>

⁴⁰ UN, Meetings Coverage and Press Releases, Speakers Discuss Ways to Monitor Capacity-Building, Technology Transfer Needs of Developing States, as Marine Biodiversity Treaty Talks Enter Second Week, 26 August 2019, at <https://www.un.org/press/en/2019/sea2114.doc.htm>.

⁴¹ UN, Meetings Coverage and Press Releases, Speakers Consider Criteria for Area-Based Management Tools, as Negotiations on Draft Treaty to Protect Marine Biodiversity Enter Third Day, 21 August 2019, at <https://www.un.org/press/en/2019/sea2111.doc.htm>

recommended that the capacity building under the new ILBI should focus *inter alia* on the secretariats of the regional fisheries management organizations (RFMOs) in order to enhance intra-regional and inter-regional cooperation and sharing of best practices.⁴²

31. States also discussed whether or not ABMTs should be time-limited and subject to periodic review and adaptive management. The importance of equitable and transparent stakeholder engagement and participation had also been underlined.

3. EIAs

32. Under Article 204 of UNCLOS, EIAs' goal is "...to observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment." The ambit of EIAs has been sought to be defined in the negotiations, albeit without obvious consensus. While most States agreed that the State undertaking the activity should be the one responsible for the EIA, an agreement on the content of the assessment was elusive. Some States, mostly developing countries, wanted a scientific committee attached to a global body to review the EIAs. This was met with staunch opposition from most of the developed States. Furthermore, the debate also talked about Strategic Environmental Assessments (SEAs).

33. During the third session of the IGC some agreement was reached that a State party to the instrument- rather than the proponent of a planned activity- should determine the need to conduct EIAs. However, opinions differed on the details of carrying out such assessments, including the role that would be played by a scientific and technical body to be established through the treaty, as Articles 30, 31 and 32 of the draft Agreement were scrutinized.⁴³

34. Most States agreed that there needed to be a clearinghouse mechanism to store EIAs and emphasized that the point of this was to make them publicly available. This public access was cited by many states as vital, and the only condition put upon it was the protection/redaction of material related to intellectual property rights or other sensitive information.

4. MGRs of ABNJ, including questions of benefit-sharing

35. Taking up Article 7 of the draft treaty, dealing with the objectives of benefits sharing related to MGRs, the delegates have deliberated upon the issue of governance of MGRs as regards materials of real or potential value, as well as the specific types of resources to be regulated and the sharing of benefits arising from them.⁴⁴ While several technologically advanced States noted the need to avoid burdensome regulations and costs that might deter industry investment, developing States pointed out that an open access and weak benefit-sharing regime would result in all the profits and potential being scooped up by multinational

⁴² Robert Blasiak and Nobuyuki Yagi (2016), "Shaping an international agreement on marine biodiversity beyond areas of national jurisdiction: Lessons from high seas fisheries", *Marine Policy* 71: 210-216.

⁴³ UN, Meetings Coverage and Press Releases, Delegates Agree State Party Should Decide Need for Environmental Impact Assessments Yet Differ on Scope, Implementation, as Marine Biodiversity Treaty Talks Continue, 22 August 2019, at <https://www.un.org/press/en/2019/sea2112.doc.htm>.

⁴⁴ UN, Meetings Coverage and Press Releases, Concluding First Week of Marine Biodiversity Treaty Negotiations, Legal Experts Assess How to Regulate Genetic Resources, Share Benefits, 23 August 2019, at <https://www.un.org/press/en/2019/sea2113.doc.htm>.

corporations from the developed world.⁴⁵ Another pertinent problem accrues from the indeterminacy vis-à-vis the principle applicable to MGRs and the activities involved in their exploitation and use: the ‘freedom of the high seas’ principle or the ‘common heritage of mankind’ principle that underpins the rules on seabed mining and the structure and mandate of the ISA.

36. Furthermore, developed and developing States had very different ideas about which stages should be subject to access and benefit sharing. Developing states in general supported a much stronger set of rules to govern access to MGRs, including both non-monetary and monetary benefit sharing and open access data repositories for the dissemination of in silico genetic information obtained in ABNJ. Developed countries also emphasized that they did not support any type of monetary benefit sharing in this treaty, demonstrating that, despite some convergence on the need for meaningful access and benefit sharing that avoids undue burdens on private sector bio-prospectors, the schism between the developing and developed countries remains on several important topics.

IV. Recommendations from the Secretariat

37. The latest Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) warns that across most of the globe, nature has been significantly altered by multiple human drivers, with the vast majority of indicators of ecosystems and biodiversity showing rapid decline, calling for an urgent coordinated mix of interventions. The IGC and the ILBI it has proposed has the potential to play an important role in bringing the international community together in turning the tide against this rapid decline.

38. The ILBI, whose text is set to be finalized in the first half of 2020, promises to be “one of the most significant developments in UNCLOS for over 20 years”.⁴⁶ 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.

39. The ILBI ought to be perceived from the lens of resilience thinking whilst catering to sustainable utilization of resources. The only possible avenue of attaining this is through cooperation and multilateralism.

40. 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 as contained in the Secretary-General’s Report and views from the Member States and Liaison Officers.

41. The Secretariat shall shortly nominate the Chairperson, Vice Chairperson and the Rapporteur of the Working Group for approval of Liaison Officers on behalf of the member States.

⁴⁵ H. Harden-Davies (2017), “Deep-sea genetic resources: new frontiers for science and stewardship in areas beyond national jurisdiction”, *Deep Sea Research Part II: Topical Studies in Oceanography*, 137: 504-513.

⁴⁶ Kahlil Hassanali (2018), “Approaching the implementing agreement to UNCLOS on biodiversity in ABNJ: Exploring favorable outcomes for CARICOM”, *Marine Policy* 98: 92-96.

42. The Secretariat proposes that the Working Group should immediately commence its responsibilities.