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Hang Chuon Naron

31 Lectures on The International Law of the Sea

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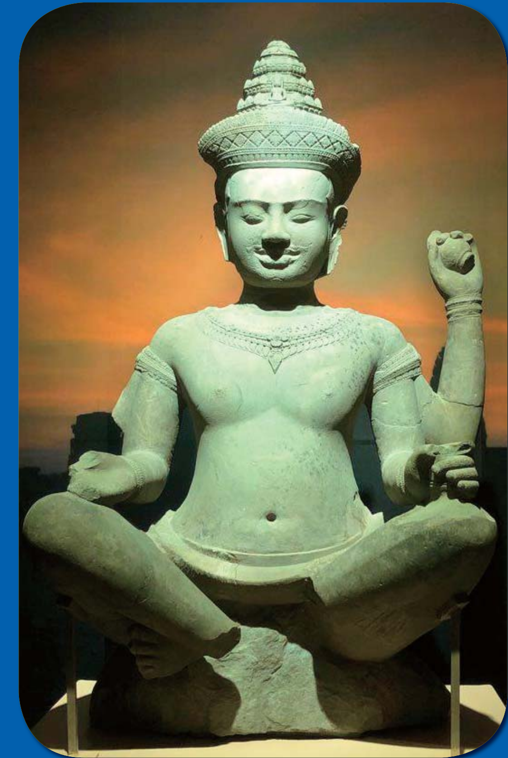

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Abbreviations

ABNJ	Areas Beyond National Jurisdiction
BL	Baseline
CBD	Convention on Biological Diversity
CCZ	Clarion-Clipperton Zone
CITES	Convention on International Trade in Endangered Species
CLCS	Commission on the Limits of the Continental Shelf
CM	Continental Margin
CSC	South China Sea
CTH	Capacity to Harvest
CZ	Contiguous Zone
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
EIA	Environmental Impact Assessment
EU	European Union
F/S	Foot of the Continental Slope
FAO	Food and Agriculture Organization
GA	General Assembly
GC	Geneva Convention (1958)
GCCS	Geneva Convention on the Continental Shelf
HS	High Sea
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes

IEL	International Environmental Law
IL	International Law
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
IO	International Organization
IPOA	International Plan of Action
ISA	International Seabed Authority
IST	International Seaborne Trade
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUU	Illegal, Unreported and Unregulated (fishing)
IW	Internal Water
IWC	International Whaling Commission
LA	Latin America
LOS	Law of the Sea
LOSC	Law of the Sea Convention
LTE	Low-tide Elevation
MARPOL	Marine Pollution
ML	Maritime Law
MPA	Marine Protected Areas
MSR	Marine Scientific Research
MSY	Maximum Sustainable Yield
NAMMCO	North Atlantic Marine Mammal Commission
NM	Nautical Mile
NP	National Prolongation
NY	New York University
OCA	Overlapping Claims Area

OSPA	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PNG	Papua New Guinea
RFMO	Regional Fisheries Management Organization
SC	Surplus Catch
SEZ	Special Economic Zone
SG	Secretary-General
SMS	Seafloor Massive Sulfides
SOLAS	Safety of Life at Sea
TAC	Total Allowable Catch
TS	Territorial Sea
UNCITRAL	United Nations Commission on International Trade and Law
UNCLOS	United Nations Conference on the Law of the Sea
UNEP	United Nations Environment Programme
UNFSA	United Nations Fish Stocks Agreement
UNSC	United Nations Security Council
USSR(URSS)	Union of Soviet Socialist Republics
WB	World Bank
WTO	World Trade Organization
WWF	World Wildlife Fund

PREFACE

This book on the International Law of the Sea is intended to raise awareness of the United Nations Convention on the Law of the Sea (UNCLOS) among the Cambodian public. It is also intended for students and practitioners serious of becoming familiar with and understanding the law governing the sea. It refers to the concept of the law of the sea and explains, when necessary, the terms used.

This book is organized in 32 Lectures on the International Law of the Sea. It deals first in the executive summary section with the main concepts of the law of the sea, followed by the lectures on historical background, navigation and passage, Exclusive Economic Zone (EEZ), navigation in the high sea and EEZ, continental shelf, marine scientific research (MRS), Fisheries, dispute settlement, International Seabed Authority (ISA) advisory opinion, deep seabed, oceans and climate change, baselines, marine delimitation, options for resolving maritime boundary disputes, litigation and arbitration of disputes under UNCLOS, outer limits of continental shelf, the practices of the Commission on the Limits of the Continental Shelf (CLCS), EEZ fisheries regime, high sea fisheries regime, illegal, unreported and unregulated (IUU) fishing, continental shelf petroleum resources, biodiversity beyond national

jurisdiction, marine mammals, marine environment, enforcing environmental standard, maritime law, International Tribunal on the Law of the Sea (ITLOS), arbitration, ad hoc judges, military activities and warship immunity.

It was felt that these issues are useful to those who want to gain insight into the International Law of the Sea.

Hangchuon Naron, PhD

LECTURE 1:

AN OVERVIEW OF THE INTERNATIONAL LAW OF THE SEA

I- The Law of the Sea

The law of the sea is one of the oldest branches of international law. The foundations of ancient maritime law are linked to the Rhodian Sea Code (*Lex Rhodia*), dating to around the 8th century A.D. The roots of modern oceans law are often traced to the early 17th century treatise by the Dutch scholar Hugo Grotius titled *Mare Liberum* (Freedom of the Seas). The concept of the freedom of the seas became the guiding principle of the law of the sea.

The basic rules of oceans law underwent a transformation starting from 1930, when the League of Nations began its codification work related to the law of the sea.

The Truman Declaration

The period following World War II saw a proliferation of expanded and conflicting maritime claims over ocean space and advances in marine technology. The Truman Proclamation of 28 September 1945, responding in part to pressure from domestic oil interests, unilaterally extended United States

jurisdiction over all natural resources of its continental shelf beyond its territorial sea. A statement was issued defining the continental shelf as the seabed extending to 200 metre isobaths. This was the first major challenge to the freedom-of-the-seas doctrine. State practice is claimed to be one of the means by which customary international law is created but State practice or one that results from unilateral declaration could hardly be treated as customary law.

Other nations soon followed suit. In October 1946, Argentina claimed its shelf and the epicontinental sea above it. Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas.

Soon after the Second World War, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries laid claim to a 12-mile territorial sea, thus clearly departing from the traditional three-mile limit.

Later, the archipelagic nation of Indonesia asserted the right to dominion over the water that separated its 13,000 islands. The Philippines did likewise. In 1970, Canada asserted the right to regulate navigation in an area extending for 100 miles from its shores in order to protect Arctic water against pollution.

In the late 1960s, oil exploration was moving further and further from land. The oceans were being exploited as never before. Tin had been mined in the shallow waters off Thailand and Indonesia. Potato-shaped nodules, found almost a century earlier and lying on the seabed some five kilometres below,

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were attracting increased interest because of their metal content.

Large fishing vessels were roaming the oceans far from their native shores, capable of staying away from port for months at a time. Fish stocks began to show signs of depletion.

Offshore oil was the centre of attraction in the North Sea. Britain, Denmark and Germany were in conflict as to how to carve up the continental shelf, with its rich oil resources. It was late 1967 and the tranquility of the sea was slowly being disrupted by technological breakthroughs.

The oceans were generating a multitude of claims, counterclaims and sovereignty disputes. The hope was for a more stable order, promoting greater use and better management of ocean resources and generating harmony and goodwill among States that would no longer have to eye each other suspiciously over conflicting claims.

The Codification Conferences

This led to the First United Nations Conference on the law of the sea in 1958 that produced four keystone conventions:

1. The Convention on the Territorial Sea and the Contiguous Zone, which came into force on 10 September 1964;
2. The Convention on the High Seas, which came into force on 30 September 1962;
3. The Convention on Fishing and Conservation of the Living Resources of the High Seas, which came into force on 20 March 1966; and
4. The Convention on the Continental Shelf, which came

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into force on 10 June 1966.

But the breadth of the territorial sea and the extent of fisheries jurisdiction were left unresolved.

The continental shelf was subjected to the alternative depth criterion and the exploitability criterion. The Convention on the Continental Shelf defined the term "continental shelf" as: "*the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.*"

These issues were addressed again without success at a Second Conference in 1960. Thereafter, the unresolved territorial sea and fishery conflicts were compounded by newer issues, such as the legal regime for mineral resources of the deep ocean beyond national jurisdiction and the need to protect the marine environment.

The exploitability criterion of the continental shelf (the 1958 Convention) has encouraged States to treat the continental shelf as conterminous with the continental margin which is the entire submarine extension of the land mass as far as the border of the abyssal plain and include, in addition to the geological shelf, that part of the submarine extension which comprises the continental slope and the continental rise.

II- The History of the Convention

The triggering event for the Third Conference was an inspiring speech by Ambassador Arvid Pardo of Malta made to the U.N. General Assembly in 1967 calling for the deep seabed

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resources to be declared the "common heritage of mankind."

The new regime began in 1967 when the concept of the Common Heritage of Mankind was first discussed. The GA established an *Ad Hoc* Committee to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction (Sea-Bed Committee).

In 1970 at the 25th Session of the General Assembly two important developments took place: (i) the GA adopted the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction and (ii) decided to convene in 1973 a Conference on the Law of the Sea which would deal with the establishment of an equitable international regime governing the sea.

The Declaration of Principles stated that: "*The seabed and ocean floor, and the subsoil beyond the limits of national jurisdiction… as well as the resources of the area, are the common heritage of mankind*" and "*shall not be subject to appropriation by any means by States or persons.*"

The Sea-Bed Committee acted as a preparatory committee for the future conference. During its summer session in 1972, the Committee on the Sea-Bed and Ocean Floor adopted a list of subjects and issues to be dealt with by the Conference:

- The breadth of the territorial sea;
- Straits used for international navigation;
- The continental shelf – its limit and the nature;
- The concept of an exclusive economic zone beyond the territorial sea, including the question of an exclusive fishing zone;

- The question of non-exclusive jurisdiction of the coastal State over the resources beyond the territorial sea;
- The freedom of the high seas;
- The problems of land-locked and shelf-locked States;
- Preservation of the marine environment;
- Scientific research;
- Peaceful use of ocean space.

In late 1973 the Third United Nations Conference on the Law of the Sea (UNCLOS) was convened. Because of large number of participants, working groups were formed, the elaboration process took place in smaller, informal meetings, on an ad referendum basis, on the basis of consensus. The working groups were established on the basis of interest in a particular issue:

- Coastal States wanted a legal régime that would allow them to manage and conserve the biological and mineral resources within their national jurisdiction;
- Archipelagic States wanted to obtain recognition for the new regime of archipelagic waters;
- Land-lock States were seeking general rules of international law that would grant them transit to and from sea and rights of access to the living resources of their neighboring States;
- Some industrial nations wanted to have guaranteed access to the seabed mineral resources beyond national jurisdiction within a predictable legal framework;
- Developing countries wanted to be more than silent witnesses to the acquisition of new knowledge of the

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oceans so that marine science and technology could be put at the service of all;

- States bordering straits wanted to ensure that free passage would not result in damage to their marine environment or threats to their national security;
- All nations wanted to preserve the freedoms of navigation, commerce and communication;
- Mankind needed to ensure that a new legal regime would safeguard the marine environment against depredation.

The major work of the Conference shifted to three Main Committees:

- First Committee: dealing with the Sea-Bed and Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction.
- Second Committee: Dealing with the general Law of the Sea.
- Third Commission: Dealing with Marine Environment, Marine Scientific Research and Transfer of Technology.

Economic Zone

The central issue of the Conference is the economic zone or the patrimonial sea. Before the UNCLOS, the area beyond the territorial sea constitutes the high sea.

The essence of this concept is the assertion of coastal State's right to extend its jurisprudence beyond the limits of its territorial sea to an area adjacent to its coast in which it will exercise sovereignty over the living and non-living resources of

that area, including seabed and subsoil. The general trend is to accept the breadth of the territorial sea of 12 miles.

The extent of economic zone (patrimonial sea) has been limited to 200 nautical miles, measured from the same baselines as the territorial sea. The establishment of the EEZ would not affect the exercise by all States of the freedom of navigation, the freedom of overflight and the freedom to lay submarine cables and pipelines.

The freedom of high sea comprises, both for coastal and non-coastal States:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

In the EEZ, the coastal State's exclusive jurisdiction would apply to:

a) The adjacent waters for fisheries purposes; and
b) The adjacent under sea areas for exploitation of mineral resources.

III- The 1982 UNCLOS

The Conference was convened in New York in 1973. It ended nine years later with the adoption in 1982 of a constitution for the seas - the United Nations Convention on the Law of the Sea (UNCLOS). During those nine years, representatives of more than 160 sovereign States sat down and discussed the issues, bargained and traded national rights and obligations in the course of the marathon negotiations that produced the Convention.

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The key provisions of the UNCLOS are: Setting Limits of Navigation; Exclusive Economic Zone; Continental Shelf; Deep Seabed Mining; The Exploitation Regime; Technological Prospects; The Question of Universal Participation in the Convention; Pioneer Investors; Protection of the Marine Environment; Marine Scientific Research; and Settlement of Disputes.

The Convention

The Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean: Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a more unique feature, a binding procedure for settlement of disputes between States.

The Convention was adopted as a *"Package deal,"* to be accepted as a whole in all its parts without reservation on any aspect.

The Convention came into force on 16 November 1994, one year after Guyana became the 60th State to adhere to it.

Governments have taken steps to bring their extended areas of adjacent ocean within their jurisdiction. They are taking steps to exercise their rights over neighbouring seas, to assess the resources of their waters and on the floor of the continental shelf.

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Navigation through the territorial sea and narrow straits is now based on legal principles. Coastal States are already reaping the benefits of provisions giving them extensive economic rights over a 200-mile wide zone along their shores. The right of landlocked countries of access to and from the sea is now stipulated unequivocally. The right to conduct marine scientific research is now based on accepted principles and cannot be unreasonably denied.

The International Seabed Authority (ISA) organizes and controls activities in the deep seabed beyond national jurisdiction with a view to administering its resources; as well as the International Tribunal for the Law of the Sea (ITLOS), which has competence to settle ocean related disputes arising from the application or interpretation of the Convention.

Part XI, which deals with mining of minerals lying on the deep ocean floor outside of nationally regulated ocean areas, in what is commonly known as the international seabed area, had raised concerns from industrialized States. The Secretary-General initiated a series of informal consultations in order to resolve those areas of concern. The consultations successfully achieved, in July 1998, an Agreement Related to the Implementation of Part XI of the Convention.

Setting Limits

Conflicting claims over the oceans were not new. In 1494, two years after Christopher Columbus' first expedition to America, Pope Alexander VI met with representatives of Spain and Portugal and divided the Atlantic Ocean between them. A

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Papal Bull gave Spain everything west of the line the Pope drew down the Atlantic and Portugal everything east of it. On that basis, the Pacific and the Gulf of Mexico were acknowledged as Spain's, while Portugal was given the South Atlantic and the Indian Ocean.

The major and primary issue is the setting of limits clearly defining the line separating national and international waters. Though the right of a coastal State to complete control over the territorial sea had long been recognized in international law, States did not agree on the breadth.

At the start of the Conference, the States that maintained the traditional claims to a three-mile territorial sea had numbered a mere 25. Sixty-six countries had by then claimed a 12-mile territorial sea limit. Fifteen others claimed between 4 and 10 miles, and one remaining major group of eight States claimed 200 nautical miles.

Smaller States favored a wide territorial sea in order to protect their coastal waters. Naval and maritime Powers, on the other hand, sought to limit the territorial sea as much as possible, in order to protect their fleets' freedom of movement. The move towards a 12-mile territorial sea gained wider and eventually universal acceptance.

The Convention retains for naval and merchant ships the right of "innocent passage" through the territorial seas of a coastal State.

In addition to their right to enforce any law within their territorial seas, coastal States are also empowered to *implement certain rights in an area beyond the territorial sea, extending for 24*

nautical miles from their shores, for the purpose of preventing certain violations and enforcing police powers. This area, known as the "contiguous zone," may be used by a coast guard or its naval equivalent to pursue and, if necessary, arrest and detain suspected drug smugglers, illegal immigrants and customs or tax evaders violating the laws of the coastal State within its territory or the territorial sea.

The Convention also contains a new feature in international law, which is the regime for archipelagic States (States such as the Philippines and Indonesia, which are made up of a group of closely spaced islands). For those States, *the territorial sea is a 12-mile zone extending from a line drawn joining the outermost points of the outermost islands of the group that are in close proximity to each other.*

The waters between the islands are declared archipelagic waters, where ships of all States enjoy the right of innocent passage. In those waters, States may establish *sea lanes* and *air routes* where all ships and aircraft enjoy the right of expeditious and unobstructed passage.

Navigation

At its origin, the basis of the claim of coastal States to a belt of the sea was the principle of protection; during the 17th and 18th centuries another principle gradually evolved: that the extent of this belt should be measured by the power of the littoral sovereign to control the area.

In the 18th century, the so-called "cannon-shot" rule gained wide acceptance in Europe. Coastal States were to exercise

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dominion over their territorial seas as far as projectiles could be fired from a cannon based on the shore. According to some scholars, in the eighteenth century the range of land-based cannons was three nautical miles. It is believed that on the basis of this formula developed the traditional *three-mile territorial sea limit*.

By the late 1960s, a trend to a 12-mile territorial sea had gradually emerged. However, the *major maritime and naval Powers clung to a three-mile limit on territorial seas.*

A 12-mile limit would effectively close off and place under national sovereignty more than 100 straits used for international navigation. A 12-mile territorial sea would place under national jurisdiction of riparian States strategic passages such as the Strait of Gibraltar (8 miles wide and the only open access to the Mediterranean), the Strait of Malacca (20 miles wide and the main sea route between the Pacific and Indian Oceans), the Strait of Hormuz (21 miles wide and the only passage to the oil-producing areas of Gulf States) and Bab el Mandeb (14 miles wide, connecting the Indian Ocean with the Red Sea).

At the Third United Nations Conference on the Law of the Sea, the United States and the Soviet Union insisted on free passage through straits, in effect giving straits the same legal status as the international waters of the high seas. The coastal States, concerned that passage of foreign warships so close to their shores might pose a threat to their national security and possibly involve them in conflicts among outside Powers, rejected this demand.

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Instead, coastal States insisted on the designation of straits as territorial seas and were willing to grant to foreign warships only the right of "innocent passage," a term that was generally recognized to mean passage "*not prejudicial to the peace, good order or security of the coastal State.*"

The major naval Powers rejected this concept, since, under international law, a submarine exercising its right of innocent passage would have to surface and show its flag is an unacceptable security risk in the eyes of naval Powers. Also, innocent passage does not guarantee the aircraft of foreign States the right of overflight over waters where only such passage is guaranteed.

The compromise that emerged in the Convention is *a new concept that combines the legally accepted provisions of innocent passage through territorial waters and freedom of navigation on the high seas.* The new concept, "transit passage," required concessions from both sides.

The regime of transit passage retains the international status of the straits and gives the naval Powers the right to unimpeded navigation and over-flight.

Ships and vessels in transit passage, however, must observe international regulations on navigational safety, civilian air-traffic control and prohibition of vessel-source pollution and the conditions that ships and aircraft proceed without delay and without stopping except in distress situations and that they refrain from any threat or use of force against the coastal State. *Straits are to be considered part of the territorial sea of the coastal State.*

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Exclusive Economic Zone

The exclusive economic zone (EEZ) *recognizes the right of coastal States to jurisdiction over the resources.* To the coastal State falls the right to exploit, develop, manage and conserve all resources - fish or oil, gas or gravel, nodules or sulphur - to be found in the waters, on the ocean floor and in the subsoil of an area extending 200 miles from its shore.

About 87 per cent of all known and estimated hydrocarbon reserves under the sea fall under some national jurisdiction as a result. The most lucrative fishing grounds too are predominantly the coastal waters.

The desire of coastal States to control the fish harvest in adjacent waters was a major driving force behind the creation of the EEZs.

The special interest of coastal States in the conservation and management of fisheries in adjacent waters was first recognized in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.

The claim for 200-mile offshore sovereignty made by Peru, Chile and Ecuador in the late 1940s and early 1950s was sparked by their desire to protect from foreign fishermen the rich waters of the Humboldt Current.

Between 1974 and 1979 alone there were some 20 disputes over cod, anchovies or tuna and other species between, for example, the United Kingdom and Iceland, Morocco and Spain, and the United States and Peru.

It is evident that it is archipelagic States and large nations endowed with long coastlines that naturally acquire the greatest

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areas under the EEZ regime. Among the major beneficiaries of the EEZ regime are the United States, France, Indonesia, New Zealand, Australia and the Russian Federation.

Each coastal State is to determine the total allowable catch for each fish species within its economic zone and is also to estimate its harvest capacity and what it can and cannot itself catch. Coastal States are obliged to give access to others, particularly neighbouring States and land-locked countries, to the surplus of the allowable catch. Such access must be done in accordance with the conservation measures established in the laws and regulations of the coastal State.

Coastal States have certain other obligations, including the adoption of measures to prevent and limit pollution and to facilitate marine scientific research in their EEZs.

Continental Shelf

In ancient times, navigation and fishing were the primary uses of the seas. Then there is a rich bounty of other resources on and under the ocean floor - minerals, natural gas, oil, sand and gravel, diamonds and gold. *What should be the extent of a coastal State's jurisdiction over these resources? Where and how should the lines demarcating their continental shelves be drawn? How should these resources be exploited?*

States with a wide shelf had a basis for their claims, but the geologically disadvantaged might have almost no shelf at all. The latter were not ready to accept geological discrimination. Also, there was no agreement on the shelf's outer limits.

The States did not use the term "continental shelf" in the

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same sense. In 1958, the first United Nations Conference on the Law of the Sea accepted a definition adopted by the International Law Commission, which defined the continental shelf to include "*the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres, or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.*"

At the Third United Nations Conference on the Law of the Sea, there was a strong consensus in favor of extending coastal-State control over ocean resources out to 200 miles from shore so that the outer limit coincides with that of the EEZ. *But the Conference had to tackle the demand by States with a geographical shelf extending beyond 200 miles for wider economic jurisdiction*.

The Convention resolves it by:

- *Setting the 200-mile EEZ limit as the boundary of the continental shelf* for seabed and subsoil exploitation, satisfying the geologically disadvantaged.
- It satisfied those nations with a broader continental shelf about 30 States, including Argentina, Australia, Canada, India, Madagascar, Mexico, Sri Lanka and France, with respect to its overseas possessions, by *giving them the possibility of establishing a boundary going out to 350 miles* from their shores or further, depending on certain geological criteria.

Thus, the continental shelf of a coastal State comprises the seabed and its subsoil that extend beyond the limits of its territorial sea throughout the natural prolongation of its land

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territory to the outer edge of the continental margin, or to a distance of 200 miles from the baselines from which the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance.

In cases where the continental margin extends further than 200 miles, nations may claim jurisdiction up to 350 miles from the baseline or 100 miles from the 2,500 metre depth, depending on certain criteria such as the thickness of sedimentary deposits. *These rights would not affect the legal status of the waters or that of the airspace above the continental shelf.*

But, coastal States must also contribute to *a system of sharing the revenue derived from the exploitation of mineral resources beyond 200 miles.* These payments or contributions are to be equitably distributed among States parties to the Convention through the International Seabed Authority (ISA).

To control the claims extending beyond 200 miles, the Commission on the Limits of the Continental Shelf (CLCS) was established to consider the data submitted by the coastal States.

Deep Seabed Mining

Deep seabed mining is an enormous challenge. On 13 March 1874, somewhere between Hawaii and Tahiti, the crew of the British research vessel HMS Challenger hauled in from a depth of 15,600 feet a trawl containing the first known deposits of manganese nodules. Analysis of the samples in 1891 showed the Pacific Ocean nodules to contain important metals, particularly nickel, copper and cobalt.

By 1974, 100 years after the first samples were taken, it

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was well established that a broad belt of sea floor between Mexico and Hawaii and a few degrees north of the equator (the so-called Clarion Clipperton zone) was literally paved with nodules over an area of more than 1.35 million square miles.

In 1970 the United Nations General Assembly declared the resources of the seabed beyond the limits of national jurisdiction to be "the common heritage of mankind."

The Exploitation Regime

The treaty faced the question of who should mine the minerals and under what rules. The developed countries took the view that the resources should be commercially exploited by mining companies in consortia and that an international authority should grant licenses to those companies. The developing countries objected to this view on the grounds that the resource was unique and belonged to the whole of mankind, and to establish a public enterprise to mine the international seabed area.

Thus, a range of proposals ran from a "weak" international authority, noting claims and collecting fees, to a "strong" one with exclusive rights to mine the common heritage area, involving States or private groups only as it saw fit. The solution found was to make possible both the public and private enterprises on one hand and the collective mining on the other - the so-called "parallel system."

This complex system, the Agreement on Part XI, is administered by the International Seabed Authority, headquartered in Jamaica.

Technological Prospects

Unfortunately, the road to the market is long, hard and expensive. The nodules lie two to three miles - about 5 kilometres - down, in pitch-black water where pressures exceed 7,000 pounds per square inch and temperatures are near freezing. Many of the ocean floors are filled with hills and valleys. Appropriate deep-sea mining technology must be developed to accommodate this environment.

Extracting metals from the nodules is another task altogether. Recovered nodules retain a great deal of water. Heat processing would therefore require a great amount of energy. Moreover, processing would involve such waste that special sites would have to be found to carry out operations.

The Question of Universal Participation in the Convention

The market conditions are not good. The prevailing economic prognosis on which the seabed mining regime was built has not been realized.

The Convention on the Law of the Sea holds out the promise of an orderly and equitable regime or system to govern all uses of the sea. But it is a club that one must join in order to fully share in the benefits.

The Convention - like other treaties - creates rights only for those who become parties to it and thereby accept its obligations, except for the provisions which apply to all States because they either merely confirm existing customary law or are becoming customary law.

In this context, the Convention was adopted as a "package deal," with one aim above all, namely universal participation in the Convention. It has defined rights while underscoring the obligations that must be performed in order to benefit from those rights.

The adoption of the Agreement on Part XI has eliminated this threat. The Agreement has particularly removed those obstacles which had prevented the industrialized countries from adhering to the Convention.

Pioneer Investors

The Preparatory Commission for the International Seabed Authority (ISA) and for the International Tribunal for the Law of the Sea (ITLOS) was established, prior to the entry into force of the Convention, to prepare for the setting up of both institutions. The Preparatory Commission proceeded with the implementation of an interim regime adopted by the Third United Nations Conference on the Law of the Sea, designed to protect those States or entities that have already made a large investment in seabed mining.

This so-called Pioneer Investor Protection regime allows a State, or consortia of mining companies to be sponsored by a State, to be registered as a Pioneer Investor. Registration reserves for the Pioneer Investor a specific mine site in which the registered Investor is allowed to explore for, but not exploit, manganese nodules. Registered Investors are also obligated to explore a mine site reserved for the Enterprise and undertake other obligations, including the provision of training to

individuals to be designated by the Preparatory Commission.

The Preparatory Commission had registered seven pioneer investors: China, France, India, Japan, the Republic of Korea, and the Russian Federation, as well as a consortium known as the Inter-oceanmetal Joint Organization.

Protection of the Marine Environment

Scientists fear, the oceans' regenerative capacity will be over-whelmed by the amount of pollution it is subjected to by man. Signs of such catastrophe are clearly observed in many seas.

There are six main sources of ocean pollution addressed in the Convention: Land-based and coastal activities; continental shelf drilling; potential seabed mining; ocean dumping; vessel-source pollution; and pollution from or through the atmosphere.

The Convention lays down the fundamental obligation of all States to protect and preserve the marine environment.

Coastal States are empowered to enforce their national standards and anti-pollution measures within their territorial sea. Every coastal State is granted jurisdiction for the protection and preservation of the marine environment of its EEZ. Such jurisdiction allows coastal States to control, prevent and reduce marine pollution from dumping, land-based sources or seabed activities subject to national jurisdiction, or from or through the atmosphere.

With regard to marine pollution from foreign vessels, coastal States can exercise jurisdiction only for the enforcement of laws and regulations adopted in accordance with the Convention or for "generally accepted international rules and standards".

Such rules and standards, many of which are already in place, are adopted through the competent international organization, namely the International Maritime Organization (IMO).

On the other hand, it is the duty of the "flag State" to enforce the rules adopted for the control of marine pollution from vessels, irrespective of where a violation occurs. This serves as a safeguard for the enforcement of international rules, particularly in waters beyond the national jurisdiction of the coastal State, i.e. on the high seas.

Furthermore, the Convention gives enforcement powers to the "port State," or the State where a ship is destined. In doing so it has incorporated a method developed in other Conventions for the enforcement of treaty obligations dealing with shipping standards, marine safety and pollution prevention. *The port State can enforce any type of international rule or national regulations adopted in accordance with the Convention or applicable international rules as a condition for the entry of foreign vessels into their ports or internal waters or for* a call at their offshore terminals.

Finally, as far as the international seabed area is concerned, the International Seabed Authority, through its Council, is given broad discretionary powers to assess the potential environmental impact of a given deep seabed mining operation, recommend changes, formulate rules and regulations, establish a monitoring program and recommend issuance of emergency orders by the Council to prevent serious environmental damage. States are to be held liable for any damage caused by either their own enterprise or contractors under their jurisdiction.

Marine Scientific Research

With the extension of the territorial sea to 12 miles and the establishment of the new 200-mile EEZ, *the area open to unrestricted scientific research was circumscribed*. The Convention thus had to *balance the concerns of major research States, mostly developed countries, which saw any coastal-state limitation on research as a restriction of a traditional freedom* that would not only adversely affect the advancement of science but also deny its potential benefits to all nations in fields such as weather forecasting and the study of effects of ocean currents and the natural forces at work on the ocean floor.

The developing countries demanded "prior consent" of a coastal State to all marine scientific research (MSR) on the continental shelf and within the EEZ. The developed countries offered to give coastal States "prior notification" of research projects. The final provisions of the Convention represent a concession on the part of developed States. *Coastal State jurisdiction within its territorial sea remains absolute*. Within the EEZ and in cases involving research on the continental shelf, the coastal State must give its prior consent. However, such consent for research for peaceful purposes is to be granted "in normal circumstances" and "shall not be delayed or denied unreasonably," except under certain specific circumstances identified in the Convention. In case the consent of the coastal State is requested and such State does not reply within six months of the date of the request, the coastal State is deemed to have implicitly given its consent.

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Settlement of Disputes

The Convention on the Law of the Sea is unique in that the mechanism for the settlement of disputes is incorporated into the document, making it obligatory for parties to the Convention to go through the settlement procedure in case of a dispute with another party.

What emerged from the negotiations was a combination of the two approaches, regarded by many as a landmark in international law. If direct talks between the parties fail, the Convention gives them a choice among four procedures - some new, some old: submission of the dispute to the International Tribunal for the Law of the Sea (ITLOS), adjudication by the International Court of Justice (ICJ), submission to binding international arbitration procedures or submission to special arbitration tribunals with expertise in specific types of disputes. All of these procedures involve binding third-party settlement, in which an agent other than the parties directly involved hands down a decision that the parties are committed in advance to respect.

The Convention also contains so-called "optional exceptions," which can be specified at the time a country signs, ratifies or accedes to the Convention or at any later time. A State may declare that it chooses not to be bound by one or more of the mandatory procedures if they involve existing maritime boundary disputes, military activities or issues under discussion in the United Nations Security Council.

Disputes over seabed activities will be arbitrated by an 11-member Seabed Disputes Chamber, within the International Tribunal for the Law of the Sea. The Chamber has compulsory

jurisdiction over all such conflicts, whether (ITLOS) involving States, the International Seabed Authority (ISA) or companies or individuals having seabed mining contracts.

IV- Conclusion

Thereafter, the United Nations General Assembly convened the Third Conference with a comprehensive agenda that was negotiated from 1973 to 1982 by virtually every nation on earth. The culmination of this largest negotiation in history was the adoption of the United Nations Convention on the Law of the Sea in 1982.

Built around *existing international agreements* and *state practice,* the 1982 Convention covers virtually all activities in the oceans. The Convention establishes a "Constitution" for contemporary oceans law by setting out *rules governing the rights and jurisdiction of nations in various maritime zones.* These include rights over living and nonliving resources, and the critical rights of freedom of navigation enjoyed by the entire international community. The Convention provides the framework for the progressive development of international law dealing with the oceans and its uses.

The 1982 Convention has 168 parties, and is widely considered as *reflective of customary international law* in almost all respects. The main source of this law is found in the 320 detailed articles plus nine annexes contained in the 1982 United Nations Convention on the Law of the Sea. The original deep seabed mining regime in the 1982 Convention was updated in 1994 just before the 1982 Convention entered into force on November 16, 1994.

LECTURE 2:

HISTORY AND BACKGROUND OF THE LAW OF THE SEA

The modern law of the sea linked to State responsibility; sovereignty is linked to nation State. Early history of the law of the sea was dealing with shipping, duties of captain, cargo on the ship. The foundations of ancient maritime law are linked to the Rhodian Sea Code (*Lex Rhodia*), dating to around the 8th century A.D., which defined the duties of shipping. By the 13th century there was a separate court to deal with that. Admiralty was become a separate system, the Admiralty law.

State jurisdiction began in 15th century. In 1493, the Pope mediated dispute between Portugal and Spain. The *Tordesillas* treaty in 1494 divided the new world between Spain and Portugal, west of that line belonged to Spain, while east of line belonged to Portugal. The result of this treaty is that the Brazilians speak Portuguese, and the rest of Latin America speaks Spanish.

The Dutch were not delighted and began to challenge. It came from superb scholar, Ambassador and the father of international law (IL), Hugo Grotius, who wrote in 1609 *Mare Liberum* (Freedom of the Seas). The concept of the freedom of

the seas became the guiding principle of the law of the sea. That is why the roots of modern oceans law are often traced to the early 17th century treatise.

Twenty-six years later, looking at interest, out of UK came a book written by Jonh Selden, who wrote *Mare Clausum* (*The Closure of the Sea*) in 1635. The British argued for dominion of the sea, grapping the ocean and divide it up. It is the offshore fish stock that was important. It was called "*the battle of the books.*"

There was no development since then until 1930s, when the concept of territorial sea was discussed. Why and how the 3-mile territorial sea, it is the history of the cannon-shot rule. This rule came from the security zone, entitled the territorial sea. However, the problem of fishing kept raising its head. In 1926 the International Law Association proposed the 9-mile contiguous zone, beyond the 3-mile territorial sea. This began the debate on the issue. In 1927, the Permanent Court of International Justice (PCIJ) decided on the *Lotus* case.

Towards the 1930, the question posed was what is the breadth of the territorial sea. The report for the Hague Codification Conference in 1930 was the Schuckling report on territorial sea. Some countries argued for a 6-mile territorial sea. Portugal argued for the 12-mile territorial sea. The only country which had 12-miles was former USSR, observer at the conference. The drafting committee proposed a 3-mile territorial sea. Portugal proposed a 6-mile territorial sea and a 6-mile contiguous zone, with a total breath of 12 miles. That was until the World War II. It was therefore a conference that produced text, but never led to anywhere. The idea of the 1930

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conference was that if there was no agreement, then nothing happened.

After the World War II a lot of changes occurred in the law of the sea. In 1945, the US President Truman was interested in development of oil and gas, knowing that there is no legal basis. President Truman claimed the resources, but not sovereignty on the continental shelf up to 200 meters or 100 fathom curve, or 600 feet. The coastal States have jurisdiction to make unilateral claims. This unilateral act set off a wave of unilateral claims. In 1946, Argentina claimed its shelf and the *epicontinental sea* above it (not only shelf, but fishing). The US protested. Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas. The 200-mile claim was not clear from the character. The general concept is that Latin American countries were active in whaling. Before WWII European powers were active. Since then, the west coast of Latin America made claims up to 200 miles.

The balkanization of the world oceans pushed the UN to strengthen rule of law. The First United Nations Conference on the Law of the Sea (UNCLOS I) was held in 1958. International lawyers prepared the texts in different areas. Out of this conference came four Conventions. But the ideas were to have only one convention:

1. ***Continental shelf convention***: States are happy to have sovereign rights over 200-mile mark or a 100-fathom curve. There was a vague language of superjacent

water admitted for exploitation. The Chairman of the conference said it was the geologic continental shelf.

2. ***Convention on territorial sea***: The territorial sea led to nowhere. The polarization was along the cold war opponents. The contiguous zone is seaward toward territorial sea. There was a notion of separating territorial sea from contiguous zone. The contiguous zone is an enforcement area for ship that has gone into territorial sea or going to port. It was an enforcement concept at that time. Because of the cold war, there was no agreement on the breath of territorial sea.
3. ***Convention on the High Sea***: This convention codified the High Sea practices.
4. ***Convention on Fisheries***: It dealt with fishing beyond territorial sea and the conservation beyond territorial sea. It also focused on the stocks that disappeared beyond territorial sea. It became customary international law.

UNCLOS II held in 1960, the US put pressure on delegations trying to get the adoption by 2/3 majority of votes. At that time there is agreement between US and Canada for a 6 plus 6 proposal, i.e. a 6-mile territorial sea and a 6-mile fisheries zone. The 6 plus 6 formula failed because of only one vote. The Korean delegate voted countered to instruction from the Korean government. The problem with this 6 plus 6 formula is that there is no strait built in to it. If 6 plus 6 was accepted, there will be no strait regime.

Ambassador Pardo from Malta was excited about deep sea-bed mining and minerals. He then made a proposal about

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sea-beds and arm control. These minerals should be declared "***Common heritage of mankind***". Immediately, the UN created the Sea-Bed Committee in 1967 and have 35 members to study the common heritage idea.

The Law of the Sea Conference began in New York in 1973. The conference was successful. This time there is a package deal. There is no voting committee, according the consensus procedure. The second session was the Caracas conference on the law of the sea. Nothing came out of that. There was no text. The third session was held in Geneva. The delegates began to look out on issues such as the dispute settlement. Committee II worked on high sea. The goal at the end of session there will be texts. The chairmen of the first, second and third Committees came out with negotiating texts: Single Negotiating Text (SNT). Some 95% of everything of the Law of the Sea Convention came from the SNT, including Part XI on deep-sea mining. On the environmental protection, there are few things, land lock, art 76 on continental shelf. The 6th session and 7th in New York failed to reach agreement. On December 10th, 1982, with the adoption of the Final Act and the convention, the agreement had not reached deep seabed mining. In 1982 UNCLOS III is over, but not everything resolved. The US, Israel and Turkey voted against the Convention. The US is solely because of deep seabed mining. Israel voted against and it was not sure about the motif.

In 1983 there was a preparatory conference to establish the Sea Bed Authority and ITLOS. The US did not take part. Subsequently in the 1990s successful negotiations got underway

to resolve the deep seabed mining. By 1992 and 1994 negotiations on part XI was completed. Every single conditions of the US were fully met. In 1994, US President put the treaty to the Congress. Senator Jessie Helms did not like anything from UN. It went to Senate Foreign Relations twice. Again in 2012 the US made attempt again to ratify UNCLOS. Secretary Clinton totally committed and Secretary of Defense Panetta was committed. The reality is that in the past no administration wanted to do.

The protection of fish stock beyond 200 miles was governed by the Convention on straddling and highly migratory stocks. There was significant overfishing off the coast of Canada beyond 200 miles. Canada seized the ships of Spain, making EU furious. Canada proposed the conference on straddling stock and highly migratory species. Two years later, an agreement on highly migratory stocks and straddling stocks was reached.

At present, there is a problem of creeping jurisdiction: there are substantial unilateral claims of oceans that is opposite of the rule of law. One of the core problems is functional differentiation.

The United Nations Convention on the Law of the Sea (UNCLOS) is often referred to Constitution of the Oceans. It constitutes a codification of the Law of the Sea by convention. However, matters not regulated to the convention continue to be governed by the rules and principles of general international law. Some provisions come from 1958 conventions that represented customary international law, were also included in UNCLOS. There are many other provisions and many treaty

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laws. UNCLOS also reflects the customary international law. It is the results of negotiations over a quarter of century at the high level. This is a treaty dealt with a peace time. UNCLOS is widely accepted: 168 States are parties to the convention. The European Union adhered to UNCLOS as of May 15, 2011. It entered into force since 16 November 1994. There are 17 Parts with 320 articles, plus 9 annexes. UNCLOS was negotiated in 4 committees over 10 years (from 1967 until 1982). There are two implementing agreements:

- ***Agreement relating to implementation of Part XI of UNCLOS***: The Area; and
- ***Agreement for the implementation of the provisions of UNCLOS relating to the conservation of management of straddling fish stocks and high migratory fish stocks***: in force since 11 December 2001. There are 78 parties as of 29 October 2010, the US a party since 1996. Fish management is carried out not by species, but by stocks. It has a dispute settlement mechanism. The highly migratory species listed in annex I to UNCLOS.

The purpose of writing these Lectures on the Law of the Sea is to introduce the Law of the Sea to Cambodian students and the Cambodian public. Cambodia signed the UNCLOS but never ratisfied it. Cambodia is bordered by the sea, therefore the Cambodian public has the interest to know about different regimes for maritime zones and functional aspects of the Law of the Sea, such as:

- ***Territorial sea***: (Part II, sections 1, 2, 3);

- ***Contiguous zone*** (Part II, section 4, articles 33 and 303, archeological and historic waters);
- ***Exclusive Economic Zone*** (EEZ) (Part V): primarily fish;
- ***Continental Shelf*** (Part VI- and Annex II on the Commission on the Limits of the Continental Shelf and Final Act Annex III); primarily oil and gaz;
- ***High seas*** (Part VII);
- ***Deep seabed***: mining;

Other important provisions are:

- Strait used for international navigation (part III);
- Archipelagic states (part iv);
- Island (part viii): history of land lock state;
- Enclosed or semi-enclosed seas (art ix);
- Access of land-locked states to and from the sea and freedom of transit (part x);
- Low water mark: there is definition;
- High water: no definition;
- Protection and preservation of the maritime environment (part xii);
- Marine scientific research (part xiii);
- Development and transfer of marine technology (part xiv) plus final act annex vi; and
- Settlement of dispute.

I hope that this book helps to promote the understanding of the Law of the Sea among the Cambodian students and public.

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EEZ REGIME

EEZ is a site of most ocean activities

- 36% of the total area of the sea
- Over 90% of commercially exploitable fish stocks
- Over 80% of the known offshore oil and gas deposits
- Almost all major shipping routes
- A high proportion of marine scientific research

EEZ Regime

EEZ Claimants: State Practice

- Most coastal States (more than 120 States)
- Non-claimants
    - Extensive territorial sea claimants (150-200 miles)
    - States bordering the semi-enclosed seas: Mediterranean States;
    - EFZ claimants (historic zone)

Extent

- *Inner limit:* outer limit of territorial sea
- *Outer limit:* "200" miles from the baselines from which the territorial sea is measured (max.)
- Based on claim through proclamation, declaration, etc (cf.

continental shelf)

- 200 miles more political than scientific;
- EEZ is based on claim through proclamation, declaration etc (different from CS, you don't have to claims, CS belongs to coastal State *ipso jure* et *ab initio*); for EEZ you have to claim.

Legal Nature

- *Sui Generis* regime: neither residual territorial sea nor residual high seas.
  - "Specific legal regime established in Part V (of the LOSC), under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention" (Art. 55)
  - Key articles
    - Art. 56: Rights, jurisdiction and duties of coastal States
    - Art. 58: Rights and duties of other States
    - Art. 59: Formula for attribution of rights and jurisdiction that do not fall within either of coastal or other States

I. Rights, Jurisdiction and Duties of Coastal States

A. Sovereign Rights for Resources and Economic Activities:

- Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources and with regard to other activities for the economic exploitation and exploration

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of the zone

- Sovereign rights with regard to the seabed and subsoil to be exercised in accordance with Part VI (on continental shelf)
- The term "exclusive" economic zone is misleading.

Sovereign Rights (Art. 56) exploring, exploiting, conserving and managing:

1. Non-living resources (minerals: in seabed and its subsoil (Part VI on continental shelf);
2. Living resources (fish etc.);
3. Other economic resources (energy);

Here land-locked States can exploit the surplus.

Exclusive Jurisdiction (Activities):

1. Construction of artificial islands and installations;
2. Marine scientific research;
3. Pollution control.

Fisheries Regime of EEZ

Key provisions of LOSC

- Art. 61: Conservation of the living resources
- Art. 62: Utilization of the living resources
- Arts. 63-68: Special species (shared and straddling stocks, highly migratory species, marine mammals, anadromous stocks, catadromous species, and sedentary species)
- Arts. 69-70: Right of land-locked States and geographically disadvantaged States

- Art. 73: Enforcement of laws and regulations of the coastal state

Conservation Regime (Art. 61)

- Coastal State shall determine the allowable catch (TAC) for EEZ fisheries
- Coastal State must "take into account" the best "available" scientific information
- Coastal State shall adopt measures to prevent "overexploitation"
- Coastal State must maintain or restore stocks at levels which can produce "maximum sustainable yield (MSY)", "as qualified by relevant environmental and economic factors," including the economic needs of coastal fishing communities and the special requirements of developing States, . . .
- Measures must consider "effects on species associated with or dependent upon harvested species" to ensure such species do not become "seriously threatened"

Management Regime (Art. 62)

- Objective: *optimum utilization* of EEZ living resources ("without prejudice to Art. 61")
- TAC (based on qualified MSY) – CTH = SC (TAC: total allowable catch. CTH: capacity to harvest, SC: surplus catch)
- Access to other States for SC
- *Factors to be considered in giving access to other States:* significance of living resources of the area to the economy of the coastal State and its other national

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interests, the provisions of Arts. 69 and 70, the requirements of developing States in the sub-region or region, and the need to minimize economic dislocation in States whose nationals have fished in the zone . . .

- Foreign fishermen must comply with conservation measures and other terms and conditions established in the laws and regulations of coastal State.

Criticism

- Vague wordings and the lack of specific and unqualified obligations (e.g.: role of scientific evidence, qualified MSY, consideration of associated or dependent species)
- Broad discretion on the part of coastal State to conserve and manage EEZ resources (e.g.: determination of TAC and CTH, allocation of surpluses)
- Ineffective approach to conservation and management (e.g.: MSY-based approach, absence of precautionary approach and ecosystem-based management)
- Absence of effective dispute settlement procedures in respect of most matters relating to EEZ (Art. 297 (3) (a))

Assessment

- The premise of the EEZ regime that coastal State exclusive jurisdiction over living resources to 200 miles would prevent their overexploitation has proved to be flawed
- Control over the entry into domestic fisheries has failed

and the problem of overfishing continues

- LOSC regime for coastal State conservation and management is vague, overly flexible, and difficult to enforce
- Need to strengthen the EEZ fisheries regime and incorporate the post-UNCLOS developments relating to fisheries management such as precautionary approach, protection of biodiversity, ecosystem-based management, and using MSY as a limiting (conservation) reference point (cf. Art. 3(2) of UNFSA).

B. Jurisdiction regarding artificial islands and installations, marine scientific research, and the protection of marine environment.

States have jurisdiction regarding those activities. Jurisdiction is more limited than sovereign rights.

Artificial Islands, Installations and Structures

- Coastal State has exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures
- Artificial islands v. artificial installations and structures: no clear definition
- Coastal State has exclusive jurisdiction over such islands and installations and rights to establish safety zones (max. 500 meters) around them
- Duty of coastal states to give notice, maintain permanent means for giving warning, and remove the abandoned or disused installations and structures

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Marine Scientific Research

- Coastal State has the right to regulate, authorize and conduct marine scientific research in the EEZ (cf. marine scientific research in the territorial sea: "exclusive right," "express consent")
- Coastal State must give consent to pure research by other States (mandatory) but may withhold its consent to resource-purpose research (discretionary)
- Duty not to interfere with other activities undertaken by coastal States

Protection and Preservation of Marine Environment

- Coastal State has prescriptive and enforcement jurisdiction in its EEZ to deal with dumping, vessel-source pollution, and pollution from seabed activities
- Coastal State's jurisdiction with respect to the vessel-source pollution in the EEZ
- Coastal State may require an offending vessel (that is within its TS or EEZ) to give necessary information
    - Coastal State may undertake physical inspection where the alleged violation has resulted in "a substantial discharge causing or threatening significant pollution"
    - Coastal State may arrest a vessel only where the alleged violation has resulted in "a discharge causing major damages or threat of major damage to the coastline or related interests of the coastal State . . ."

II. Rights and Jurisdiction of other States

Freedoms of Transportation and Communication

- Freedom of navigation, over flight and laying submarine cables and pipelines
    - Other international lawful uses of the sea related to these freedoms

Freedom of Navigation

- All the States enjoy "the freedoms referred to in Art. 87 of navigation" and "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships," and "compatible with other provisions of the Convention"

- ***Limitations***
    - Duty of "due regard" for the interests of other States (Art. 87(2) and Art. 58(1), LOSC)
    - Subject to Arts. 88 to 115 of the Convention and other pertinent rules of international law dealing with navigation on the high seas (Art. 58(2), LOSC)
    - Duty of due regard to the rights of coastal State and to comply with laws and regulations adopted by the coastal State in accordance with this Convention and other rules of international law not compatible with Part V of the Convention (Art. 58 (3))
    - Subject to coastal State's control in the contiguous zone (max. 24 miles)

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III. Attribution of Unspecified Rights and Jurisdiction

- Any conflict over activities not falling within rights of either coastal State or other States should be resolved on the basis of equity and in light of all relevant circumstances
    - (e.g.) recovery of archaic items or historic wrecks

EEZ: Controversial Issues

- EEZ remains "a zone of tension" between coastal State control and maritime State use of the sea
- "Territorial temptation," "thickening jurisdiction," "competition between *mare liberum* and *mare clausum* over substantive limits"
- Coastal State's tendency to expand its jurisdiction to protect resources, environment and security
- *Tension between resource interests and navigation*
    - Art. 73 (1), LOSC: "The coastal State may, in the exercise of its sovereign rights to explore, exploit… the living resources in the EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings as may be necessary to ensure compliance with the law and regulations adopted by it…"
    - Some coastal States expect foreign fishing vessels to identify themselves and explain their intentions when they enter the EEZs, even on transiting through the area

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- *Tension between environmental interests and navigation*
    - Art. 230, LOSC: "If there are grounds to believe that a vessel has violated international pollution rules and standards in the EEZ, the coastal State may require information, undertake physical inspection, or institute proceedings including the detention of the vessel."
    - However, coastal States tend to expand their jurisdiction far beyond this provision
        - Prior notification and ship reporting requirement
        - Strict safety regulations for a vessel with dangerous cargoes
        - Prior authorization or ban on the shipments of hazardous radioactive materials
- *Tension between security interests and navigation*
    - LOSC is silent on military use of the EEZ except Article 88 (Reservation of the high seas for peaceful purposes)
    - Military activities in the EEZ
    - *Military exercises and maneuvering,* weapon testing and firing, intelligence and surveillance activities, flight operations, telecommunication and space activities
    - *State practice divided:*
        - Maritime States consider military activities as part of the normal freedom of navigation and over flight that are available in

        the EEZ

        - Some coastal States require user States to obtain consent for such activities

    - *Marine scientific research* and surveys
        - Lack of definition of the terms in LOSC
        - *Hydrographic and military surveys:* LOSC is not clear and State practice divided

30th anniversary: EEZ is important part of the convention. EEZ regime is not a perfect regime, some deficiencies, problems, fisheries regime: a lot of dispute from EEZ, between environment protection and navigation, security and navigation.

But EEZ has withstood the test of time. Resources management.

Disputes related to navigation (58) should take advantage of the compulsory dispute settlement procedures.

Has EEZ widely accepted by coastal states? EEZ regime has entered into customary international law. It does not mean that all regimes have become customary international law.

LECTURE 4:

NAVIGATION IN THE HIGH SEAS AND EEZ

Drawing one line for fish and for navigation has failed. Fish management is carried out by stocks. At the same time, we need navigation freedom. Navigation should remains free. No case to put navigation freedom under coastal State's control. To draw a single line is a failure for both.

As we move toward Ocean law, 1958 Convention is useful, but it was not addressed functionally.

Five Major Navigation Problems in 1958 Geneva Convention

The five major navigation problems in 1958 Geneva Convention Regime and how UNCLOS III solves these navigation problems.

Problem Number 1

Expanding territorial sea may close many straits

In Art. 3 of UNCLOS, the breadth of TS is up to 12 nm measured from baselines. While some illegal claims of TS beyond 12 nm, the international community is addressing. You

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do not have to declare TS. In Greece, some TS is less than 12 nm, proximity to Turkey.

Japan is another example that does not want to make problem claiming lesser TS.

Problem Number 2

Uncertainty as to a definition of innocent passage

There was an argument about possibly coastal State, an ambiguity of regime of TS. That was resolved in the convention in innocent passage through TS: Part II, section 3.

Art. 19: the definition of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State…

2. Passage of foreign ship shall be considered prejudicial to peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

List of kinds of things that make non-innocent passage in TS:

a) Threat or use of force;
b) Exercise with weapon;
c) Spying;
d) Propaganda;
e) Launching or landing aircraft;
f) Launching military device;
g) Smuggling;
h) Pollution;
i) Fishing;
j) Research or survey;

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k) Interfering with communication systems;
l) Activities having direct bearing on passage.

Toward the end of LOS negotiation, military activities are in the provision of innocent passage. LOS does not support modification of warship going through TS. A number of States continue to do, but illegal.

Problem Number 3

Strait regime

Moving from 6 miles to 12 miles, 100 straits are affected. There are huge implications for international navigation. It does not include submerged submarine. Major problems in Strait Gibralta, no country can send aircraft. What to maintain communication, you have to treat straits separately. The Camp David accord has provisions that protected strait regime.

Straits from High seas to territorial seas (totally 5 in the world). It is very important for US and USSR as maritime superpowers, especially for navy ships.

Transit Passage Regime (Part III of UNCLOS)

Article 37: Transit passage is applied to strait used for international navigation between:

a) One part of the high sea or an EEZ; and
b) Another part of the high seas or an EEZ

Exceptions: The regime is not applied to (Art. 35):

1) Areas of internal waters within a strait;
2) The high sea or EEZ leading to the territorial seas of

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States bordering straits;

3) Straits in which passage is regulated by long-standing international conventions (route of convenience).
4) (Art. 36) A strait used for international navigation if there exists through the strait a route through the high seas or through an EEZ (High sea or EEZ corridor).

Transit Passage: under Geneva Convention: Create rights for a third party.

Words:

- ***Hampering***: physical obstacle such as wreckage;
- ***Suspension***: legal policy;
- ***Impediment***: aircraft and ship.

The regime provides both strait the freedom of navigation regime (not innocent passage).

Ships and aircraft enjoy the right of transit passage:

- Shall not be impeded:
- Freedom of navigation and over flight for the purpose of continuous and expeditious transit.

Art 39: Duties of ships and aircraft during transit passage

It is high sea freedom in going through strait.

Normal mode: for submarine, aircraft.

Aircraft shall observe rules by ICAO.

Ships in transit passage must comply with "*generally accepted international regulations, procedures and practices*" for "*safety at sea, including the International Regulations for Preventing Collisions at Sea*" and for "*the prevention reduction and control of pollution from ships*." (Art. 39(2)).

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Art. 40: No research and survey activities

Art. 41: Sea lanes traffic separation shcemes

Straits states may adopt laws and regulations regarding "the safety of navigation and the regulation of maritime traffic," in particular designating sea lanes and prescribing traffic separation schemes (Arts. 41, 42(1)(a)).

Straits states also may adopt laws and regulations "*giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait*." (Art. 42(1)(b)).

If a violation of the foregoing straits state regulations causes or threatens major damage to the marine environment of the straits, the straits states "*may take appropriate enforcement measures*" (Art. 233).

Art. 42. Laws and Regulations of States bordering straits related to transit passage

Adopt laws and regulations relating to transit passage through straits:

a. Safety of navigation;
b. Control of pollution;
c. Prevention of fishing;
d. Smuggling.

Limitation: Foreign ships shall comply with laws and regulations of coastal States.

The flag State of a ship or State of registry of an aircraft

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entitled to sovereign immunity shall comply with the law and bear international responsibility for loss.

The Convention provides accommodation to archipelagic States, who then must do to be favorable to navigation.

Problem Number 4

Four categories of accepting straits:

1. Art. 35(c): the legal regime by long-standing international convention: The Turkish Strait, the Strait of Magelan; Chile; next 3: Denmark or Sweden. The belt: Denmark alone.
2. *The second categories of exceptions:* Art. 36: Strait is so broad, you must keep your normal high sea freedom. The regime is complete freedom of navigation.
3. The 3rd category of strait, excluded in Art. 38(1): a special category. There is a regime of non-suspendable innocent passage, if the strait is formed by an island and the mainland and there exists seaward of the island a route through the high seas or through an EEZ of similar convenience (Art. 38).
4. *The 4th category not governed by strait regime is Art. 45: the regime of innocent passage.*

The regime of innocent passage shall apply for international navigation:

- The strait going from high seas or EEZ to territorial sea. The boundary between Iraq and Kuwait after the Gulf war. The regime of non-suspendable innocent passage.

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Two articles in LOS applied to strait chapters: so central to negotiation, that other chapters are not applied:

First: Art. 233: Safeguards with respect to straits used for international navigation.

If a foreign ship has committed a violation of the laws and regulations referred to in Art. 42, causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures. *Mutatis mutandis*: the necessary changes having been made.

Second: Art. 234: Ice-covered areas.

Canada, wanting to control the Artic, has expanded the law to 100 miles. Canada worked very hard to win out the LOS to have SEZ to include source pollution.

There are 3 limitations on special power given to iced-covered areas:

Coastal States have the rights to adopt and enforce laws and regulations for prevention and control of marine pollution from vessels within the EEZ. The laws shall have:

1. Due regard to navigation
2. Warship, coast guard vessels;
3. All of this is subject to dispute resolution.

Archipelagic Regime (Part IV of UNCLOS)

It is not applied continental countries, to Greece, does not apply to Canada to draw strait baselines. It does not apply

to US to draw straight baseline from California to Hawaii. Only Indonesia, the Philippines, Bahamas and Fiji.

There is second limitation: to draw straight baseline. Art. 47(1): 9 to 1: nine water and 1 land: such as Micronesia. The other side, less from 1 to 1, that excludes Japan and UK, an island.

Land area

Regime: accommodation to draw straight baseline, you get freedom of navigation: innocent passage regime, Art. 52. And Art. 53: Archipelagic sea lanes set up.

For the archipelagic State the objective is political integration: where is the country? With straight baseline system.

Problem Number 5

The vessel source pollution

There is no notification or consent regime, despite the fact that seeks to require to seek the consent for war ship to go to TS.

Security zone claims: you cannot have security zone, it is illegal. North Korea created a 150 mile security zone. It is illegal.

Third, freedom in economic zone: the core compromise: no navy would agree that 200 miles.

Freedom of the international community in the EEZ.

The right and jurisdiction of coastal state in EEZ. They never give any thing.

Art. 88 on peaceful purpose: The High sea shall reserve for peaceful purpose. Art 2. Not to violate the Charter.

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Transit Passage (Part III)

Transit passage is a *sui generis* navigational regime governed by the LOSC that gives an unimpeded right for vessels of all flags to sail through territorial straits. The Straits of Malacca and Singapore are said to fall under the category of straits where transit passage applies as they link one part of the High Seas or EEZ to another.

The compromise that emerged during the protracted negotiations consisted of:

a) allowing coastal States to extend their territorial seas to 12 nautical miles;
b) recognizing the right to "***transit passage through international straits***;" and
c) allowing countries to establish an exclusive economic zone (EEZ) out to a distance of 200 nautical miles from their coasts, governed by Part V of the Convention, Articles 55–75.

The right of "***transit passage through international straits***," as defined in the Convention, is ***nonsuspendable*** and applies to all vessels – military and commercial – and also to airplanes (Article 38(1)). Pursuant to the language in Article 39(1)(c), submarines are allowed to remain submerged when they exercise the right of transit passage.

Innocent passage does not apply to over flight and requires submarines to navigate on the surface (Convention, Arts. 17 and 20).

The position of the maritime countries that all ships should have the right to unimpeded passage through international

straits was thus largely adopted in Part III (Arts. 34–45) of the 1982 LOS Convention. Each strait, however, presents unique geographical and practical considerations, and some straits have historically been governed by unique legal regimes, which remain in force pursuant to Article 35(c) of the Convention.

Lecture 5:

Continental Shelf Regime

Extent of the outer limits. It is not surprising that coastal states are keen to have legal status of Continental Shelf (CS), as it is rich in living and non-living resources.

The superjacent waters can have effective occupation through mining. This is not only CS, but also resources to CS. This proclamation is political, and other states follow suit. However, state practice has wider area, as to geographical, by the time of the First UNCLOS, state practice over CS varies, by 1958, things have accepted as to the nature, CS has sovereign rights for exploration and exploitation of resources of CS. However, the geographical extent of CS was very difficult question, even with adoption of criteria.

The extent of CS (Outer Limits)

- First introduced as a geographic concept (without fixing specified outer limits) by Truman Proclamation of 1945. The US intended that the CS is known for many years as offshore area;
- Substantial evolution since then: separation of legal concept from geographical concept. Now CS used by lawyers is different from geological CS. Milestones:

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- Art. 1 of the GCCS (1958): "a depth of 200 meters" or "exploitability"
- *North Sea Continental Shelf Case (1969)*: "natural prolongation." It was the first delimitation case; without defining what natural prolongation is. It has used in few different contexts: (i) The Court defined natural prolongation of TS (as new definition). *Art. 1 of Geneva Convention is customary international law* (seabed and subsoil of the submarine areas adjacent to the coast) (ii) On the other hand, natural prolongation of land territory. It creates some confusion about the extent of CS. This decision was praised as landmark decision of delimitation of CS, it is the concept of natural prolongation.
- Art. 76 of the UNCLOS (1982): "continental margin" or "distance of 200 nm." *This has become customary international law*. If one looks at state practice, in national legislation this concept has been introduced either as distance of 200 nm or continental margin.

Art. 76 of the UNCLOS

It is the most difficult article. To understand require legal and scientific working together.

- **Para (1)**: *Seabed and subsoil of submerged areas beyond the territorial sea throughout the natural prolongation* of its land territory to the outer edge of the continental

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margin (CM); or to a distance of 200 nautical miles from the baseline, where the outer edge of CM does not extend up to the distance.

- **Para (3)**: CM comprises the *submerged prolongation of the land mass* of the coastal State and consists of the shelf, the slope and the rise. (CM did not include deep ocean's floor).

- **Para (4)**: How to determine the outer edge of CM (*Irish formula*) or the extended CS.
    - Either 60 nautical miles from the foot of the slope or the sediment thickness line where the underlying sediment thickness is one percent of the distance (1/100) to the F/S, whichever is greater;
    - In the absence of evidence to the contrary, F/S shall be determined as the point of maximum change in the gradient at its base.

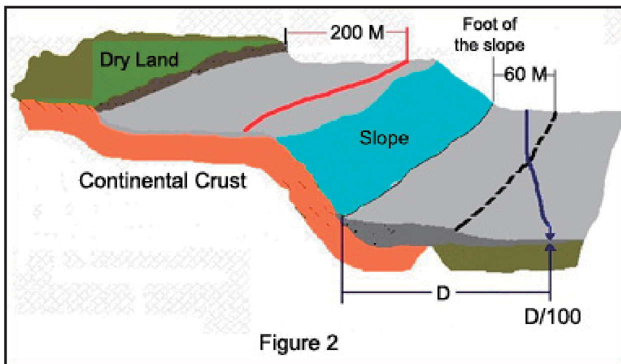

Figure 2

- ***Meaning of natural prolongation***

  "The notion of natural prolongation and that of continental margin under article 76, paragraphs 1 and 4, are closely interrelated. They refer to the same area." This is the definition of extended CS, beyond 200 nm.

Bangladesh said that natural prolongation (NP) is a separate criterion to be applied. The Bay of Bengal is the natural prolongation. Myanmar says natural prolongation is from 50 miles off the coast of Myanmar. Bay of Bengal, sediment constitutes, for this geological and geophysical reasons, only Bangladesh has natural prolongation. According to Bangladesh, the concept of NP is to be satisfied before entitled to CS. For Myanmar the notion of CS is not important, so long as you have continental margin. Myanmar argues that NP is not an independent or separate criterion that coastal state must satisfy; NP was used to justify coastal state seabed and subsoil. For the first time, since the ICJ, the ITLOS has made a definition. (*Bay of Bengal Case*). (Myanmar's view is accepted).

- **Reasons:**
  - Textual and contextual reading of Art. 76;
  - No elaboration of the notion of NP (cf. CM).
  - Object and purpose of Art. 76: to define the precise outer limits of CS.
  - *Legislative History:* many states used this concept to include all continental margin into the concept of continental shelf.
  - Commission on the Limits of the Continental Shelf (CLCS) guidelines and practice: "test of appurtenance."

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Para (5): Maximum distance

- Either 100 nautical miles from 2 500 meter isobaths or 350 nautical miles from the baseline, whichever is greater.

Para (8):

- Information on the outer limits to be submitted by the coastal state to the CLCS.
- CLCS makes recommendations on the outer limits;
- The limits established by the coastal state on the basis of the recommendation shall be final and binding.

The idea of Para 8 is that coastal state should not unilaterally set limit of CS and must go through CLCS.

- Currently, 60 submissions (+45 preliminary information) have been submitted and 14 recommendations adopted.
- Submissions cover more than 30 millions km^2 of extended continental shelf (including overlap)
- Broad areas of overlapping extended continental shelf and needs for delimitation

Nature

- Sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources (CS does not belong to coastal state);
  CS is not a part of the territory of the coastal State.
- Inherent right (*ipso facto* and *ab initio*);
- No occupation or proclamation necessary (cf. EEZ);
- Entitlement to the continental shelf does not depend on establishment of its outer limit.
- Exclusive right: No one may undertake exploration and exploitation without the express consent of coastal State;

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- Continental shelf regime distinct from the EEZ regime:
  - "Outer continental shelf" (beyond 200 nautical miles)
  - Inherent right v. claim-based right

Rights and Duties of Coastal State

- Sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources (Art. 77).
  - Absence of reference to "*conservation and management*"
  - Natural resources comprise mineral/other non living resources of the seabed and subsoil and living resources belonging to sedentary species;
- Exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands and installations (Arts. 80 and 60)
- Exclusive rights to authorize and regulate drilling on the continental shelf for all purposes (Art. 81);
- Legal status : of superjacent waters/air space unaffected (Art. 78)
- No infringement and unjustifiable interference with navigation and others rights and freedoms of other States (Art. 78).

Rights and Duties of Other States

- Rights of all States to lay submarine cables and pipelines on the continental shelf of coastal State (Art. 79)

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- Coastal State may not impede their laying/maintenance, subject to its right to take reasonable measures for exploration, exploitation and prevention of pollution from pipelines (pollution from pipeline);
- The delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal State

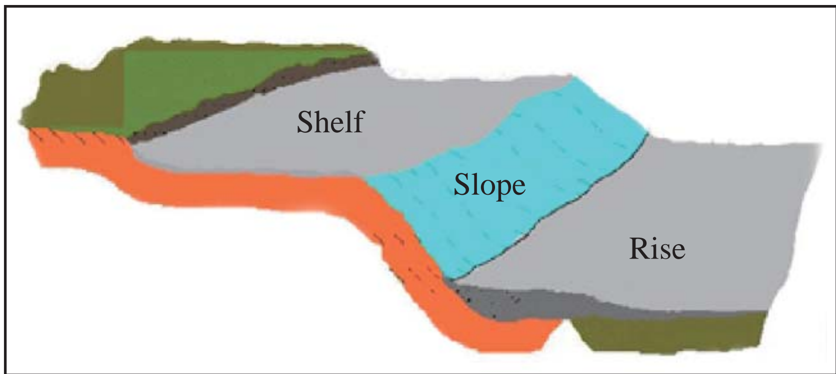

Figure 1

- Coastal State has right to establish condition for cables or pipelines entering into its territorial sea or jurisdiction over cables or pipelines used in connection with the exploration and exploitation:
    - Distinction between pipelines and submarine cables
    - Disputes over laying/repairing of submarine cables and pipelines

Rights and Duties of Coastal States over the Continental Shelf beyond 200 nm (Arts. 82 and 246 (6))

Outer continental shelf (beyond 200 nm).

- Coastal State has the same rights and duties over the outer continental shelf except:
    - Obligation to pay to the *International Seabed Authority* a proportion of the value or volume of the production at the site after the first five years of exploitation
    - Proportion would rise from *one per cent in the sixth year to seven per cent in the twelfth and following years*
    - A developing State that is a net importer of the mineral produced is exempt from the obligation to pay
    - The Authority is to distribute the payments to State Parties to the LOSC on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them (Art. 82(4))

Exceptions:

Marine scientific research applied to EEZ and to CS.

Marine scientific research is divided into pure and resource-purpose.

For Continental Shelf:

- Coastal State may not withhold its consent for conduct

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of MSR of direct significance for the exploration and exploitation of natural resources on the continental shelf beyond 200 miles outside those areas designated as areas for exploitation or detailed exploratory operations (Art. 246(6))

Continental Shelf (EEZ) of Islands

- Rocks which cannot sustain human habitation or economic life of their own are not entitled to EEZ/CS (Art. 121(3));
    - Rockall in the North Atlantic Ocean
    - Japan's continental shelf claim to the Okinoto-rishima (2008)
    - Serpents Island in the Black Sea
    - Scarborough shoal in South China Sea

Serpents Island in the Black Sea (did not use serpent Island as base point), this is the same like Koh Kut. Serpents Island is entitled to the 12 mile territorial sea, but the Court did not give any effect for the delimitation of CS and EEZ. It means that Serpents Island is given full effect in delimitation of territorial sea. Superficially there is inconsistency in treating this island, but there are rationales.

Within 200 nm, it is the CS regime and not EEZ regime.

Boundary Delimitation of EEZ/Continental Shelf (Arts. 74/83)

- Consequence of the extension of maritime jurisdictions: overlaps and needs for boundary delimitation

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- More than 400 places of such overlaps around the world, many of which have yet to be delimited
- Articles 74/83 of the UNCLOS are of little substantial help for delimitation
- On the other hand, there have been more than 20 decisions by International/Arbitral Tribunals so far
- Equity (equitable principles) is the prime principle of delimitation but its content remains uncertain

Future Challenges

Establishing the limits of the continental shelf beyond 200 nm.

- Overlaps and boundary delimitation
    - *Bay of Bengal Case:* the first adjudication to delimit the CS beyond 200 nm.
- Development of a scheme for payments or contributions with respect to exploitation of oceans.
- Increasing activities further offshore in deeper waters and needs for regulation
- Emerging uses

Conclusion

Art. 76 of UNCLOS

617 words that redefine the CS of a coastal state and provide a mechanism of the state to extend its sovereign rights over the resources of the seabed and subsoil of the CS.

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Art. 76

1. Now all states gets 200 mile EEZ, no matter the geographic shelf is: (i) natural prolongation of its land territory; (i) continental margin; (iii) baselines.
2. The CS shall not extend beyond the limits provided in Para 4 to 6.
3. The continental margin comprises the submerged prolongation of land mass.
4. The breadth of 200 miles.
   Thickness of sedimentary rocks is at least 1 percent of the shortest distance from (Ireland formula).
5. Two mechanisms: the sediment. The fixed points containing the line of the outer limits
6. Submarine ridge (Iceland case).

Legal continental shelf:

Old continental shelf really means continental shelf.

The word continental shelf now means continental margin.

Foot of the slope.

Half of States cannot get out of the 200 nm continental shelf: shelf-locked countries.

Thickness of 1% from the foot slope is the limit of the continental margin.

The extended CS a coastal state is established through the 'natural prolongation' of continental land mass the limits of which are determined by:

- Depth and shape of the seafloor (FOS and 2 500 metres
- The thickness of the underlying sediments.

LECTURE 6:

MARINE SCIENCE RESEARCH REGIME

The jargon of LOSC is marine scientific research (MSR). It appears in the Geneva conference in 1958. But 1958 it was not an important subject, and was not important at the beginning of UNCLOS III. The third committee dedicated to marine environment.

The subject was more important than people have thought. During the law of the sea conference time, marine scientific research (MSR) was clear example of activities at sea.

Negotiating diplomatic viewpoint, MSR was a battleground for discussion at the conference about the new regime and ideas of EEZ. The most complex of MSR discussion in the LOS, the regime MSR is related to EEZ. In order to reach general agreement on reasonable formulation on articles of the regime of EEZ, States had to go through the application of ideas through MSR. The key moment of LOS, as far as EEZ is concerned, there is the high-level semi-secret Castañeda-Vindenes group, in which top representatives of States negotiated Arts. 54, 55, 56, 58 related to EEZ. It is not TS, not part of HS, it is *suis generis*, in which coastal states have jurisdiction, but freedom of high sea is preserved.

MSR was the subject in which there was tension between

the interests and needs of coastal states and the interests and needs of other States. This was an important and indispensible testing ground for future regime.

First of all, MSR is not defined in the LOS. During the conference, there was an idea that you can reconstruct indirectly. There was no formal definition. For certain conference or activities that set the lines for both scientific research. Some amount of flexibility to keep track of new developments it is not so bad. The idea was the discipline that includes experimental work designed to increase the knowledge, marine biology, geophysics and physical oceanography. There are certain forms of sciences left that are excluded: marine archeology, but it is clearly not included in natural characteristics of the ocean. The real difficulty concerned certain activities: traditional and modern, debatable.

MSR: is more on legal idea:

First, *whether hydrography, the collection of routine meteorological and oceanographic observations by voluntary observing ships and floats, and bioprospecting are included in the notion is controversial*. There is controversy whether this belongs to MSR. Reading the LOSC, Art. 40, mentioned Hydrographic survey as separate. There is a document of Chairman of Third Committee, which says so. It is not covered by Part XIII.

During the LOSC there were disussions on the bio-prospecting, research on genetic material from the seabed. Practical implication to obtain results to be used on economic purposes, whether we are in Part XIII or not and being discussed at UN.

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Legal Aspect

When the UNCLOS started, the word is already on the table, Art. 5 of the CS of GC 1958, which provides for a dual regime:

- *The regime of consent; and*
- *The regime of freedom of geography.*

There was difficult discussion, as held in the framework of the Third committee attended by a lot of scientists, junior members of delegations. Diplomats concentrated in the Second Committee, deep sea mining.

The Regime, Art. 30

A regime in which the basis principle is that of consent of coastal state. In order to conduct MSR in the zone under jurisdiction of the State, you need consent. The importance of scientific activities at sea has found limitation to the principle of consent.

General Articles

Art. 39: Promotion of MSR. All States have the rights to conduct MSR, subject to rights and duties of coastal State.

Art. 240: MSR should be conducted for peaceful purpose: *not against UN Charter is peaceful*, not military activities, safeguard.

- Conduct with scientific methods;
- Not interfere with use of sea; application of principle of reciprocal due respect in EEZ and HS.
- MSR must be conducted respecting other activities and other activities must be conducted respecting MSR

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(navigation, fishing etc.);

In the convention, MSR is treated in general part, MSR is an activity. In the article this transversal approach is not followed. The Convention goes zone by zone: in TS, EEZ and CS. But also provisions of MSR in areas and waters beyond EEZ, HS.

Not much to say about TS. MSR can only conducted with consent of coastal states. The coastal states enjoy sovereign in TS.

In EEZ and CS, Art. 246 is the key article in Part XIII. It started with provision science friendly.

Coastal States: There is general right of regulation, including authorizing. General Principle in paragraph 2, MSR in EEZ and CS shall be conducted with consent of coastal zone (need authorization).

On convention, CS is the bottom of EEZ. This is indication that in most case equivalent, because sometimes CS may extend beyond EEZ, some time a State may not claim EEZ.

We have 2 regimes:

1. Regime normally consent should be given;
2. Regime in which consent may be or may not be granted, depending on domestic law. Coastal State can say yes or no without giving reasons.

Coastal state: Art. 246 Marine scientific research in the EEZ and on the CS.

We deal with "pure MSR," with the aim of increasing knowledge for the benefit of mankind. The result is accessible to everyone. Customs and practice are to be conducted in secret.

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There are difficulties: an attempt normal circumstances exist despite no diplomatic relations. You cannot say normal state prevails if no diplomatic relations.

In fact, there is a lot of uncertainty of the regime. There is a legal definition. Coastal State may grant consent, but in their discretion to withhold consent, if the projects (4 hypothesis of projects) to withhold its consent (connected with resources):

- Exploration or exploitation of natural resources: living and non-living: mineral or fish.
- The use of harmful means, the use of explosives.
- Use of construction and use of artificial islands.
- The project contains communicated nature of the project (sanction of misbehavior).

There is an acceptance of categories of projects in which coastal states may withhold permission.

Para 6 of Art. 246: research conducted in the outer CS, beyond 200 miles. Coastal state may not withhold consent, in respect of MSR project to be undertaken on CS from base, outside those specific area, in which Coastal State…

The idea is that State may have extended CS beyond 200 miles, approved by CLCS. The coastal State will designate certain parts of its extended CS for exploration and exploitation. On this part there are serious activities, the rights to withhold consent of activities. On the whole of CS, if no area is designated, research activities, or non-resource oriented should not be denied (a compromise formulation between States that have more than 200 nm CS and less).

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Art. 252 about implied consent: seen as a tool to avoid excessive delay by coastal states to answer request to conduct activities.

If no answer is given before 6 months. This is important at the time that not many States were involved with activity.

If we compare regime set out in LOSC and practice, consent is less correspondent. States abides by convention, but they do not follow certain details. The State should provide the names of research directors, some states want to get all on the vessels. The convention is part of customary law, whether customary law is changing the convention.

Dispute may arise on MSR. Possibility of certain of disputes to be submitted.

MSR may have relevance in *effectivités* in dispute concerning sovereignty on island or marine area: if research is conducted in such a way without opposition that implies that state enjoy sovereignty, that state control feature. Each case is different, but nothing exclude that MSR is relevant.

US holds the view that military research is included: EEZ of China.

Military activity: if addressed explicitly would raise controversy. The choice was not to address explicitly, state should read and shape the meaning on those who make observation. Art. 58 on activities in EEZ, the freedom of the HS is key provision. What is meant to activities internationally lawful use of sea, such as operation of ship, aircraft, submarine and pipelines? Activities as manoeuvre, use of vessels could be included in this, laying of pipeline or cable for military uses go

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on the same provisions. Marine military research done for use of military, transmission of sound under sea, provided on the peaceful purpose clauses, may go.

Part XIII was an area that developed maritime oriented State conceded in order to gain freedom of navigation under EEZ. Still there are regimes, articles on CS, there is rule called customary. The coastal state has the right and responsibility. You need consent. The impression is that practice, there is merit, State, science is a regime in which the interest of coastal state dictated by legitimate: security and resource prevail on science. If those who answer the request of the mission, if coastal state are involved in the process, only politician or military. There are a lot of legal researches on these aspects.

Art. 58 what jurisdiction on 56, not jurisdiction on military activity. Would there be implication if military research is not included 58 or high sea freedom? Are researches before the freedom of high sea prevail?

Art. 56, coastal state has jurisdiction on MSR. Do military research is part of MSR or is separate? States are shy on Art. 59.

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Lecture 7:

Fisheries Regimes

International law of the sea was based on two simple propositions: coastal state has exclusive rights on TS (narrow) and high sea. The right includes fishing. All over the high sea, beyond the limit of TS, fishing was free, based on the assumption, Grotius specified in his book, that resources were infinite in the sense that fishermen can fish and would remain in the centuries. This premise today is not correct any more. This applies up to the 1930s of the last century.

On the high sea, 3-6 nm, everybody was free to catch. In the preparation of the codification conference in 1930, many voices were raised that it is free to fish in coastal sea, beyond the limit of TS. However discussion was held in giving coastal states some rights beyond TS, these rights would include customs rule, later on contiguous zone. When discussion about right on fishing there was voice. Gilbert Gidel said these prospects of giving rights to coastal state in contiguous zone could not entertain as it give arbitrary claims.

It was seen as a big change even though not too much against the principle. When Truman adopted declaration on fishing, less famous than CS, it was recognized that fish beyond the limit of TS has to be protected, and the idea in the

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Proclamation, the US as coastal state has the same rights and would adopt a protection zone for fisheries which had been exploited alone by US fishermen. This is the first claim of exclusivity beyond the limit.

The Truman Proclamation says this has to be regulated by specific agreement. This is revolutionary. What happens next, certain countries in South America, the proclamation of exclusive rights on CS resources, was much more assertive than the one on fisheries. Why you should have exclusive rights on minerals and not fish? This is how exclusive rights on fisheries were discussed. Some claim 200 nm. However, these claims were not accepted by the international community.

When the Geneva Convention came, the traditional line, some agreement found beyond the limit of TS, but the convention was unsuccessful. During the CLOS III, the original idea, of LA claiming 200 miles became generally accepted.

A lot happened during the conference.

Now we have the notion of EEZ, broad notion of sovereign rights and jurisdiction of coastal states: exploration, exploitation, management. The coastal state has exclusive rights on everything, including fisheries.

Art. 56, then various more detailed provisions concerning fishing in EEZ, the sovereign rights of coastal state, attention Arts. 61 and 62.

Art. 61 rights of coastal states shall determine the Total Allowable Catch (TAC) of living resources and shall say, nothing can be captured if stocks decline. Responsibility to determine catch based on scientific evidence: rights plus responsibility.

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In Art. 62, fishing resources are to be utilized, coastal state shall determine TAC can harvest in EEZ. Coastal state can exploit the TAC determined unilaterally, if it is determined, if some resources that can be fished, it doesn't fish this surplus may be fished by other states. There is a complex system allowing land-locked and geographically disadvantaged state, under Art. 69, Art. 70 would have right to fish the surplus. However, the rights depend on agreement with the coastal state. It is an obligation to conclude an agreement, a right but weak right; like a marriage.

There are states that allow other states to fish, but not land-locked or geographically disadvantaged.

In EEZ, it is the regime that coastal state call the cards. All the decision belongs to the coastal states. The other states have to negotiate the way.

The LOSC speaks about the straddling stocks, *anadromous* stocks and *catadromous* species living in the parts of EEZ, some in HS are dealt with in special convention.

The remainder outside of EEZ, remains the HS for the purpose of fishing.

Concerning HS, Art. 87 states that all States enjoy freedom of fish subject to condition laid out in section II. In freedom of HS fishing is included. Section II is short. We should consider the following:

Up to the recognition of EEZ or EFZ of 200 miles, we consider HS and fishermen; long distance fishermen went fishing. When coastal states established 200 miles, the fishermen were kicked out, some through agreement. The former

fishermen had to go out, they went to the HS. The HS was marginal area from view point of fisheries, now become important. Now only 15% of world catches come from HS. Most fish come from EEZ. This 15% of HS, tension and destruction of present decades, the fishermen that used to fish, they prefer areas of the HS that are not too far from the coast. Fish tend to be not in too deep water.

So concern arose in coastal states, called straddling stocks beyond 200 miles; they say coastal states should have the rights to preserve these stocks. There was tension and brought to the conclusion in 1995 UN straddling stock agreement, in which parties agreed not to battle on principle, coastal states have right up to 200 nm, and institutionally deal with these rights. International cooperation in the mechanism, introducing ideas from the development of international environmental law. In the straddling agreement, there is the Precautionary Principle, unknown when the LOSC was adopted.

The Agreement on straddling stocks was not a success as the LOSC, the American continent and Canada were part of this. The EU and Japan become a party. It is a good indication of the way ahead.

Under IL there were a lot of activities, under UN and activities of the FAO. They developed the Code of Conduct for the responsible fisheries. It includes compliance agreement, a lot of other provisions; State can look at development of their domestic laws. On FAO there was tension of practical development of law. The Convention of Port State Measures on authorizing and to fight against fishing. Fishing is the name of

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the game in UNCLOS. It is clear that flag states don't behave as they should in fisheries; coastal states don't have capability and reach to impose or force system to which over fishing is avoided. Fishing resources of the world is dwindling in the HS. Fisheries remain outside of overview. If they don't they will not accept the international community telling them. On the HS it is different. There is an effect to establish the convention to try to avoid overfishing and decreasing fishing resources. Sooner or later, global outlook will be necessary and coastal states will have to develop an overview.

What about dispute on fisheries?

As far as fisheries in the EEZ similar to Scientific research, most dispute how coastal states with sovereign rights are excluded from jurisdiction of the tribunal. You cannot sue a state that adopted an TAC wrongly. This is purely sovereign rights. You can submit the matter to conciliation.

On the HS, any dispute with fishing on high sea falls within the jurisdiction in Part VII. So far the dispute is not. There is lateral, indirect glimpse on high sea, fishing vessels arrested and detained by coastal states on alleged violation of rules on fisheries. The discussion is on guaranteed. On the LOSC and the Straddling Stock Convention and other Conventions the rule that dispute can be brought to a judge or arbitrator under the LOSC. Under straddling stock convention dispute arising between States have to do with application an interpretation related to bilateral agreement, even dispute can be brought before the judge. It means that agreement that have

no, become provider through participation of the Straddling stock. This is important mechanism not yet exploited.

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Lecture 8:

Dispute Settlement

1- Overview

UNCLOS is remarkable in terms of dispute settlement mechanism.

Part XV: "One of the most innovative features of the Convention"

- Sec. 1: General provisions (Arts. 279-285)
- Sec. 2: Compulsory procedures (Arts. 286-296)
- Sec. 3: Limitation and exceptions to applicability of Sec. 2 (Arts. 297-299)

2- General Provisions

- Obligations to settle disputes by peaceful means (Art. 279); Art. 2 of the UN Chapter.
- Peaceful means of parties' own choice prevail over Part XV (Art. 280); they can choose whatever means.
- Obligation to exchange views (Art. 283)
    - *Pactum de negotiando*: an obligation to negotiate in good faith with a view to concluding an agreement; only they are not able to reach an agreement they will submit the dispute for section 2.

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- *Pactum de contrahendo*: an obligation to reach an actual permanent agreement.

3- Compulsory Procedure

Only where consensual settlement is not possible (Art. 286)
Forums for compulsory dispute settlement (Art. 287)

- Disputants given considerable freedom in choosing the specific forums
- Four main choices: ITLOS, ICJ, Annex VII Arbitral Tribunal, and Annex VIII Special Arbitral Tribunal
- If the parties have chosen the same forum, the dispute goes to that forum; if not, the dispute goes to the Annex VII Arbitral Tribunal
- State Party that has not selected is deemed to have accepted the Annex VII Arbitral Tribunal
- Thus, Annex VII Arbitral Tribunal is a default forum: in the absence of concurrence of choice. From the ITLOS, the ITLOS should be the default forum. It can be PCA or any *ad hoc* arbitration. The majority of Parties have chosen ITLOS as their choice, 30 plus did not choose (compare to 162 parties).
- There were concerns for the fragmentation of international law. ICJ and Annex VII have been mutualized, 3 or 4 judicial bodies dealt with the same subject matter: ICJ, ITLOS, Annex VII Arbitral Tribunal deal with delimitation cases. There is possibility of different judgment. So far this concern has not turned out to be true, especially in disputes concerning interpretation.

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ITLOS is well aware of the structure and the possibility. It would be disservice to the international community, if the two judicial bodies do not make consistent judgments.

4- Exceptions

- Exclusion of certain categories of disputes that touch upon discretionary power or vital interest of State (sovereignty, boundary, security, etc): State is sovereign. You cannot force State to do things. A shift of consensual paradigm to compulsory paradigm in dispute settlement. States are concerned with the possibility of selecting procedures without its consent, especially regarding sensitive matters.
- Balance between the need for safeguards against an abuse of power (thus, an effective dispute settlement system) and the need for safeguards against an abuse of legal process.

(1) Limitations on the applicability of compulsory procedures (Art. 297)

- Disputes concerning the exercise of a right or discretion by coastal State regarding marine scientific research (Art. 246) or a decision to suspend or terminate a research project (Art. 253)
- Disputes concerning the exercise of sovereign rights (discretionary powers) with respect to living resources in the EEZ

- Cf. The above two types of disputes subject to *compulsory conciliation under Annex V*, section 2.

2) Optional exceptions (opting-out) to applicability of compulsory procedure (Art. 298)

- Disputes concerning sea boundary delimitation or those involving historic bays or titles (subject to compulsory conciliation under Annex V, sec. 2)
- Disputes concerning military activities and law enforcement activities in regard to the exercise of sovereign rights/jurisdiction related to Art. 297 (2) or (3)
- Disputes in respect of which the UNSC is exercising its functions

5- International Tribunal for the Law of the Sea (ITLOS)

1) Relationship between Part XV and the ITLOS

a. ITLOS is one among the four means of dispute settlement under the Convention (not the "default procedure")
b. Jurisdiction of the ITLOS goes beyond the settlement of disputes arising under the Convention

2) Jurisdiction

a. Contentious jurisdiction

The tribunal has jurisdiction over:

- All disputes and all applications submitted

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to it in accordance with the Convention (Art 21, Statute); and

- All matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Art. 21, Statute: 10 such multilateral agreements so far)
- Any dispute concerning the interpretation or application of treaty already in force and concerning the subject matter covered by the Convention, if all parties to such a treaty so agree (Art. 22, Statute)

The tribunal has jurisdiction of mixed dispute. It is difficult to say categorically that the ITLOS has no jurisdiction over sovereign dispute, relation of sovereign dispute to maritime dispute. If party to dispute agree to submit boundary dispute to ITLOS, ITLOS may not be able to reject. The duty of tribunal is to resolve the dispute submitted to it, on the basis of mutual agreement. Maybe one of the disputes involve sovereignty over island.

Exception to exception: art 298. Concurrent jurisdiction.

b. Advisory jurisdiction: (*innovative part of ITLOS. Seabed Dispute Chamber (11 judges) has advisory opinion*).

   i. *The Seabed Dispute Chamber* may give an advisory opinion on legal questions arising within the scope of the activities of the Assembly or Council of the ISA (Art. 191);
   ii. The Tribunal may give an advisory

opinion on a legal question if this is provided for in an international agreement related to the purposes of the Convention (Art. 138, Rules). (*Innovation, when there is no rule in convention or Statute, Art. 21 of Statute, ITLOS jurisdiction is drafted broadly encompassing broad matters*).

1. A major innovation;
2. Statutory basis: Art. 21, ITLOS Statute
3. Who may submit a request?: whatever "body" authorized in the respective agreement.

3) Access

The Tribunal is open to:

- States Parties to the Convention (Art. 20 (1), Statute: currently 168 States Parties); and
- Entities other than States Parties in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case (Art. 20 (2), Statute)

The Seabed Dispute Chamber is open to:

- States Parties, the Authorities and the other entities referred to in Part XI, section 5 (Art. 37, Statute)

4) Urgent Proceedings

a. Provisional measures pending the constitution of an Annex VII arbitral tribunal (Art. 290(5))

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i. An innovation in international adjudication
ii. ITLOS becomes a default forum for provisional measures:
   1. *where a dispute on the merit has been submitted to the arbitration tribunal*
   2. *if it is not constituted or parties fail to agree on any other court or tribunal within two weeks from the request*
iii. Measures to protect the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision
iv. Normally, it takes four weeks to prescribe provisional measures after the request
v. Thus far, three such proceedings

b. *Prompt release of vessels and crews (Art. 292)*
   i. Tribunal becomes a default forum over the prompt release from detention in the following cases:
      1. When the authorities of a State Party have detained a vessel of another State Party
      2. It is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release upon the positing a reasonable bond or

other security (Art. 73 (2) on the alleged violation of fisheries legislation; or Arts. 220 and 226(1)(b) on marine pollution or environmental damage)

c. The parties have not agreed upon the application of release to any court or tribunal within 10 days from the time of detention
    i. Application by or on behalf of the flag State: a private person authorized by the flag State may institute this proceedings
    ii. Nine cases involving the prompt release of vessels and crew, all cases for alleged violation of fisheries legislations.

5) Advantages of the Tribunal

Specialized court with competence over the law of the sea disputes

- Access, though limited, to non-State entities: Seabed Authority, legal persons, physical persons.
- Advisory jurisdiction
- Urgent proceedings: order within one month;
- Speedy trial: Myanmar vs Bangladesh: 2 years and 3 months.
- Legal aid: ITLOS trust fund

6. Cases submitted before the Tribunal

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Case No. 1 The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release	**Case No. 2** The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)
Cases Nos. 3 and 4 Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures	**Case No. 5** The "Camouco" Case (Panama v. France), Prompt Release
Case No. 6 The "Monte Confurco" Case (Seychelles v. France), Prompt Release	**Case No. 7** Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)
Case No. 8 The "Grand Prince" Case (Belize v. France), Prompt Release	**Case No. 9** The "Chaisiri Reefer 2" Case (Panama v. Yemen), Prompt Release
Case No. 10 The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures	**Case No. 11** The "Volga" Case (Russian Federation v. Australia), Prompt Release

Case No. 12 Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures	**Case No. 13** The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release
Case No. 14 The "Hoshinmaru" Case (Japan v. Russian Federation), Prompt Release	**Case No. 15** The "Tomimaru" Case (Japan v. Russian Federation), Prompt Release
Case No. 16 Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal	**Case No. 17** Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)
Case No. 18 The M/V "Louisa" Case (Saint Vincent and Grenadines v. Kingdom of Spain)	**Case No. 19** The M/V "Virginia G" Case (Panama v. Guinea-Bissau)

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- As of 2012, number of cases submitted before the Tribunal: 19
- Current status
  -15 cases resolved
  -2 cases discontinued
  -2 cases pending
- Types
  -9 prompt release cases
  -4 provisional measures (2 provisional measures under Art. 290(1))
  -5 cases on merits
  -1 advisory opinion
- Parties
  -Asia (10), Africa (4), Latin America (9), Europe/others (13), Developed (18), developing (18)

Subject matters

Disputes about fishing, pollution and marine environmental protection, detention of vessels, maritime boundary delimitation, development of deep seabed, damages to vessels

Assessment

Tribunal has received more cases than any other forums under Art. 287. The pace of building its docket thus far is comparable to that of other judicial bodies in their early years. As more activities take place in the Area, more disputes are likely to be submitted to its Seabed Dispute Chamber. Needs to make State Parties more familiar with Part XV and the

procedures of the Tribunal.

Declarations in accordance with Art. 298 of the 1982 Law of the Sea Convention.

State	Date day/mon./yr.	Exclusion Article 298(1)(a). (b). (c)
Argentina	01/11/1995	All three
Australia	22/03/2002	First
Belarus	27/07/2001	All three
Canada	07/11/2003	All three
Cape Verde	10/08/1987	Second
Chile	25/08/1997	All three
China	25/08/2006	All three
Equatorial Guinea	20/02/2002	First
Denmark	16/11/2004	All three
France	11/04/1996	All three
Gabon	23/01/2009	First
Iceland	21/06/1985	First
Italy	13/01/1995	First
Mexico	06/01/2003	First and Second
Norway	24/06/1996	All three
Philippines	08/05/1984	Unclear
Portugal	03/11/1997	All three
Republic of Korea	18/01/2006	All three
Republic of Palau	27/04/2006	Maritime boundaries
Russia	12/03/1997	All three
Slovenia	11/10/2001	All three
Spain	19/07/2002	First
Tunisia	24/04/1985	All three
Ukraine	26/07/1999	First and second
United Kingdom	07/04/2003	Second and third
Uruguay	10/12/1982	Law enforcement activities

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Lecture 9:

ISA Advisory Opinion

The advisory opinion on ITLOS, Case No. 17, Advisory Opinion, 1 February 2011. Judge Treves was President.

Most of the cases deal with the contentious cases. However, like ICJ, advisory opinion can be made. LOSC permits the Council of International Seabed Authority to ask advisory opinion to the Seabed Chamber. Not all possibilities of advisory opinion in the convention, the tribunal in drafting its rules, introduced Art. 139 of the rules, 'if an advisory opinion on matter on LOS is requested by body on an agreement that permits such request the ITLOS is competent to render an advisory opinion.

Commentators like the ideas, there are a lot of talk about this. What has happened that Council of ISA requested advisory opinion from 11 member Seabed Chamber, request in May 2010, opinion on Feb 2011, 7 months, quick.

The first advisory opinion by the Chamber and ITLOS. It is remarkable, and also it is completely unanimous opinion. None of them wanted to add separate opinion. For the first time, not only decision was unanimous, but with one voice.

The rule: written phase and hearing. President does not sit all the time in Hamburg. The President should decide who should preside on: the Authority and Parties to LOSC should

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participate. It is possible to invite inter-governmental organization that have competence in subject matters, but who?

On top of that, there was feeling shared by colleagues that it would be an incomplete discussion as the environmental implications to do so in total absence of the environmental community. So the Chamber look at how to do as no provision to involve NGOs. The first thing is to identify the NGOs to be invited. The Chamber has found that NGOs that has accreditation with ISA, then invite them. Then IUCN, which is a strange IO. It is a domestic Swiss law association, however, among members there are 96 sovereign States that give particular positions that can be treated as Inter-governmental organization, and was invited to participate to join the observer status of the Authority to have the voice of NGOs. Nobody protested. It is beneficial, as IUCN signed MOU and sent advocates to plead.

After that Chamber got a letter from 2 NGOs, Green Peace wanted to participate as amici curiae. The decisions were made, the NGOs should not participate in hearings. But ICJ issued a non-binding directive, Memo of NGOs cannot be accepted as cases, but can be put in a special place in Peace Palace for parties. The Chamber says Green Peace's documents can not be considered as documents of the case, but can be put on the website of the ITLOS. All parties and the whole world can benefit from them.

It was the first time in the area of LOS that NGOs are involved.

One point that may be interesting that the Chamber made some reflection about its own role in handing out its

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competence about advisory opinion. The discussion was on whether it is part of the system of the Authority. In order to exercise its function, the Authority may need the opinion of others. The task is to act as an independent voice, the Chamber works to help the system, the Authority function. The best way to help it is through advisory opinion: advisory opinion of the ICJ.

Advisory Opnion

The reason why the advisory opinion was requested: Nauru has submitted application for Seabed area, they want to know liability if they sponsor such enterprise. In order to do so you need sponsorship of State party. They say we are small, we want to do, but we want to know the liability. They made the request of 10 pages. The 3 basic questions:

One: obligation

Two: liability

Three: measures to meet liability.

The Chamber dealt with how to approach interpretation; as customary international law and ITLOS in Bangladesh/ Myanmar case. Regulations adopted by Seabed Authority. This is unexplored ground, the Tribunal observed that the regulations are binding texts adopted by State parties of the convention through diplomatic conferences, Treaty and Vienna rules govern. The ICJ says something similar about decisions of the UNSC, but the decisions of UNSC are weaker. This is interesting from general international law.

What does sponsorship mean and what activity in the Area means?

Sponsorship: there was an explanation to the effect that the Convention strives to be a State to State convention, when private entities are involved, a State must be also involved. Contract to private entities with sponsorship of the State. When entities signing contract, it is a State. Can a State sponsor itself. Under IL, State parties involved are liable under convention and there is no need for sponsorship.

State should not sponsor themselves.

Activities: Obligations arise and liability arises. There is a difference between what is set out in the Convetnion and what is set out in Authority's regulation: transportation and processing. In light of conflict between the two, the rules of the higher authority should prevail.

Real answer:

First, responsibility and obligation: here there were certain articles, 139, Para 1, Art. 4, Para 4 of Annex 3. State parties should have responsibility that activities in Area undertaken by State parties shall be carried out.

In Art. 3, the sponsor State has responsibility to ensure that the contract of sponsor carry out in conformity of obligation under the Convention. The relevance in the agreement, the sponsor state has two different kinds of responsibility: liability, it is an obligation. We clarify this linguistic problem from the outset. The opinion is there are two kinds: (i) responsibility to ensure that the activity to conduct in convention: (ii) obligation

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does not mean that sponsor state does not violate its obligation, if contractor violates. Violation occurs if the sponsor state does not behave diligently. The state has to do the utmost, adequate means, exercise possibility efforts, the effect. It is an obligation of due diligence, *an obligation of conduct and not an obligation of result*. The State has to behave like due diligence, but they are not obliged to behave to obtain the result from the sponsor entity. This is due diligence obligation.

Due diligence is a variable concept and will change all the time.

Apart from this general due diligence, an examination of the convention shows that sponsoring states have direct obligation for which they have to do something not through the sponsored entity. This is important from viewpoint of environmental issue. This is obligation to adopt a precautionary approach. It is set out clearly in regulation adopted by the Authority. They say that the sponsoring State shall apply precautionary approach in order to ensure protection of marine environment. The precautionary principle, the Authority refers to non-binding document, the Rio document.

The provision of the regulation transforms the precautionary approach into the binding obligation, the obligation of the sponsored State. *The precautionary approach* will become important in LOS.

We come to the conclusion: the trend of making this *approach as part of customary international law*. It is a rule applicable in the LOS. In the *Southern Tuna Bluefin* Case is close.

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Sponsorship of convenience should be avoided.

If sponsored State cannot do, having the laws, should get insurance.

LECTURE 10:

DEEP SEABED IN LOSC

I- Deep Seabed Resource

What resources are under water? Where they are? Dawning of a new industry. Protected areas vs multiple use.

Green economy, Toyota Prius Hybrid contains about 50 kg of copper. Wind turbines contain 1 metric ton of copper. From where will all the copper come?

China is building 221 cities of 1 million people by 2025 (13 cities per year from 2008). Metropolitan Athens has 3.7 million people, so a new Athens every 15 weeks. From where will all the metal come?

Price of copper is 3.37USD/lb.

"How inappropriate to call this planet Earth, when it is quite clearly Ocean."Arthur C. Clarke.

10% under ice, 71% is the sea. Huge potential of minerals in the deep sea. It is huge undiscovered in the Oceans.

Today, China cannot achieve sustainable development without going to the ocean.

The ocean crust is made of volcanic rock (basalt), heat, nutrient, life incubator, ores.

Ireland Arc. 88 000 km^2. Marine regimes that contain mineral deposits, mostly within EEZ.

There are nodules: copper, nickel, cobalt; crusts: cobalt, nickel, platinum; Sulfide deposits of copper, zinc, lead, silver and gold. Salt, sand and gravel, lime; placer deposits of gold, tin, other heavy minerals; diamond. The only things are Salt, sand and gravel, lime; placer deposits of gold, tin, other heavy minerals; diamond in shallow waters that are mined.

The US is number one in the world with the largest EEZ areas and number 2 is France (colony).

There are many deposits in the ocean:

1. In Shallow water: there are deposite of Tin, Chromium, Titanium, Thorium, Zirconium, Rare Earths.
2. Diamonds are almost gem quality in offshore Namibia. Industrial diamond falls apart. Gem diamond remains.
3. Tin: world largest marine metal mining cooperation. Tin dredging offshore Indonesia. It can be found in 50m water depth/can go to 180 m. The production is estimated at 3 million tonnes/years; stripping ratio 3:1 (stripping waste rock).

   China is number One producer of tin in the world.
4. Phosphate nodules in the Chatham Rise in New Zealand EEZ.
   - 250 nm from port;
   - 400 m water depth,
   - 380 km2
   - 65,000 t/Km^2
   - Price: 2007, 50 dollars/t
   - 2012 is 175 dollars/t.
   - Chatham Rock Phosphate Ltd.

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To do it: Trailing suction hopper dredge from the sea floor.
Methane hydrate on continental shelves: solid, with water, gas hydrate, can be burnt.
Fishermen accidentally netted gas hydrate off west coast Canada.

Deep Sea Resources:

There are cobalt-rich manganese-iron crusts on seamounts.

They contain cobalt, nickel: form on flat surfaces, growth rate 1-6 mm per million years, porous, absorbs things on sea water and high porosity allow surface absorption of metals from seawater. Pacific average 0.51 wt %, cobalt and nickel.

The most permissive area for cobalt-rich crusts in the global ocean is located in the western equatorial Pacific.

There are manganese nodules (aka Polymetallic nodules).

In the Central and Eastern Pacific, the ocean floor contains Nickel: 340Mt, Copper: 270 million t, Cobalt: 78 million T, Molybdenum: 19 Mt, Manganese: 7500 Mt.

The nodules grow slowly a meter for million year. Fish will come along and turn the nodules along.

Nodules contain Ni 1.3%, Cu 1.1%, Co, 0.2%.

Clarion fracture zone and in Clipperton fracture zone, between them are leases issued by the Seabed Authority.

The idea is to make it benefit mankind. How to benefit? Small countries do not have resources to do it. The parallel structure of the Inter Seabed Authority (ISA) to do it.

Self propelled robotic seafloor nodule miner tested from "Glomar Explorer" at 5,000 m water depth in the Pacific in

1976 and 1979 (CIA cover to salvage a Soviet submarine).

Seafloor massive sulfides (SMS) is found off the west coast of Canada. Hot water comes out to produce sizeable deposits. Seafloor hot spring deposits of copper, zinc, lead, silver and gold are found in many places in the world. More than 300 known and inferred sites. Most are small. Estimated 1,000 worldwide.

Ocean mining involves public and private companies from Korea, China and Japan.

Announcement of a new industry of marine mining for base and precious metals at a site offshore Papua New Guinea discovered by Ray Binns (CSIRO Australia) and Steve Scott (University of Toronto).

Conclusion

SMS and nodule mining are technologically feasible;

Exploration and development costs for SMS are similar to green-fields on land (dollar 350-400 million)

A few sulfide deposits are mineable now;

Large areas of the Clarrion-Clipperton nodule filed are economic to mine now.

Environmental issues are being addressed.

II- Mining Regulations

Issues with 1982 UNCLOS

Marine deposits are mostly in EEZ. Crusts: cobalt, nickel, platinum.

Nodules: copper, nickel, cobalt.

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Part XI. The Area

Art 133. Use of Terms

The definition of resources:

-Resources are used very loosely, inferred, indicated and proven resources used in land mining as rigorously defined by 'NI43-101.' Used as standard practice like on land.

-Resources, when recovered from the Area, are referred to as 'minerals. Why only 'when recovered ?'

Another issue: Art. 151 Production Policies

"The Authority shall have the power to limit the level of production of minerals from the Area"; nickel production ceiling.

The production ceiling for any year of the interim period was based on a complicated formula involved trend lines for consumption based on the 15 most recent years.

Art. 144. Transfer of Technology

1. The Authority shall take measures in accordance with this Convention:

a. to acquire technology and scientific knowledge

b. to promote and encourage the transfer to developing states.

Why mine the oceans?

- Oil industry in the 1930-40s offshore oil
- There is plenty of oil on land
- We don't have the technology

- So, why recover offshore oil?

The reason is that there are potentials of mine in the sea floor.

The costs of mining on land are increasing.

Stripping ratio: ratio of waste rock; remove 3 tons of waste rock to get 1 ton of ore; 3:1 strip.

Average Manganese Nodules in the Clarion-Clipperton Zone *in situ*: Nickel, Copper, Cobalt, Manganese.

Advantages of mining in the Oceans: reusable of infrastructures. On land you should have tunnels underground that you leave behind when finish mining. Mining on land is fixed infrastructure, you have to include that in the costs. The mining company are looking at elephant.

Seafloor mining is useable. It also much smaller footprint for mining on the seafloor than on land. There is no settlement on land. You mine just the deposit, while on land you have to mine the whole lot of rock. The grade material is cost effective and there is no waste.

You reuse the infrastructure and move from site to site. Mine is dangerous. Rocks fall. The miners in the seafloor are highly trained, robotic engineers managing the robots on the seafloor.

People don't want miners around them because of pollution. In Canada, people stopped miners. Nickel mining was stopped, delays cost money. People don't live on the seafloor. There are no social problems.

ISA's exploration licences

The ISA reserve areas and areas claimed by India. India is spending a lot of money developing specialized vessels mining nodules in the Indian Ocean. India makes a major push on this and China is doing the same thing in searching minerals in the deep sea.

In 2011 and 2012 there is a map of exploration licenses given out by ISA. Tonga and Nauru by parallel system: the benefit of mankind sounds good. How you do it? The way ISA think, the Island nations are partners, they can have their claims in the offshore, like Germany, France. But Nauru, the island is stripped mined. This is the way to help them. They raise money and when profits are made, they will return back to Nauru for education and health through the ISA parallel system.

Tonga established a convenience company, the Nation State has to be adequate. There is no jurisdiction on the company at all. 5,000 km claimed by the country. This is a breakthrough to get the land-locked nation to get the business.

ISA has issued mining licenses:

Polymetallic Nodules (aka Manganese Nodules) in the CCZ

Polymetallic Nodules in the Indian Ocean

Polymetallic Sulfides (aka SMS) on the Mid-Atlantic Ridge

Polymetallic Sulfides in the Indian Ocean

The most recent one: The Russians discovered deposits in the Atlantic, estimated 17.4 Mmt under the licenses granted by ISA for Polymetallic sulfides to Russia on the MAR and to China on SWIR in 2011. SMS has become mines of the future.

Environmental issues

In 2000 ISA issued regulation.

In 2002 ISA issued recommendations for the guidance of the contractors for the assessment of the possible environmental impacts arising from exploration for polymetallic nodules in the Area.

The environmental issues for nodule.

If you run machine in the settlement, 90% of water, you produced a settlement plume, cloud carried km away, sediment plume smothering pelagic animals km away. To address that not yet been resolved. The animals will be affected. Water column fish.

The other issue is the release of water and particulates back to the seafloor. Seafloor is 5,000 meters down. The solution is to drop material on the seafloor, you put the pipe, let it go to the seafloor and has it tested.

Nodule mine vs 3 Land Mines:

In order to recover metals you must have 3 mines on land. The copper recover deposits are low grade. In ocean, are rich one.

Nickel can come from land mine or laterite, ocean crust. Ocean crust produces iron oxide. You got a Manganese mine, 35%. The strip ratio, Mn 1:1.

The waste for nodule is zero; on land you have millions of tons of waste per year. The tailing, after removing the things you want, you can have a few tons you want. There are a lot of waste. In the case of nodule, you have no wastage in nodule, as it is Manganese.

Environmental Problems for Sulfides on Land: acid

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drainage and large excavations. None of these are a problem on the seafloor. Biggest problem will be potential loss of habitat.

There is a problem because there is biology around. Environmental sustainability is comparable. Deposits on land must be large to be mineable because of fixed infrastructure.

Biological issues and environmental assessment for sulfides. Pompeii worms living in water at temperatures up to 80°C. Tube worms, crabs, "sea fleas" mussels. The problem is that you kill animals. You must do a lot of biological work to understand that you are not going to kill the animals around there.

Code for Environmental Management of Marine Mining

By the International Marine Minerals Society, in 2001.

The IS of the UN is developing regulations to control the environmental impact.

In the ocean floor, "*in the ocean depths, there are mines of zinc, iron, silver and gold that would be quite easy to exploit.*" Jules Verne, 1870.

LECTURE 11:

OCEANS AND CLIMATE CHANGE

Oceans and global warming

Ocean covers 71% of Earth surface, 97% of world's water, 90% of living biomass, 13,000 new species discovered.

Ocean is a big sink.

Possible that life come from the Ocean.

The source of heat energy is the sun, the Ocean that stores the most heat from the sun: warms and cools more slowly than land.

The heat retention of the water is remarkable. Swimming in cold countries is in October. Ocean supplies most water vapor to atmosphere.

Asymmetric heating due to winds: between southern hemisphere, hot in December and cold in June, Australia. A lot of heat in the center, a cold in the Polar region. This asymmetric distribution leads to the air heating up moving up and down, circulation in the atmosphere, distributing heat in the atmosphere in the sub-region.

At the same time water at different temperature, deep sea circulation patters, warm water from the Equator cools down and eventually rises up in the Pacific water. The whole point is heat is redistributed in the Ocean. The 2000 year trip to get a circle.

The Greenhouse effect

Helping the sun is the greenhouse effect, critical and sensitive. The heat coming in through the atmosphere, some bounced back in the atmosphere, some of it continues to come in and heat the air. When heating the air, the ocean warming up, light energy and radiates it back, but some energy cannot get it out trapped by the gas (CO_2) in the atmosphere and hit back. Some get through. It acts just like the sun light goes through the glass and called the greenhouse effect. The CO_2 keeps the excess heat. It regulates the temperature of the Earth.

Global warming can:

- Change the temperature distribution pattern;
- Melt ice – raise sea level;
- Change or even turn off circulation and tipping point;
- Serious stuff, but it is happening.

The Earth is getting hotter: the thermometer record. 2005 was the hottest year on record; 2007 tied with 1998 for 2nd hottest; 14 hottest all occurred since 1990. The Earth is getting hotter.

The heating is not uniform geographically. The asymmetric distribution is going to have effect.

The Melting Snows of Kilimajaro.

Pasterze Glacier in Austria, phenomenal retreat.

Himalayas Gangotri Glacier, water going to the Oceans and water rise.

Mountain glacier changes since 1970.

Huge pieces of ice in Alaska are in the Ocean. Ice on the ground, when melting raises sea level.

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The effect is only land, melting permafrost, harm is already occurring, structures are falling.

In the Arctic, ice margin reduced drastically, 12% reduction every ten years.

With the melting ice, there is the rise of sea level and the rising temperature. When the sun heats the ocean, the oceans are heating up too.

But is this just part of a natural cycle or the result of human impact? How can we tell?

If we are to understand the impact of human activity on the earth's climate, we need a model. The problem of the models are based on the laws of physics. The models are based on our experience – both observational and experimental.
The ice age is 18,000 years ago.

Paleoceanography: to learn from the past and predict the future (Chinese saying).

What is the range of natural variable? How warm or cold has it gotten in the past? How has CO_2 varied in the past? How has the climate system responded to know changes? What were wind patterns like during cold glacial times? How did ocean currents change?

To answer these questions we turn to the sediments or the seafloor. When it is warm, certain species behave different way when it is cold. The seafloor is 2000 years. How fast the species, the proxies, get to the seafloor. Scientists dropped devices to the seafloor to get the mud, sediments.

This is the development of deep water drilling technology,

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long before the oil industry started. This gives the birth of the science. When take a look at the records, we see the cycling records: the ice volume, up and down hundreds of thousands years. This is global record of temperature.

But now we are anomaliously higher than thousands years ago.

The identification of these frequencies strongly supported a hypothesis put forth in the 1920's by a Serbian scientist, Melakovitch.

The Earth spin changes contribute to the changes in the position of the earth vis-à-vis the sun, and changing temperature. Every thousand years the earth moves its position vis-à-vis the sun.

Linear System

The 50% of the climate can be explained.

Keeling measurements, 1958, the Keeling curves, the "hockey stick." There is a lot of debates about the hockey sticks that started from the industrial revolution, the 1830s.

John Holdren looks at the chemistry of CO_2, the key greenhouse gas increases were caused by CO_2.

The CO_2 increase that manmade lead to that increase.

Intergovernmental Panel on Climate Change (IPCC) predictions of future CO_2: past and future CO_2 atmospheric concentrations.

Increase in CO_2 implies in acidity of the ocean. The surface of the ocean pH has fell and affected corals.

The temperature prediction is rising. During the last two years, we get the worse ice. Temperature rises, CO_2 rise, sea

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water rises.

With one and a half meters sea level rises affect 22,000 km^2, and millions of people.

This affects the baselines.

Art. 5

"low-water line along the coast as marked on large-scale charts officially."

Art. 6

The Chart has to be updated.

From Art. 76

What about the Continental Shelf?

No land, no continental shelf, from the legal point of view.

Land dominates the sea.

Property rights.

Fisheries stocks will move north.

Lecture 12:

Baselines

LOSC entered into force on 16 November 1994 for States Party.

- 168 States Party
- Thailand 15 May 2010.

North Sea Continental Shelf Cases: 1969.

“The land dominates the sea” (para. 96).

You should have clear title over the land to claim maritime spaces.

A coastal State’s maritime rights derive from its sovereignty over the land. The baseline (BL) represents the seaward edge of the coastline

Importance of BL

- Provide the base from which the limit of the territorial sea is measured:
- CZ, EEZ and CS are measured from BL.
- The BL plays a very important role for a country to establish military zone(MZ).
- Key to determining equidistance lines between neighbouring States;
- Practice to develop provisional equidistance lines in

third-party resolution of boundary disputes.

Once you get the data, St A vs St B: both people will come up with equidistance line.

- The BL determines the maritime zones: nothing can happen behind the BL unless a coastal state gives consent;
- One excessive claims, States claim security in the CZ, which is not in the LOSC.
- States claim not just internal water (IW), but also claim seaward TS, EEZ.

Normal baselines:

Art. 3, Art. 82 (Art. 5). Normal baseline is the low-water line along the coast as marked on large-scaled charts officially recognized by the coastal States.

Countries used maps done by other countries, from US, France etc. Hydrographic services: Each hydrographic can have different standards for low-water line. No one is right and wrong. They can use the criteria to set up the charts.

The tides go through various tides: when Hydro services use tides during 98 years. You can have nautical chart. hydrographic organization based in Monaco helped to set standards.

Iran and Iraq do not have maritime boundaries yet:

Ship in low-water line: not knowing where the low-water line can have big implications.

Baseline comes and goes: as base points can get lost to water level: hydrographic services should keep up to date the charts.

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Middleton Reef, Australia: LOSC does not provide for a closing line for a reef (Atoll): internal waters vs. territorial sea. A ship does not know whether they come into TS or IW.

What is the BL for the atoll?

- Drying fringing reef (you should see something above water at high tide)?
- 0.12 n. miles

Law of the Sea, an edge of a reef, can be used as BL, if dry, and have mark. Sometimes it is difficult to chart the drying reef.

River closing line: not in LOSC; not all river have nice clean look going into the sea. Negotiators avoid going into the closing line provisions.

Juridical Bay:

Art. 10 Bay closing line: 5/10 coastal penetration to BL segment length:

- Maximum length: 24 n. miles.
- Semi-circle test and
- Bays: screening islands
- Low tide elevations
- Below water at high tide: above tidal datum at low tide.

Art. 121: The regime of island

Art. 121(3). "Rocks which cannot sustain human habitation or economic life": you need more meaning on this.

How is this article to be applied? What is a rock? What does sustaining human habitation mean? What is economic life? Lighthouse? The Mathematics of a maritime claim: single point.

Rockall (UK), rock west of Scotland. UK claims TS around this rock.

Japan's coral atoll: Okinotorishima: Japan is creating a concrete wall around it: used to submit CS; not only creating EEZ. But South Korea, China protested vigorously.

Japan eye power plant near disputed area.

South China Sea area: Mid 1960s. Geographs went there and think there could be oil and gas.

Straight BL Claims:

- Deeply indented
- A fringe of island along the coast in its immediate vicinity.

History: 1930 Hague Codification Conference

Norway had claimed straight baselines along its northern coast. ICJ Fisheries Case.

Norway's Northern Coastline: deeply indented and fringe of island, think of Norway and Chile.

Bay closing line – maximum 24 miles.

Straight baseline does not provide definition.

2001 Qatar-Barein-ICJ.

State Practice

Vietnam : 60 miles off the coast;

Paracel: look like archipelagic claim, but China cannot claim it as it is not an archipelagic state.

Historic waters: no definition: Art. 10

In 1962. UN Secretariat study:

It takes 19.8 years for the cycle of the points on the

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Hydrographic Charts: these points are influenced by the positions of the moon, earth and sun to get the tidal positions. The tide is very much influenced by the moon.

Datum is a reference point: the number of measurement expressed in a chart. Some charts have a datum for the depth: vertical datum and horizontal datum. Sometimes they are different.

LECTURE 13:

MARITIME DELIMITATION

Delimitation requires overlap of claims.

- Boundary is only required in the area of Overlapping Claims Area (OCA);

Drafting the 1958 Conventions

- Limited practice before 1945
- Continental shelf: a concept did not exist.

In the 1960s there were a lot of negotiations between States.

  - Larger area
  - Greater need for certainty

- First International Law Commission (ILC) draft: the first draft has only:
  - Agreement between States
  - Third party settlement: there need to be rules.
- Comment of states: need for substantial rule

To address this issue, the rapporteur proposed a number of delimitation methods to establish:

- Prolongation of the land boundary;
- Bisector/perpendicular to general direction of the coast;
- Equidistance/median line: The experts were of the view that the equidistance methods were the best. But they also noted that there might be a problem:

- Special reasons might call for a different method: small islands;
- May not lead to an equitable solution, which should be achieved by negotiations.

The General direction of land boundary

How do you select the relevant part of the land boundary? This is the problem. The land boundary may not be related to the general direction of the coast.

There is also certain similarity to the equidistance line (with the bisector) in the Nicaragua v Honduras.

- How do you select the relevant coast for determining general direction?
- ICJ (red): *coastal façade of sufficient length to account properly for the coastal configuration and no cut-off (Judgement of Nicaragua v Honduras, Para 298).*

Equidistance

- Line that is always at equal distance from baselines for the States concerned;
- There is always only one equidistance line
- What base points to consider?
- Can be objectively determined .. if you agree on relevant baselines
- In many cases divides the area of overlapping maritime zones more or less equally.

Construction of equidistance line – Black Sea case

- Disregards Serpents' Island for which Ukraine claimed

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full weight. That would have resulted in a very different Equidistance line: it is a very small island and does not form a feature part of the coast of Ukraine. It also shows subjectivity.

How should you adjust the equidistance line?

Adjustment of Equidistance

- Equidistance may lead to inequity: "given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatmen could result." (Judgement of North Sea Continental Shelf Cases, Para 91).
- Examples of special circumstances:
    - Navigational channel (TS);
    - Configuration of the coast (eg headland)
    - Small islands
    - Practices of the parties: the practice is not sufficient, but need express agreement.

1958 Convention:

- Agreement: you need an agreement to draw equidistance;
- Equidistance line is boundary
- Unless there are special circumstances (CSC).

North Sea CSC

- Red line: Boundary claimed by Denmark and the Netherlands (equidistance lines).

North Sea CSC – Position of the parties

- Netherlands/Denmark:
- Germany:
  - Art. 6 not customary law;
  - Basic rule customary law: equitable apportionment;

North Sea Continental Shelf Cases

Judgment of the ICJ:

The Court did not look at the combined rule of equidistance and special circumstances. State can select any method to arrive a equitable solution. Not the method is criticized, but the result is criticized.

Equitable principles mentioned by Court

- No refashioning of geography: Germany may get more or less equal treatment. You should respect coastal relationship between parties.
- No encroachment:
- Giving due respect to all relevant circumstances
- Combination of relevant circumstances of case
- Outcome after North Sea Continental shelf cases.
  - Judgment indicated that Germany should get more or less equal treatment;
- Political consideration also plays a very important role: for Germany the bilateral relations with Denmark and Netherlands are very important and not to ask for more.
- The shade areas were given to Germany as part of the political agreements. Denmark wants to give the non

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potential area, keeping the drilling sites, Germany want to get the access to the North Sea, after a series of negotiations.

Third UN Conference on LOS

- Two groups at the Conference:
    - Equidistance group
    - Equitable principles group
- Outcome: a compromise solution. Each party can read what they want.

Cases after the North Sea continental shelf cases

- Anglo-French arbitration
- Tunisia/Libya: less importance to equidistance: give large amount, the outcome is unpredictable;
- Libya/Malta: return to more predictability;
    - Draw a provisional equidistance line:
- Qatar v Bahrain and beyond:

Black Sea case, judgment – Delimitation methodology

Para 115: When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

Para 116: These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Judgment, I.C.J. Reports 1985*, p. 46, para. 60), have in recent decades been specified with precision. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography

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of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 745, para. 281). So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both.

Para 149. Serpents' Island calls for specific attention in the determination of the provisional equidistance line. In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State's coast, in particular when a coast is made up of a cluster of fringe islands. Thus in one maritime delimitation arbitration, an international tribunal placed base points lying on the low water line of certain fringe islands considered to constitute part of the very coastline of one of the Parties (*Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *RIAA*, Vol. XXII, pp. 367-368, paras. 139-146). However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting "the coast" of Ukraine.

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto

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Ukraine's coastline ; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration (cf. the islet of Filfla in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13).

For this reason, the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine. Further aspects relevant to Serpents' Island are dealt with at paragraphs 179 to 188 below.

The Court adjusted the line to give the 12 mile territorial sea to Serpents Islands.

Case law and State practice compared

- ICJ: only around 20 cases;
- More than 170 bilateral agreements
- State practice: greater reliance on equidistance
- Some reasons to go to Court/arbitration:
    - Impossibility to reach agreement;
    - Internal political considerations.
- Some reasons to negotiate:
    - Greater control over outcome;
    - Less costs (money/resources);
    - Greater flexibility (non-legal considerations can be included in solution): management of trans-boundary resources, trans-boundary agreement.

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Two types of proportionality: the length of relevant coasts in adjusting provisional line; 1 to 8 or 1 to 9 to draw provisional line. You do not look at maritime area of the coastal states.

Look at the Romania v Ukraine map for the presentation: very similar to Cambodia: relevant coasts.

If the ratio of relevant coasts is 1 to 2 and the ratio of maritime area is 1 to 2.5 is still equitable for the Court.

To read: Judgment on CS: Bangladesh / Myanmar

- Location of resources was taken into account: fisheries in this case.

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LECTURE 14:

OPTIONS FOR RESOLVING MARITIME BOUNDARY DISPUTES

LOSC

Art. 15 Territorial Sea, Art. 74 EEZ and Art. 83 CS: give to difficulty, as it is a compromise, it was agreed and nobody knows what it means. It leaves to the Court and Tribunal to determine what the principle of IL is.

Agreement: if you cannot reach an agreement in a fair amount of time, parties should use Part XV.

Non-binding Procedures, Part XV, Section 1

Art. 279 Peaceful means

UN Charter, Art. 33 (1): procedures that are non binding.

UNCLOS Art. 283. Obligation to exchange views.

UNCLOS Art. 284. Conciliation.

Conciliation under Annex V

- Report shall not be binding.

This method was used by Iceland and Norway in negotiations in the 1980s.

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Section 2
Compulsory Procedures Entailing Binding Decisions

As a package deal, there should be a system of compulsory procedures entailing binding decisions.

Art. 286 Application of procedures

Art. 293 Applicable law

Art. 296 Finality and binding force of decision

The Court may apply other conventions, agreements not incompatible with Convention.

Maritime Boundary Dispute and Section 2 of Part XV

Art. 287 Choices of procedure

For Myanmar, they went to ITLOS because it has fund for developing countries.

Art. 298 Optional Exception to applicability of Section 2.

Opt-out provisions: so that other countries will not take you to compulsory procedures.

Exception to the Exception in Art. 298 – Non-binding Conciliation for some disputes.

Conciliation Procedures for maritime boundary disputes under Art. 298.

Parties shall, by mutual consent, submit the question to one of the procedures provided for in Section 2.

Timor and Australia: In 1994, if you reach agreement can you get Australia. Not clear you have to get the good faith efforts.

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Provisional Arrangements under Art. 74 and Art. 83

Art. 74 (3) Pending agreement as provided for in para 1, … shall make efforts to enter into provisional arrangements of a practical nature,… not to jeopardize or hamper... Such arrangements shall be without prejudice…"

Obligation to negotiate in good faith

- States are to enter into negotiations…
- Pending final agreement on the maritime boundaries, States have an obligation not to take action that would jeopardize..

When does obligation arise?

- Clearly arise when there are existing OCA

"Without Prejudice"

- Provisional arrangements are "without prejudice" to final agreement

Joint Development

- An arrangement to jointly develop hydrocarbon resources in the area of OCA

Case Law on Provisional Arrangements

- Guyana instituted proceedings in 2004;
- Arbitral Tribunal constituted in accordance with Annex VII.

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Guyana/Suriname Arbitration 2007

Art. 74 and Art. 83 imposes two obligations

Hampering or Jeopardizing

- This obligation was not intended to preclude all unilateral activities in disputed maritime areas;
- You can do the survey but not drilling. Exploitation is admissible; exploration is permissible, but the Court says you should share the data with the other side.

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Lecture 15:

Litigation and Arbitration of Disputes under UNCLOS

The litigator looks at the issue differently than an academic and the judge.

The judge looks at the situation objectively and apply the law.

That is not what litigator does. As litigator, the job is not to look at the case academically. What a State wants is not the most perfect, a country wants more land, greater access to resources, to control navigation, protect marine environment. The litigator is not to look for the most fair solution, but looks for how he can persuade the tribunal to help accomplish the most strategic objectives that the clients have set.

With that concept and approach:

1- Determining strategic objectives

A. What geographic area and/or features are in dispute? Where is the area we want?

Aegean Sea: Median line: calculated median line (why Greece elevates equidistance to the principle and Turkey does not accept. What to

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give small island; if Greece were to expand TS to 12 miles, the Aegean Sea will be blue. This is a very serious dispute and raises a lot of elements. What is geographic areas and features?

B. What strategic interest are involved? Why we want that rock?

   a. Access to oil, gas, fish and other resources: these are state practices; in Bangladesh/Myanmar there is potential of oil and gas in the Bay of Bengal. No one risks to invest tens of millions of dollars and nothing to show for. Fish and other living resources. A part from resources,

   b. Coastal security and navigational interests: in addition to access to resources, there is security:

   c. Protection of the marine environment: some States declare maritime protected areas (UK), expand it trying to keep out exploitation of resources.

C. What is the desired outcome? Where we want the line to be drawn, straight line, curve line?

   a. For the Guyana/Suriname: Guyana claim line and Suriname claim line and in the middle, the oil deposit which fails to exist. For Guyana is to get all oil deposit. In the end, Guyana claims the equidistance, the desired outcome to get most of the oil on its side.

   b. For Bangladesh/Myanmar: This is the first case for CS/Bangladesh outcome is to reach out

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beyond 200M. Bangladesh proposal is to use bisector line, wants some kind of line to delimit the area.

D. Are there acceptable alternative outcomes? What are we happy with?

You ask for something. You develop a theory to justify, to convince the judges to give us as much that we can get. The line cut off if used equidistance, the Bisector line (Green line). In the last round of pleading, Bangladesh proposes, started as bisector line, then intersects the green line, and the tribunal might accepts as the middle line, and makes the line stands out (the Neon line, this is what you should do). What the ITLOS adopted is almost good, took the bisector line and came. Argument: you cannot use equidistance, the whole coast is concave. What try to show, the equidistance would produce. This line would eliminate the distortive effect of the concave case. Consider the special circumstance before drawing the line. You have to adopt the bi-angle bisector approach.

E. International boundaries are not established unilaterally:

a. Benefits of Agreed boundaries;
b. Stability and permanence
c. Avoid of non-compliance
d. Further good bilateral relations

2- Negotiation vs Third Party Dispute Resolution;

a. What are the prospects of achieving a negotiated solution?
b. Does the political climate allow compromise? In many States, a dozen, the position is the question of sovereignty: patriotic people is a treason to concede any part of waters to the other sides. Opposition parties will use any agreement the government made at the next agreement. But boundary agreement is a compromise, unless one state has too much power to force another. Each side gives up something, that creates vulnerability for government, the opposition, to press what to implicate government. Many disputes could be settled, but cannot do it because of politics.
c. What flexibility is there, on each side, to reach a mutually acceptable middle ground?
d. If an agreement is not acceptable, is the status quo acceptable?
e. If status quo is not acceptable, then give to arbitration or adjudication.

3- Choice of Forum for Dispute Resolution

Because States are sovereign, they cannot be sued in an international court or forced to submit to international arbitration without consent.

a. International Court of Justice: some States have accepted jurisdiction unilaterally or by compromise to ICJ,
b. ITLOS: states can bring disputes by agreement:

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Bangladesh and Myanmar. UNLOS provides venue for resolution of disputes arising from convention, is subject to compulsory dispute resolution, UNCLOS provides for states to choose the forum.

c. Arbitration under the 1982 Law of the Sea Convention: each side appoints one arbitrator, then the president appoints the three others. if one state wants to bring another state to a final and binding resolution, if subject matter of the dispute, Art. 298 state that explicitly adopted the resolution: China, Japan, Korea.
d. Conciliation under the 1982 LOSC: is not compulsory; state A can invite state B to resolve the dispute. There is one provision that conciliation is compulsory.

4- Prepare the case for litigation and arbitration

a. Establish a Team
   i. The Agent: the leader of the team: the client who supervises all the work and can make political decision. Somebody is a Minister, Bangladesh, Ecuador – Attorney General; some Ambassador in the Hague, International Lawyer, a distinguished person in the country.
   ii. The Internal Team: in additional to the agent should include the whole team: the armed forces, the navy, the office of the President, the PM, the legal affairs, the representative of the Minister in charge of resources, Oil Minister, Fishing Department. It is important to have all the stakeholders involved to

have more ideas, expertise, transparency, comfortable decision;

iii. International Legal Counsel: the benefits and counsels who have argued cases before, knowledge of the law, knows the judges and arbitrators, credibility with the judges and arbitrators and look at the clients. How importance hiring international counsels. In State practice, in all maritime cases, international counsels.

iv. Technical Experts: hydrographers, national and international experts who have experience to present the evidence in international tribunals: Bob Smith, Alex as lawyer and technical expert. In Guyana and Suriname case, on dramatic coastline, an arc to it. Suriname tried to argue the opposite: irregular coast, difficult to draw equidistance, the Gulf of Maine coast, extremely irregular. Coast of the Gulf of Maine, the difficulty of drawing the line. The Chamber did not use equidistance. The Team took the coast of Gulf of Maine, and slowly turn around as Guyana-Surinam; put on top of the Guyana-Suriname, the judges laugh and the end of the argument.

b. Formulating the claim

i. Relationship between Strategic Objectives and the Claim:

1. The maritime areas and features a State should claim depends on its strategic objectives;

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2. A claim must be realistic; It should not be so exaggerated as to be implausible or completely lacking in legal justification: the biggest asset is the credibility before the judges, that you will not help them to find solution.
3. A claim should never call into question the State's credibility.

ii. Deciding on the most suitable delimitation methodology:
1. Justify what delimitation methodology to give us the boundary that we want. The difference between academic approach: and part of legal team of that state. What we want the delimitation methodology to get the boundary that we want, but that is defensible, not just that best for the team.
2. Maximize the claims but make it acceptable.
3. For Bangladesh, equidistance is not the acceptable methodology: use bi-angle bisector approach: the goal is to convince the tribunal not to use equidistance.
4. Nicaragua-Colombia: Nicaragua has a long coastline, though Colombia has only two islands. These are tiny feature, cannot be ignored, entitled to TS, but not EEZ. These features should be enclaved, these islands exist in the Nicaragua's EEZ and CS. There is a bank: historically cartography is under water, under

seabed and under Nicaragua's continental shelf.

c. Developing the factual and legal arguments
    i. Coastal geography and baselines: satellite view of the coast of Bangladesh: if you want to do equidistance line, where to put the point, at high tide, the water is up. We must do the straight baseline, highly irregular coast has to be taken into account when delimitation;
    ii. Maritime features: how they figures in delimitation. St. Martin's Island should be given weight of Bangladesh: Oyster island, very small, a dozen sea bird should be ignored: they gives partial effect;
    iii. Special and relevant circumstances: median line is adjusted for partial effects: the rules to apply to adjust. Bangladesh sits in a double concavity: the coast in concavity; the entire coast is in concavity, the equidistance line converge, the coast does not have any base point to push out the baseline.
    iv. Historical factors and effectivités: what are elements: effectivités when consider sovereignty over island. In Bangladesh/Myanmar: the two countries agreed on the line in TS in a Minute, we argue that this is historical factors that Myanmar has accepted this line as equitable for 25 years, and used effectively against Myanmar. Effectivités:
    v. Diplomatic history: minutes agreed in 1974, not a treaty, but an understanding about the location of the boundary signed by Ambassadors as evidence, it

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would be equitable to represent the boundary. This is not an agreement, but for a long time, that Myanmar considers that this is equitable. This note gives St. Martin a TS.

vi. Jurisprudence, Case Law, Commentaries, Custom: you have to study the laws, the treaties.

d. The Litigation/Arbitration Process

i. Preparing and filing the application/Statement of claim: in ITLOS proceeding starts with the statement of claims; in arbitration the claiming state calls into office the Ambassador of the other state and give the diplomatic notes, as a complaint in a law suit. It is not a lengthy document, between 5 to 15 pages;

ii. Selection of judges *ad hoc*/arbitrators: once the arbitration commences, it is important to who you appoint as arbitrators. They try to reach an agreement, in choosing one arbitrator. Often let's appoint somebody we know on our side. I counsel client against doing that. If you appoint somebody partisan on your side, that person will not be seen as objective to the other arbitrators. Do we really need the 2 others to go. You want somebody who is sympathetic, knowledgeable, you are strongly believe, recognized as a great authority, good advocate, you want to pick a lawyer to serve as your arbitrator, the credibility and ability to arbitrate. The ITLOS president appoints the others 3. In Bangladesh-India: President Jessup did not want to impose: give me a

list of 6 names, he prepares the list of additional names and give to parties. He ultimately appoints the judges that the parties accept. There is no formal procedure, but this is the way it works. Arbitrators are supposed to be neutral and impartial. In arbitration, the appearance of impartiality is important. As arbitrator, if I am persuasive, they would believe that I loose credibility.

iii. Written pleadings: in 2 rounds, 6 months to 1 years to do, counter memorial.
iv. Oral hearings: the parties have chance to explain key issues and respond;
v. Judgment/Award: 6 to 8 months. In Bangladesh/ Myanmar: they call public session, they read the public judgment.

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Lecture 16:

Outer Limits of Continental Shelf

There are two definitions of CS: the narrow one (the narrow CS, geographic) and the broad CS (the shelf, the slope and the rise, the legal meaning). The legal CS is from 12 nm (TS), as the outer limit of TS to the 200 nm or beyond 200 nm.

The definition of CS is 200 minimum. The LOSC incorporate the legal CS (the broad definition).

Historical background

- The Truman Proclamation, 1945, has become the new rule of the customary IL. This new rule can be developed in a very short time.
- The Santiago Declaration;
- The Geneva Convention on CS, 1958: the definition has been repeated in LOSC, 1982. The inner limit of the CS is the outer limit of the TS. The outer limit is two: (i) the Truman Declaration, 200 nm; (ii) the outer edge of the CS: has been criticized for bringing all seabed in the world into the jurisdiction of coastal states.
- ICJ 1969 confirmed the CS is the rule of IL; proximity

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principle; natural prolongation; coastal states have inherent rights (come to Art. 77);

- The UNCLOS III: deep seabed beyond national jurisdiction is proclaimed heritage of mankind. Opposing positions between countries for 200 nm and the other group to extend beyond 200 nm. Then it results in the Art. 76 and complicated formula. The revenue sharing is also a compromise: the outer CS beyond 200 nm: the first five years is free; after the 6th year – 1% of value or volume up to 7% in the 12th year. Mexico and US outside the EEZ: Mexico has a CS. There is a bilateral agreement; the condition for bidding is subject to revenue sharing.
  - ***The term natural prolongation***: has to be unbroken from the coast, despite the remark in the Bengal Case, there must be continuity and unbroken;
  - ***The foot of the slope***: the gradient change or variety of options: use general geological data to opt for one or another: the most important is 60 M from Foot of the Continental Slope (FS) or 1% of distance to FS (if the distance is 100 miles, the sediment is 1 m or the ***Irish formula***), whatever greater; Max 1: 350 M; Max 2: 100 M from 2500 m isobath;
  - ***Delineation Principles***: first 200 M limit; then the 60M limit from FS (Headberg Formula); then Irish formula. The 350 M and the 60 M

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limit from FS are the maximum: the Irish formula and the 200 M limit can kick in if the other formula is shorter;

- *Seafloor highs:*
  - *The deep ocean floor with its oceanic ridges (Art. 76(3)):*
  - *Submarine ridges (Art. 76(6));*
  - *Submarine elevations that are natural components of the CM (Art. 76(6)).*

- **Commission on the Limits of the Continental Shelf (CLCS):** the international community could see that the states can do it correctly;
  - Coastal states should submit information and data: commission does not have any role of insightful data;
  - The commission can consider that you put the outer limit here and not here;
  - The commission's recommendation is final and binding;
  - Time limit: 10 years after entry into force of convention; but guidelines adopted in 1999, the coastal states were given May 2009; some states still have time if they become party later than 1994.
  - Advise to coastal states in preparation of data to assist states: primary role is to provide recommendations;
  - Commission is not a court: 21 members, geoscien-

tists and not lawyers (the Russian happens to be a lawyer); the work is not purely technical but Art. 76. Scientists have been given task of making interpretation that have legal implication;

- Interpretation of Art. 76, Para 8, is final and binding: sea-level rise, what happen to the outer limit. It will not be affected by sea-level rise, as the limit is permanent. This is exception to the rule. For states that did not make a submission, this rule is not applied. Only state party could make submission;
- There is a definition that coastal states must take into account the recommendations of the CLCS, but to get to the finality;
- The outer limit of the coastal state: other state cannot go to the tribunal to contest;
- Submissions in cases of unresolved land or maritime disputes (commission does not have a role there, it is an exception, the coastal state can agree that the CLCS to look at the outer limit. There is a possibility of partial submission: submit the areas not disputed, leaving the disputed parts and the 10 years deadline is not applied to the disputed areas. The coastal states have to get the agreement that part of it or all of it could be a joint development area or submissions and ask conditions to look at the outer limit.

- Submissions and recommendations: 61 submissions (some states have made several submissions) received so far, more expected; this is huge explosion; 18 recommendations issued so far; 45 states have submitted preliminary information (when they don't have expertise and financial resources to do);
- Workload of the CLCS: NY and Deep Seabed meeting; from 2 months to 6 months; members are paid by governments; there is trust fund for members from developing countries;
- Submission of charts and other information to the UN and publication thereof;

- Legal status of the CS
  - Rights of coastal states over CS;
  - Resources of the CS;
  - Legal status of the superjacent;
  - Revenue sharing;
- Iceland and Norway: Jan Mayen 1981: Iceland has 200 nm:
  - 1997: a small rock that affects median line;
  - with UK from Rockall: UK joins the convention they gave up,
  - 3 CS areas: one solved Aegir Basin: Iceland, Norway and Jan Mayen: preliminary agreement on the subject of shelf; the Reykjanes Ridge. Hatton-Rockall area is disputed with UK;
  - Iceland has made only partial commissions: the Aegir Basin and the Reykjanes Ridges;

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- Myanmar and Bangladesh: Bay of Bengal Case:
  - Declaration of Judge Wolfrum: equidistance, circumstances and proportionality. It should be only 2 steps: equidistance and circumstance and proportionality is one step.
  - The judges have the jurisdiction: to delimit 200 M and outer CS beyond the 200M. Justification: the unique situation, everybody knows that this is natural prolongation, there is no problem to delimit this area. This is practical approach and not a principle approach. What happens if CLCS has come to the conclusion that 200 M is the limit ?
  - Final test maintains that prolongation not only morphological and can be geological. There is no need for prolongation to be geological and morphological is sufficient. Art. 76 (4) has to fulfilled, slope.
  - ICJ had confirmed that delimitation of EEZ and CS: the natural prolongation should not be a matter and the distance criteria; out of 200 M, natural prolongation should apply. ITLOS seems to reject that story. The same principle should be applied within and outside.

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LECTURE 17:

CLCS PRACTICE

Submissions to the CLCS – Overview

- Coastal State has to make submission on outer limits to the CLCS;
- Within 10 years of entry into force of Convention;
- SPLOS/72 (2001) deferral of first time limit to 12 May 2009: a procedural matter; State parties;
- SPLOS/183 (2008) possibility to submit preliminary information to meet time limit: location FS and outer limit of CS. This question how decision lead to the rules of Convention itself; states have to meet compliance within 10 years;
- 61 submissions (1 July 2012): number of states have made submissions for different areas: France, extended CS in *territoires d'Autre-mer;* it covers significant areas;
- 45 submissions of preliminary information;
- Special regime for Antarctica: claims on sovereignty are frozen. They are of view that CS will be in accordance with LOCS; in the Antarctica Treaty would allow claimants to submit to CLCS (Australia has made large submissions; then Norway);
- The most excessive: Iceland – 7 to 8 NM; and Sri Lanka

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– a Statement of Understanding of the Bay of Bengal; India is entitled to apply the same formula as Sri Lanka;

- At the time of the conference: people thought about 30 countries to submit, now 100.
- Procedure following submission by coastal state:
  - Possibility for other states to react;
  - Has happened in considerable number of cases;
  - May lead to deferral of consideration submission;
- Consideration of sub-commission by sub-commission (7 members) of CLCS and full CLCS – involvement of coastal state. Not an adversarial process, but a dialogue between the sub commission, commission and coastal states. Convention does not require publication of the CLCS. If not published it is difficult for other states to evaluate CLCS carrying out its work;

Recommendations of the CLCS – Overview

- CLCS to make recommendations to coastal states;
- Outer limit on the basis of recommendations shall be final and binding;
- If a coastal state does not agree to the recommendations it shall make a revised or new submission;
- Commission thus far has issued recommendations on 18 submissions (as of 1 July 2012);
  - In most cases recommended limits;
  - Russia recommended to make:
    - Revised submission (Arctic Ocean)
    - Partial submission (Sea of Okhotsk):

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territorial dispute with Japan;
        - Submission after entry into force of boundary treaty (Barents Sea and Bering Sea): with the US that has not been approved by Duma and not entered into force;
    - UK (Ascension Island): CLCS recommended not to establish outer limits on the basis of scientific and technical data contained in the submission. UK and Commission differ over competence of the CLCS; UK "believes that there are issues of legal interpretation upon which the Commission would have benefitted from taking expert legal advice." The Commission says that UK does not have entitlement.
    - Japan made submissions in 6 areas and one is the submission in relation to Okinotorishima: issue of article 121 (3) raised by China and ROK;
    - Okinotorishima can generate substantial maritime zones;
- Japan considered that the status of Okinotorishima was not an issue that would prevent the Commission from looking at the submission in relation to it;
- CLCS instructed sub-commission to look at scientific and technical data in relation to the continental shelf. Deferred its decision on how to deal with issue in recommendations;
- China and ROK submitted that Commission should not act;

- Recommendations CLCS (19 April 2012);
    - The Commission considered whether it shall take action on the part of the recommendation prepared by the Subcommission in relation to the Southern Kyushu-Palau Ridge Region (KPR) and decided not to do so. The Commission considers that it will not be in a position to take action to make recommendations until such time as the matters referred to in the notes verbales have been resolved.
- Information of the CS of Antarctica made by Australia is not considered under the Antarctica Treaty;

Submissions and Third States

- Art. 76 (10): The provisions of this article are without prejudice.
- Art. 9 of Annex II to the Convention
- Rules of Procedure of the Commission
    - Rule 46: Submission in case of a dispute.
    - Annex I to the Rules of Procedure:
        - 1. The commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States.
        - 5. (a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a subcomission made

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by any States concerned in the dispute.

- Matters raised by third States
  - Maritime delimitation; in most cases prior consent given;
  - Territorial dispute; in most cases prior consent not given;
  - Relationship between LOS Convention and Antarctic Treaty; common approach of claimant States: if submission: request to Commission not to consider

Cases of Implementation of Art. 76

- Arctic Ocean:
- South China Sea:

Legal title will not lead to sovereignty; only effectiviés will do.

LECTURE 18:

EEZ FISHERIES REGIME

Rules related to EEZ and HS;

Illegal, unreported and unregulated (IUU) Fishing;

- Until about 100 years ago, the general views that the ability of human being to deplete fisheries did not exist; modern technology can get unsustainable level;
- Before the EEZ, the fishing in your TS and limited jurisdiction over fisheries;
- Beyond jurisdiction, the regime is for all, could be agreement, open access, freedom to fish;
- EEZ is the biggest innovation and a great deal of time arguing about and resolving the maximum breadth 200 miles and the balance of rights and obligations of coastal states and other states in the EEZ;
- Why 200 miles: a move already by some coastal states; most of fish live in this area; unlike the legal CS, the actual 200 miles, fall off in the ocean before getting to 200 miles. Even today, 90% of fish are caught within 200 miles offshore;
- Coastal states would have jurisdiction over fisheries on the planet: 56 (a) living resources: fish;
- Sustainability argument: open access would lead to the

tragedy of the commons:

- But there are a lot of countries in the world achieving independence: Asia, LA and Africa countries consider that this is the most prosperous future;
- Who were the big winners: US have the largest, France, Australia, Russia, NZ, UK, Japan and Chile. Only two countries UK and France who have islands: EEZ surrounding the island;
- Obligations:
    - Art. 61 lists some basic obligations of Coastal States: determine the TAC in EEZ; you need to make a calculus how much is available;
    - you must protect against exploitation in the 1970s;
    - Coastal states say we do better;
    - We must maintain, restore stocks to MSY;
    - Art. 61 (4) protect species;
    - Art. 62 (1) requires coastal States to promote optimum utilization: for the surplus; and have to allocate surplus stocks to others, land-locked and geographical disadvantaged states;
    - Coastal states have wide discretion in the LOCS in determining the surplus and allocating the surplus to others;
    - The deal has been made;
    - How are the deal enforced: Art. 73 (1), Art. 62 (4): the coastal states;
- For fisheries: 200 M, within EEZ coastal states have

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jurisdiction to manage;

- Beyond EEZ, there is another regime;
- In a perfect world, fish exists only in EEZ or in HS: but fish does not get the message, stocks cross either between EEZ of neighbor state (transboundary stocks, Art. 60-61); between EEZ and HS and recognized, straddling fish stocks, some place in the world – the range and distribution beyond 200 Miles (Art. 63§2); highly migratory species – they can swim thousands of miles within HS (Art. 64). Art. 65 deals with marine mammals. Art. 66 and Art. 67: some species of fish have crazy life style born in fresh water, grows up on ocean on high sea then come back to spawn in fresh water, catadranomous stock is reverse (Art. 67).
- There is exception: coastal states have jurisdiction beyond 200M: sedentary species (Art. 77§4), stays on the shelf and on the CS regime, but falls out of CS, not the fish in the water column, but on the shelf, corals would fall into this, lobsters (but not just one species of lobsters, some swim); Icelandic scallop beyond 200 M off Canada.
- All rules of LOSC about fisheries are general, some cases call for cooperation among states, not a lot of details, no agreement to go further, the world has not broken up into problems. Only in the 1980s and 1990s the actual catch started to going down. In the late 80s, some people started to look at environmental in fisheries. More rules are necessary: Rio 92 there was a commitment for the LOSC, the agreement to launch

the process, following the Rio Meeting that lead to the 1995 Agreement of Fish Stocks: straddling and highly fish stocks; mostly the efforts to cover new sets of rules: the HS fisheries in the EEZ are not well managed; the HS fisheries should have greater control. But the HS fishing states have different point of view: they have 90% of the stocks and now telling us that we should behave better. Most of the provisions of fish stock convention are about HS, but the new general principles of disagreement are about EEZ.

- Art. 5 (g) of Fish Stock Agreement: they reflect high awareness of environmental issues that did not exist 15 years earlier. Both EEZ and HS should ensure the long-term sustainability, apply precautionary approach in Annex, terms not used in LOSC, assess the impact of fishing and other environmental factors on species in the eco-system, strong language dealing with bi-catch: you fish for something but get other species; pollution, gear, obligation to protect biodiversity in marine environment; obligation to collect and share fisheries data in EEZ and HS; Art. 6 about precaution: the absence of scientific evidence is not an excuse;
- Art. 7 of Fish Stock: compatibility between EEZ and HS: the notion was that as a biological matter, coastal states are managed, HS fisheries are managed by international agreement. But if you have two rules to manage the same species you need compatibility, it does not say how to ensure compatibility, but calls for

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compatibility. What if the coastal states as a biomass and TAC as a whole and allocate entire resources to themselves, it is a give and take. The straddling stocks are different. The fisheries organization: FMO, International Tuna Convention, the primary thinking that the fish swim to EEZ in the largest area, the only way to conserve is through EEZ. Some coastal states, like Iceland and NZ can do a good job, some do a bad jobs.

- The fish stock agreement entered into force in the 1990s and have been accepted. Most fishing states are party, those not ratified accept the general principles. FAO has the responsibility for fisheries, FAO committee on fisheries is weak, but through FAO a Code of Conduct for Fisheries, not binding, international Plan of Action, fishing capacity. If capacity is reduced, then there will be no overfishing. Shark is highly depleted. Fisheries are a major item and the fight continues today, most about high sea aspects.
- LOSC creates exclusive jurisdiction of coastal states: it does not work, for the most parts various coastal states are focusing on HS fisheries, most discussions relate to HS fisheries;
- Another argument is that EEZ regime helps developing States: some developing States either they can catch themselves or sell the rights to others. For developing countries at large, not so clear, most benefits go to the developed countries.

LECTURE 19:

HIGH SEAS FISHERIES REGIME

Within the EEZ there is a good model. This is provided that there is no unhealthy subsidies. Iceland has applied for membership of the EU. Iceland has more or less sustainable fisheries. EU's fisheries are not sustainable, a lot of subsidies.

FAO has made classification of stocks: fully exploited, over-exploited. NGOs conclude that 80% of fish stocks are either fully exploited and over exploited.

Coastal States A and B.

1. Local stocks: only found in EEZ of state A (Art. 61 and Art. 62): State A is responsible, nobody can fish. If state A fails to manage local stock, no body can complain.
2. Shared stocks, cod stocks or transboundary, not go to high sea, coastal states should manage stocks together, TAC should be determined, Art 63§1;
3. Discrete high sea fish stocks, shrimp stocks, near high sea area, not move, only in HS and do not come to EEZ. Should establish TAC, 116 applies, not regulation.
4. Straddling stocks, Art. 63 (2)
5. Highly migratory stocks, tuna, found in EEZ in many countries and in HS, Art. 64, UN agreement;
6. Anadromous stocks, salmon, Art. 66. Sate A has primary

responsibility for the stocks, fishing of adranomous stocks is prohibited on the HS.

7. Catadromous stocks, eal, Art. 67, fishing in HS is totally prohibited;
8. Sedentary species, part of CS, Art. 77(4);
9. Marine mammals, Art. 65.

Provisions of LOSC

They are vague in HS fisheries, in EEZ in Art. 61-62.

Vague provisions of straddling stocks and highly migratory that are found in EEZ and HS, not many. HS freedom fish in Arts. 116 and 119, provisions require cooperation, no teeth.

EEZ is a gray color in between. Most of the fish are close to the coast and outside of TS limit. Fishing for cods just off TS of Iceland. Developing countries, Iceland that live from fisheries, started moving out of TS limit upward and establish fisheries zones, then EEZ. Two frontiers, there are cod wars with UK in 12 miles, 100M, and 200M. These wars are fought in the conferences; In 1980s and 1990s, the vessels that are close to fisheries in coastal states, they are thrown out from EEZ. They have to fish elsewhere.

There is increased fisheries for the stocks found on both sides of the fences, straddling stocks. In the 80s and 90s there is depletion. Overfishing, a lot of vessels built. After the Rio 92, there was a call for a conference to look at the situation for an agreement suitable for the situation. Conference from 1992-95, Nanda was President of conferences: two groups of states: 1. Core group; Iceland: 2 Fishing group: China, Korea

and Third group: US. The meeting to talk to core state group to have 250 M EEZ to protect the stocks. In 1995 a consensus was adopted except the EU which very disappointed, as a loser of the conference. Canada is considered as a winner of the conference.

EU ratified the Agreement, but the other LA countries did not ratify the agreement which undermines sovereignty.

The provision of the agreement:

Regional Fisheries Management Organization (RFMO) is the real player, responsible for managing straddling and highly migratory.

RFMO: is responsible for TAC plus allocation;

State A: has more fishing stock, dependent on fishing;

B and C are normal States.

Distribution of equal amount for coastal states. 20% of stocks in each case. Straddling stocks should be managed as a whole, if overfishing in one place, it will affect the whole.

Then the D and E fish in the HS. G and H are dangerous countreis. G is party to the Convention on Straddling Fish Stocks (SP) and H is a non party.

TAC: 170,000

A- 45,000; HS share: 15,000=60,000

B- 30,000, HS share: 10,000=40,000

C- 30,000, HS share: 10,000=40,000

HS-65,000

HS share

D: 10,000

E: 10,000

F: 10,000

The most difficult is to follow the distribution. States are reluctant to follow the scientists. There are provisions about criteria to be used.

Art. 7 of UN Agreement there is compatibility provision in EEZ and HS. Fishing gear must be compatible. Art. 7: you should fish equally in the EEZ and in HS. In Art. 2, the dependence of fisheries for States, there is an argument to fish more in EEZ than in HS. The most important issue is that the stocks are single, biological unit that has to be managed as a whole.

The provisions in agreement are new in IL, the precautionary, and ecosystem approach, for both EEZ and HS. Art. 7 on compatibility applies to both species, between EEZ and HS. How does UN agreement strengthen the role of RFMO, require joining RFMO if in place, or establish RFMO? Who can join RFMO, if there is interests, genuine interests, real interests? EU tries to make interest, really interested in fisheries, you can join. But, it should be a coastal State to have real interest to fish in EEZ, even not fishing, or a country is a fishing country.

Art. 8, Para 3-Real interest

Art. 8, Para 4. State G as a State party: G and H are new comers and decide to fish from the stocks. G and H are not members of RFMO. G as member of UN agreement, should join RFMO or alternatively it must follow the possession of RFMO. If it doesn't it should be denied from fishing in the high sea.

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G and H may not granted quota, G may continue to fish illegally.

If it is a fully exploited stocks, G should not get a quota. But it is in the interest of the group to give G a marginal quota to prevent illegal fishing.

The duties of the flag states in Art. 18, not in LOSC and in the compliance agreement. The main responsibility in fishing in HS lies in flag state. Flag state jurisdiction in the HS. There is an exception, the possibility in regional agreement. The coastal state may, if serious violation, turn the vessel to court State G may want to take over the vessel. State A may agree. Usually only flag state can control vessel on HS (Art. 20-22). You cannot bring the vessels of the non parties.

Port country jurisdiction in LOSC in marine pollution.

In agreement:

Port state is important in free riders (G and H). There is a dispute settlement mechanism in Part VIII of the Agreement. The difference is that the dispute can be brought to third party adjudication. It is an instrument in RFMO. In North West Atlantic Association Agreement. There is an agreement in RFMO, there is agreement in TAC and allocation of quota. You can have dispute in allocation of quota and bring to dispute settlement mechanism.

The key question is how to deal with G and H. If G is fishing at Port it is a serious violation. What can we do with H? How can you make illegal fisheries more difficult.

Measures in customary IL:

- One method that can be used: Black listing vessels and

not allow to land in ports. This depends on individual states in the internal water (IW) the jurisdiction to regulate. Not just catch, but selling oil. This is why they try to negotiate port state agreement to close the port. The question is that it might be only the landing ban and not more than that.

- Discussion on flag state responsibility in compliance agreement, and does not live up to obligation. Iceland would like to strengthen flag state responsibility and to find legal basis for coastal to take actions against vessels. Flag state has a primary jurisdiction, if flag state does not comply, there is a secondary state to take over jurisdiction.

The review conference in 2006 and 2010 is a policy conference to look at whether the provisions are helpful if use of resources. Many recommendations. Recommendations that most provisions can be applied to discrete fish stocks.

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LECTURE 20:

IUU FISHING

IUU (Illegal, unreported and unregulated fishing):

The state of international fisheries is not in loom. Some coastal states are doing better jobs. But there are 3 challenges:

1. Over capacity and over fishing
2. Even there are rules, are they being followed?
3. Cluster issues: environmental issue that causes international community to grapple.

Illegal

- Fishing of vessels of coastal or another state fishing in violation of laws;
- Fishing that fishes against the rules of RFMO; Certain types of practices that prohibited by RFMO;
- High sea fisheries that is not RFMO rules, but flag state rules, if you violate that rules, are illegal fishing.

Unreported

- Miss-reported;
- Both coastal states have certain reporting requirements, you violate your own flag state.

Unregulated

- Vessel that flies no flag or flies two or more states violate;
- Responsibility relies on flag state;
- There is an RFMO (Regional Fisheries Management Organization), there are members and there are non members;
- There are plenty of high sea situations, there is not yet regulation;
- The problem may be nothing or may be not much;
- It is the three terms not necessary bad all the time. There are different situations on the HS;

HS fishing has the responsibility of flag states.

With the advance of RFMO system, the RFMO starts to deal with IUU fishing in a strong way to promote compliance with RFMO rules. Vessel tracking system on board.

Collectively members do joint monitoring at sea to deal with IUU fishing. A lot of fish move into international trade, there are efforts, like tuna, to track products in international trade, to ensure tuna fishing comply with track documentation.

The flag state has exclusive jurisdiction on HS. Arts. 21 and 22 in fishing agreement, allow states other than flag state to inspect vessels. All this is to deal with problem, but more need to be done.

IUU fishing is detriment to coastal states, the RFMO content. The FAO has made efforts to introduce international PoA to prohibit IUU fishing, non-binding soft law. This IPOA was the first time in a serious way to describe has all the

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elements, what constitute illegal fishing, illegal fishing and unregulated fishing. It creates tool box for all vessels: having vessel registered: only registered fishing vessels can control, duty to cooperate with other states, attempt to deal with problems of nationals having vessels registered with other states, or working on vessels registered elsewhere.

Flag state responsibility:

The coastal state can take many steps to reduce IUU fishing in coastal zones.

Port states: in International Plan of Action (IPOA) for the first time, effort to try to think how international community to come to port before going to international commerce. IPOA requires port states what to do. Coastal states have maritime zones, fishing gears, monitor people not rules.

Port states: receive fish caught anywhere. The fish may be caught in somewhere else.

IPOA may be most controversy, market state measures.

Market states can do:

- Restrictions, but not to go too far for fearing violation of WTO rules,
- Use market state measures to discriminate fish from other countries;
- Use WTO rules are evolving;
- Market measures imposed by certain entities;

With international plan of action, states are eager to apply the tool.

Fish caught in HS, if it is misreported, it is difficult to monitor.

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RFMO takes more measures to deal with IUU vessel list;

List is voted by consensus: if fish is caught illegally you can blacklist the vessels. If there is concrete evidence that a vessel is fishing illegally, you can black list. If the vessel is on an RFMO black list, another RFMO can black list too.

It can be a serious thing. If listing can be done by consensus, and flag states protect their vessels. The problems of competitors. RFMO is meeting only once a year.

Art. 23 of Port State agreement. In 1995, when the agreement was done, the world is not ready. But through FAO, non binding scheme, an agreement to negotiate a port state agreement, 2008 and adopted in 2009. Not yet in force. Myanmar, Sri Lanka, EU.

Provisions of Port State Agreement:

- Element of IUU;
- Use broad definition of vessels: not only fishing vessels, vessels used for fishing activities (transshipment vessels); provision of personnel, gears;
- Scope of agreement is limited: if port state will take action against foreign vessels, but not your own vessels; if vessels coming from neighboring countries in small scaled fisheries, you should not take action.
- Container vessel problem: thousands of containers, all but one contain frozen container: you don't have to take measure against containers that do not carry fish, but only containers with fish coming from sea;
- Designate foreign vessel would land: capacity to inspect

at minimum level, credible inspection capacity, require vessel seeking entry to send advance request with information, and certification that fish is caught according to the rules;

- Vessels on black list must be denied entry: you allow vessels to come in to inspect, not to supply services, fuel and equipment;
- Sometimes you do not have evidence, you cannot deny entry, but prevent landing fish;
- Vessel is coming, but you must take steps;
- Force major: emergency vessel has the right to come to port.
- If a port state has evidence, it has obligation to share information with the flag state, with other state if fishing in EEZ, or with RFMO.
- Developing states are drivers of this agreement. Developing states are often the victims, and there is commitment of developed state to try to help implement the agreement.

LECTURE 21:

CONTINENTAL SHELF PETROLEUM RESOURCES

General rights and obligations of the coastal state

- Coastal states exercise sovereign rights over the CS for the purpose of exploring it and exploiting its natural resources (Art. 77§1);
- These rights are exclusive (Art. 77§2);
- Rights do not affect the status of the superjacent waters and air space (Art. 78§1), but…
- Coastal state is entitled to make use of the water column in connection with exploration and exploitation of shelf. See also LOSC Art. 78 (2): The exercise of the rights of the coastal state must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States;
- Coastal State has the obligation to protect and preserve the marine environment (Art. 192). This obligation applies to the marine environment and coastal state zone.

Environmental standards

- States shall take all measures consistent with this

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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 endeavor to harmonize their policies in this connection (LOSC, Part XII, Art. 194 (1)).

- These measures shall include those designed to minimize to the fullest possible extent;
  - 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 (Part XII, Art. 194 (3.c)).
- 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 (Part XII, Art. 194(5)).
- Environmental Impact Assessment (EIA): an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.
- EIA and customary international law:
  - Pulp Mills case (ICJ: Argentina v Uruguay)

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indicates that there is a general obligation for States to carry out an EIA to avoid activities under their jurisdiction and control cause significant damage to the environment of Area Beyond National Jurisdiction (ABNJ).

    - State in domestic legislation or in the authorization process for the project to determine the specific content of EIA required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment (judgment Pulp Mills case, para. 205);

- Article 206 LOSC and EIA
    - When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205;
    - Article 206 is not specific on what should be done with outcomes of assessment.
    - Article 206 has to be read in light of judgment Pulp Mills case; precautionary approach relevant.

- UNGA 2010 resolution on Oceans and law of the sea and EIA
    - Encourage States, directly or through competent international organizations, to consider the further development, as appropriate and consistent with international law,
- International rules and national legislation (Part XII, Section 5, Art. 208);
    - (1) Coastal states shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction;
    - (3) Such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.
    - (4) Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.
    - (5) Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and

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control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

- Enforcement (Part XII, Section 6, article 214)
    - States shall enforce their laws and regulations adopted in accordance with article 208 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations.
- Some examples of international rules and practices
    - Guidelines and standards for the removal of offshore installations and structures on the continental shelf and in the EEZ (adopted by International Maritime Organization (IMO) Resolution A. 672 (16) on 19 October 1989)
    - Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention);

Joint development

- Arts. 74 (3) and 83 (3) of LOSC deal with provisional arrangement
- Australia/East Timor – Joint Petroleum Development Area (JDA)
    - Example of joint development

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- Is also a provisional arrangement
- Once the Agreement on the JDA ex

Trans-boundary deposits - general

- LOSC only in relation to deposits that straddled areas of national jurisdiction and the Area (Art. 142)
- David Ong "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?" (Vol.93 (1999), *American Journal of International Law,* pp. 771-804):
    - No rule of capture
    - Interested State obliged to notify, inform and consult the other interested party in good faith on is intentions in relation to trans-boundary deposit
    - States obliged to enter into negotiations with a view toward arriving at suitable cooperative arrangements.

Trans-boundary deposits – Art. 142 LOSC

- Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction

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Lecture 22:

Biodiversity Beyond National Jurisdiction

What are areas beyond national jurisdiction? Two regimes: HS beyond EEZ of coastal states; the other beyond CS of the coastal States (The Area).

Any genes living in the ocean, a new life form are marine genetic resources. This is not a very satisfied definition. From gene, can be made angime, protein. Some countries you can patent the gene, some countries you can only patent the process.

The access and benefit sharing regime in Part XI.

Fisheries regime in the EEZ.

Outside of the law of the sea: access of environmental information.

Nagoya Protocol: creates access and benefit sharing within national jurisdiction.

Marine Protected Area (MPA) is regulated by laws, national law and international law. MPA can infringe freedom of navigation. How to create MPA beyond the area of national jurisdiction. The basic concept is before large scaled activity there should be EIA, to reduce and mitigate environmental

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impact.

Provisions of LOSC that apply:

Part VII: the High Sea

“Freedom” to fish (subject to limitation);

Freedom to navigation;

Freedom to MSR;

Part XI. The Area: Resources are mineral.

Resources belong to everybody. Everybody has some stakes. A fish in the high sea belongs to nobody. A resource belongs to everybody. You must have a system to regulate them. If not belong to anybody, not benefit so far.

Part XI Implementing Agreement remove production limit.

Part XII. Protection of marine environment. They apply to resources in and beyond national jurisdiction.

There is an article, 206, Part XII: EIA requirements. When States have… your national vessels out in the HS may have pollution that damages to the marine environment. There is some requirement to do EIA.

Art. 209. Pollution in the Area and steps to minimize. ISA regulates mining, but also environmental pollution related to mining.

UN fish stock agreement contains Art. 5 (g): protection of marine environment.

What human activities beyond national jurisdiction have the potential to cause harm to the biodiversity:

- HS Fishing – RFMO, UN Fish Stock Agreement, FAO code of conduct, soft laws – a mixed record;
- Shipping – number two in terms of current impact:

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balance water that takes to water, pollution from ships, sound – IMO;

- Deep seabed mining: not yet, may be soon. ISA has granted licenses to a number of companies, actual commercial recovery from mining. Part XI system overseen by ISA;
- Dumping at sea: adjunct to shipping. London Convention and its Protocol, in fact little dumping in HS, mainly near the shore. Tug of wars between the Convention of Biodiversity and the Convention of London.
- Military activities: some types of sonar can cause harm to some species;
- CO_2 emission: all CO_2 emission in the atmosphere, 1/3 of it is released in the ocean, ocean is more acidic, 30% harmful to marine life (UNFCC and Kyoto Plus).

Those are calling for a new system and a coordinated approach to all these problems. In people mind that Biological resources are in national jurisdiction, state must protect and they can benefit from them. This is the thinking beyond Nagoya Protocol.

One of the arguments is cumulative impact: activities in the area, they add up. Looking at individual activity does not give total results.

MPA in the HS area today:

- MOU through IMO;
- Whaling sanctuaries. If to ban fishing and give to the area: there is no fishing on salmon and cadranomous species on the HS.

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- Canada is committed to create a MPA in the Rock Sea.
- IMO would designate a special area on the HS, called special area in order to protect biodiversity. Special area under MARPO.

Some criticism: This system is not integrated and not effective.

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LECTURE 23:

MARINE MAMMALS

The most controversial issue under the LOSC.

Two groups of States: one in favor of whaling and the other against whaling (except for aboriginal).

We are not only talking about legal arguments: emotion, ethics, wrong: 100 or 100,000 whales. They look at whales as resources.

The provisions related to marine mammals:

Art. 61: TAC, MSY

Art. 62: Optimum utilization: state supposes to optimize living resources;

Articles related to historical rights

Part VII, Section 2: Conservation and Management of the living resources of the High Seas

Annex I: Highly migratory species.

Art. 65: Marine mammals, precedent over a more general.

Two sentences: nothing in this part neglects regulates marine mammals more strictly. We have general provisions about sustainable. State A would say that we are going to take only 2 and not to optimize.

The first sentence did not say whaling is prohibited, but it gives IO to prohibit. State shall cooperate on the conservation of marine mammals, appropriate organizations (1946 International Whaling Commission (IWC) organization), reference to IOs and regional organizations. There were organizations like IWC, but did not succeed, attempt to cooperate: conservation and management. It is a complex paragraph which results from lengthy organization.

IWC established in 1946 to regulate whaling:

1. Regulation or conservation
2. Management

But IWC could not reconcile the 2 objectives, could not do good job, focusing on management and protection side. On the protection side, anti whaling 40-60%, 40% against.

Important part of the work of IWC is attached to convention: a mandate, you need ¾ majority to amend the convention. The situation is 60-40%, 60% for, then stalemate.

The scientific committee to estimate the whale stock, the objective is the conservation of whale stock, the other is to balance the whaling industry. Moratorium of commercial whaling adopted in 1962, effective in 1986. Cap limit of commercial whale stock is zero. This is a blanket commercial whaling. The commission would review this moratorium. This is controversial issue, ¾ majority, some countries objected as state allow to: Japan, Norway, Peru, Soviet Union. Later Peru, Japan and Soviet. Norway has been bound by moratorium. Iceland also bounded by moratorium.

The 1990 passed without quota issue, scientific committee

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says whale stock, not to issue any quota. There was computerized formula, revised management procedure, to determine allowable catches, close to 1962, the committee says this formula is not right, the RMS, the system of rules and inspection to ensure that the will not exceeded. Moratorium is in place and quota is not issued.

Relations between Iceland and other issues. We have type of precisions: the sanctuaries, area of prohibition of whaling, but did not apply to scientific whaling, authorized under Art. 8 of International Convention for the Regulation of Whaling: in Indian Ocean in 1999 and Southern Ocean in 1994. The Japanese conducts scientific whaling.

All the whale stocks, so many in abundant stocks, not much whaling going on. Only 2 countries conduct commercial whaling, Norway and Iceland. Norway conduct commercial whaling on milky whale, Iceland conducts milky whale commercial as it made reservation. Iceland did conduct scientific whaling, while bound by moratorium. Japan – milky whale and other whale. The third subsistence whaling by indigenous: Greenland, Russia, US, St Vincent and Grenadine. Korea says it will not do scientific whaling. The operative and subsistent whaling is considerable, not small-scaled. Some countries like Canada and other are not regulated by IWC.

The other types of using whale: whale watching for many countries, including Iceland. Iceland considers whale-watching is hand in hand. Whaling takes place elsewhere. NGOs come to Iceland makes holes and consume whale meat. WWF publishes the result, they come to eat whale during the stay in Iceland.

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Future of IWC, there is a stalemate, not decision in all, frozen. There has been an attempt to get peace in organization, almost falling apart. This is the first meeting in many years. A very hectic situation. The philosophy of compromise is not developed: a small group of 10 countries to assist the chairman: the philosophy is conservation and management: by making sure that a lesser number of whales will be taken in the future than in the past. The other countries want to reduce whaling, the other prohibit, the other for subsistence whaling. The best attempt to find peace in the organization, to have whaling quota, when brought to IWC in Morocco there are countries against whaling so much number, there are emotion, politics. In Iceland, 80% of population for, in Australia against the opposite. This affects politicians. In Morocco they cannot find compromise.

EU prohibits whaling.

When Iceland left IWC in 1982, Iceland established North Atlantic Marine Mammal Comission Organization (NAMMCO).

Seals also included. Sealing is not so controversial. Import ban on sealing in EU.

Another Convention CITES convention. In CITES, political decisions were taken to follow moratorium, all whale stocks are listed and trade prohibited, but allow to make reservation to listing. When Iceland joined CITES in 2000, she made reservation.

Iceland and Japan can sell whale meat legally.

Reservations and International Public Law

In 1982 IWC bans commercial whaling, Iceland left IWC. Iceland wants to take part in the work, but Iceland makes reservations to the moratorium.

The Public International Law (PIL) about reservations: In 2001, Iceland makes 2 attempts to joint IWC, look at reservations. When a country makes a reservation, in general rule, a specific approach applies. Countries can look at the reservations, and reply. If it is for constituent instrument, not for individual constituents, the IWC cast the vote on Iceland's reservations. Iceland is of the view that IWC does not have competence to vote on reservations. France and NZ were on Iceland side. Does IWC have competence on reservations. Is Iceland a party with reservation. Iceland lost the vote 19:18, only one vote.

Japan cannot get the aboriginal whaling quota.

Sweden and Monaco are anti-whaling countries.

Why whaling in Iceland: 1. Profit from whaling; 2. Keeping balance in ecosystem, competition with fish for nutrition; 3. The general principle: balanced use of marine resources. You cannot exclude possibility of imbalance in the future.

LECTURE 24:

MARINE ENVIRONMENT OVERVIEW

I. Historical Development

- Early Understanding/Misconception
- From Stockholm (1972) to Rio de Janeiro (1992) to the Failure of Rio 20
- Structure of International Environmental Law – Sectoral Approach: An Overview
- Protection of the Marine Environment
- What will come in the future?

1. Early Understanding

The term environment has been introduced into *legal literature, into positive law in the 1970s*. Before that nobody spoke of environment. The first international agreement could be considered as environmental treaty, animal useful to human being and not useful to human being. There were things like crocodile, elephant. It is still true even today. Protection of the environment: what is useful to human being and what is not. It is true for LOSC.

2. From Stockholm to Rio

Only with 1972 Stockholm Conference, the situation changed. The starting point of the IEL is the Stockholm Conference.

A. Old principles (no harm, good neighborliness)

Before that there were some principles established, namely the principle of no harm and good neighborliness:

TheTRAIL Smelter Case: It is an arbitration, a smelter in Canada and the fume went into the State of Washington and caused damage to cattle, 20 cattle died and brought up in a dispute. This is seriously harmful to a neighboring State. This was a revolution, *the territory of Canada is a sovereign right* of Canada, and Canada can do that. The arbitrator picked it from nowhere and developed, used the American law, Oregon and declared international law. The principle of no harm and good neighborliness.

The Pacific Fur Seal Case: In 1899, this period when the US existed, but Canada was under UK. The case between US and UK. In the Pacific island, Alaska was part of Russia, Privilop Islands, the first Pacific seal was used. All the Pacific fur seal goes there. So many fishermen go to hunt for seal. They are researching, to kill a seal on the island. The water around the island from the female seal, *the huge stocks of seal almost collapsed*. The US said this is our island and arrested the fishermen. The *Canadian said this is our island*. They brought to arbitration. The US was told ‘no you have no right”. *It is not possible for one country to protect a resource for everyone*. This is the

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beginning of the sustainable development. After that US, Russia and Canada concluded the agreement: to manage the hunting and shared skin with Japan.

Another agreement is the agreement on whaling. The whaling convention is not to protect whale but to manage the whale, so that everybody would have a fair share.

The next step was the conference in Rio in 1992. The *Stockholm conference was dominated by environment,* the Rio was on environment and development. The combination of environment and development was to protect the environment. Out of the conference there was a number of conventions: Convention on Bio-Diversity (CBD) etc. The main idea and revolutionary is one has to combine environment and development. The most essential outcome is sustainable development.

The principle of sustainable development was introduced in the 18th century, a German, *you must not cut down trees, without planting*. There was no ownership of forestry. Others have the right to cut wood, hunt pig etc. The end of the story: nobody takes care of the forest and it deteriorates drastically. *This is the common: Adam Smith.* If there are too many sheep, the pasturage will degrade. He used *property right to protect the environment*. This is the idea of EEZ. Sustainable development has been used only with renewable forests etc.

Today we use non-renewable energy: also for copper, iron etc. If you provide sustainable development for fish: reproduction rate, life span, competitor like human consumer, and what is left that may take. In LOSC, fishing on the high sea, MSY. It is not sustainable use, you can take the surplus. Other

speaks about optimum SY. It means economic use, but keep in mind that these resources are not endless.

B. The Precautionary principle:

It means when you go to the airport. You go very happy, but afraid of flight. You don't realize that from here to the airport there is a risk. When you go you weight the risk with opportunity. When building a new power plant there is a risk. You take the risk of an accident, tsunami and protection. This balance you have to establish.

The precautionary principle you take the risk, assess the risk involved, especially the magnitude of the risk involved.

There was an idea to turn the Russian river around to have more water in the South, but not so much water in the Nord. It creates a small climate.

The *algae blossom* in the sea: CO_2 should be taken out of water. Only half of Atlantic dump, our CO_2 problem will arise. The precautionary principle: the risk has to be fully assessed. If you take that risk or not to take. It first says assess the risk by EIA. If the EIA finds that there is a huge risk and you get only a small benefit, you have a 50% chance, then not to do. That is why there is no power plant in Germany. This is the most active area for earthquake, if there is an accident. The Supreme Admin Court to build the power plant that never came to existence. *The Straddling Stock Convention is the masterpiece of the precautionary principle and EIA.*

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C. User Pay Principle:

The exploitation of plant has toxic waste. It was decided that this should not be done. The industry moved to Tanzania. That is how the user pay principle comes in. The Basel Convention does not prohibit. The industry should take care and the prince should reflect all costs.

D. Common but differentiated responsibility

It means who cause for climate change: some warmer and some colder. The US, European countries for the production of CO_2 more than other developing countries. Differentiated responsibility: this is not the view of the US. This is the reason why the Rio 20 failed.

International Environmental Law (IEL)

You can approach IEL differently: transboundary air pollution or sectoral approach: international convention on fresh water on the soil, air (transboundary), climate change and Kyoto Protocol, flora and fauna (CITES), using economic mechanism to stop overharvesting wild life), the outer space, the ozone layer regime, the most successful.

The LOSC was organized in 3 big committees:

Committee Number 1: deep seabed mining;

Committee Number 2: HS, EEZ, CS; and

Committee Number 3: protection of the environment and MSR.

One could not expect, we don't have a single environment regime for the oceans, in the sectoral approach we have another

sectoral approach: fishing, mining, marine environment. The regime of fishing belongs to the protection of the marine environment. The ITLOS has said so. This is the Bluefin Tuna Case, Part XII also applies to fishing. Art. 192: States have the obligation to protect and preserve the marine environment, like in Rio, but it was before Rio. State has obligation, modified by Art. 193: States have the sovereign right to exploit: the idea of sustainable development, without saying so.

You have to distinguish between the law making: the lawmaking concerns the protection of the environment is international, the protection of deep seabed is national: enforcement is national. This is a clear cut.

Lawmaking:

The first activity in Chapter 12 Land-based marine pollution (*The Practice of Shared Responsibility in International Law*): river etc. IEL is limited. Who imagine that international organization regulates the Congo River. The drainage of the Nile is huge. Future agreements come: the OSPA Convention combines the Oslo Convention and the Paris Convention.

Next the protection is on shipping: shipping is regulated internationally: the main source is MARPOL and IMO. Scientific research is not much. Deep seabed mining is with ISA. Fishing: *cadranomous*, highly migratory species. We have a diverse system of lawmaking. Shipping is concerned for fishing authority to provide: the speed, the noise of propeller is to protect marine environment.

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IMO is a good norm maker

Safety of Life at Sea (SOLAS): under IMO, the consequence of titanic accident: if you are worried of ship accident, by pumping outside weight, confine accident by constructing the vessel.

The upcoming question in GA, what are responsibilities concerning climate change? What do we do internationally if sea level rises? The islands will disappear. Marshal Island is asking for advisory opinion: the US would say no, and Germany will say yes. The question goes to ICJ, the advisory opinion is not enlightening. *Palau and Pacific Island States will disappear: Tuvalu,* if islands vanishes, is it the end of that State.

The rise of sea level is the responsibility of all states. Should we provide them with new land or to consider this State? You could argue this under State responsibility. Try to make good to damage as far as you can. Land dominates the sea is much too conservative. This dictum was to explain the EEZ and CS. Can this be used for the State?

We don't know, but it raises responsibility. In civil law, the damage. Common but separate responsibilities. In Antarctic Treaty, Annex VI it is specified. A very good example, the agreement for the use of the outer space station and provides for common but separate responsibilities. The split in EU doesn't mean much. State responsibility is not the matter of the EU. UK will decide with US. Germany certainly will vote yes. All Scandinavian States will vote yes. Sweden will vote yes.

This is not black and white issue: the on-going discussion, we should be able to find solution. The Tuvalu has struck an

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agreement with Australia, but not what they want to be integrated. But they keep the sea area as their own, and retains the autonomy. You must find the basis for the argument. You could find the argument under *CS, which is part of sovereignty* and sovereignty does not go away easily.

Lawmaking is more and more, IO like IMO, the proliferation of environmental standards to encroach on the high sea or to find the common grounds, more convenient. So far is not encouraging, environmental standard is different, in the Mediterranean, the Red Sea. The other is to extend the protected area, the Torres Straight, the Baltic Sea. EU is keen on expand its jurisdiction not to protect the environment, but to increase power. They will not deal with old in CS, but with shipping, classification of firms. The future is unclear, and there is a lot of development.

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Lecture 25:

Enforcing Environmental Standard

I. Ensuring Compliance and Enforcement

Monitoring (Reporting, Inspection, the Role of NGOs, the Role of International Organizations, the Role of Meetings of State Parties)

There are certain mechanisms: monitoring, reporting, the role of NGOs etc. In the history of the LOSC to human rights. Human rights are based on reporting. To a certain extent the Convention of waste disposal, LOSC related to State Parties relate to reporting. It is a report of a State to IO, we should report of government to the Parliament, NGO to Parliament. The reporting system is complex. CITES, a report of violation by NGOs, Green Peace, to the Secretariat. The LOSC, pollution in the Pacific, fly under Panama ship, you will be arrested in Hamburg. The report that has been done as a Port State, in European Port State knows what you have done. The port state is responsible for implementation by report.

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II. Ensuring Compliance by Confrontational Means

Counter measures (Vienna Convention on the Law of Treaties)

The whole set of enforcement measures by means. A carrot and a whip. First of all, enforcement between states under the Vienna Convention of the Law of Treaties. If a State fails the enforcement, the other measures under LOSC. Human Rights Treaties and Environmental Treaties are meant to benefit the international community. Kicking somebody out of the regime.

Sanctions

Under the Montreal Protocol, State agrees that no State would import goods produced with FCCO. Is the treaty imposes on relations on third parties. You the members must not import. The state sanctions, Art. XI of GATT, you must protect human health. Trade sanctions.

Under Fish Stocks Agreement, there is a sanction. A couple of years ago, the vessels under Russian flag, *that violates the agreement and could not get water, fuel*. This is a sanction that works to protect community goods.

Responsibility and Liability

How can liability works as enforcement. The loss of fish or touristic value, you protect the environment, while private or state property. One judgment that goes beyond that.

ZOE-COLOCTROMI, vessel ran on coral reef in Central America, and a liability case brought against it. The Court

decided that the owner has to pay for a small animal that has been damaged. They multiply the price to organisms destroyed and multiply by 2. The EXXON oil spill in the North of France. First the Tribunal asks: *pay for the clean up, in addition to set up funds to promote the protection of the Alaska environment.*

In the Antarctic regime: Annex VI to The Protocol on Environmental Protection to the Antarctic Treaty, you have to provide the fund to pay for cleanup. If the private entity does it, you can make a claim. Beyond doubt means enforcement system. If you are facing liability claims, it disadvantages if all come after, mostly the protection of the environment.

The extension of the Frankfurt Airport is done by the principle of domestic law. Alaska Pipeline Act: the Punitive Damage – take into consideration the willful damage, the entity should pay extra: in suit for smoking, Marlboro produces additional chemical that causes addiction to smoke, based on the profit you make.

III. Ensuring compliance by non-conflicting means

By helping those who cannot comply by finance and solidarity.

The Baltic Sea Convention: countries that cannot comply will be assisted by funds and TA. Modern IEL provides for non-confrontational mechanism: it goes back to reasons why State cannot comply: 1) can not afford, 2) no infrastructure or means or 3) assist that State for a service for common grounds, and not to see pollution.

The LOSC, Art. 73 uses confrontational method. Art. 73 provides

coastal state to set up EEZ. State can do the enforcement. But *these national rules have to be in conformity with international law*. Then LOSC will look into the national law, whether the national law is in compliance with IL. We must check whether national law is in conformity with IL. A multilayer system.

Lecture 26:

Maritme Law

I- Historical Background of Maritime Law

Maritime law is both international, as well as domestic law. The two parts: governing human activities at sea convert from time to time. In the past, the merchants govern by the sanctions.

In Venice, the painting throw the ring to the sea, the land governs the sea. Also you have Papal bull in 1493 by which it is the sea that governs the land.

During the 15th – 16th century, the sea governs the land. When Great maritime power came, the UK, maritime law governs the state of the ship: maritime insurance and liability, legal liability between the master and the crew etc.

The LOS is setting the main principles and maritime law makes operative these rules. The normative aspects of the sea have two main branches, the LOS and maritime law, the system: a set of elements that communicates among themselves all the time and receive influences from outside and change the way they operate. The system creates subsystem and the subsystem creates autonomy.

LOS and maritime law are system of regulation regarding human activities at sea. The sea itself is the system. The

normative aspects of the system is LOS and ML.

There is another situation: maybe we are not aware that LOS and ML are parts of IL. We should bear in mind that IL is not to believe. IL has very large informal part: IL is both formal, the Treaties, and informal: a commander who waves a white handkerchief concludes an international agreement. Most of the rules in IL are informal.

What does consensus mean? The voting process in IO there is no abstention: adopt the text without vote or no exclamation. Without the vote, nobody cares about it. No exclamation, the Resolutions are forgotten immediately after adoption.

Adoption by consensus: Wilfred James was a legal adviser to ILO. ILO cares about workers' rights. Wilfred James explain about IL, the beginning is the contract between the sovereigns, then the contract moves between the sovereign and God, then the sovereign and the people. Then it moves to consent between States. If you have State consent, you have IL. Customary law is consent. The first approach is the contract, then consent, then the third approach is consensus. What do we mean by consensus? There are some articles that are important for you, but not important to us, there are provisions important: you got you like and I don't like very much is consensus.

Informality is one important element in the study of IL, LOS and shipping. Ship-owners are difficult people who influence the government. Conference on registration of ships, adopted for 3 years, but never ratified, the UNCTAD convention on registration of ships never enter into force. The normative evolution of the LOS.

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The Ships

Agus, according to Greek methodology, was talking to human voice. Art. 1 in LOS makes reference to ship. Ship has nationality, but not legal entity, it is the ship owner. The ship owner adopts the nationality other than his or his own, it is beneficial ownership. It is now reality, 60% of the flags of the world.

LOS contains some main rules regarding relationship between the State and the ship. States are responsible for registration of ships, have the right to fly the flag. The ship when flying the flag of the state, it has the obligation to have national registration of the flag state, Art. 94: what is the requirement for registration?

When the state allows the ship to fly its flag, it gives the document. A brilliant international judge, Indian, suggested that the State has continuous obligation toward the life of the ship, from the time it grants nationality, but it is not true.

It is practically difficult for State that grants nationality to control what happens. Why the State owners can go to a consulate of the flag state. By paying the fee, you can get the flag of Mongolia, Bolivia. States have sovereign rights, Switzerland. It comes that sometimes that state enforces law. The ship flying its flag will never see the port of Mongolia.

It happens that ship getting nationality and flag and never goes to the port of flag state. It is difficult for state to enjoy the activities of flag states.

We have Art. 91 (1), welcome by all States, because it endorses important principle: “there must exist a general link

between the State and the ship." This is a prerequisite: land-lock. This idea of general link comes from a decision of ICJ in 1955 (Industrial activity in Guatemala, in WWII, he went to Listenstein and said I would like to buy a nationality. He paid and began the citizen. Before the end of June, Listenstein said I declare war to Germany and seized the property of a citizen of Germany. The ICJ says sovereignty. But nationality presents a genuine link between a person and the country of nationality.

If a State grants nationality to a dog, but this nationality is not opposed internationally. Rule 21 (1) of LOS. The language is flexible, finance is flexible. They make all the time, businessman makes forum shopping, we have to recognize that this is reality. The second is that someone the international community has to provide with nice people with some rules of how to behave.

As the ship moves, the ownership will also moves. The Charter is a physical person who charters the ship and pay the renting costs. The process of ship registration is to take advantage.

You are not the owner, but you take the ship as if you are the owner. Private party does not know who to choose. It is extremely difficult to find the charterer. All of them they will not chase the charterer, but the owner. The liability goes beyond the owner, but he is still responsible.

Where the master of the ship stands: he had right in the past of life and death of passenger. This does not exist any more. In one legislation of an important country: the ship owner is not a physical person. No physical person will involve at Sea.

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The company has the rights to provide the ship with police assistance. If the captain disagrees he must manage the ship.

The master of the ship is an employee and receives order. If he abides by international relations. If the master disagrees if should leave the ship.

The single ship company: the ship owner owns 10 ships establish the 10 single ship company to cut down the liability. Who is the real owner, if the real owner is an enemy, the ship can be confiscated.

You have company A and ship A, company B and ship B.

The double flagging: Flag Bis. One country has territory outside Europe. They have 2 flages for those recognize and never recognize. Things change so rapidly.

Private users who classified the activities of other private use. The State have controls what is the nationality of the states. Coffee shop owner, Mr Lloyds, he used to have a book to write information around café. Lloyds shipping was created.

For certain times, classification society is US, Lloyds and other 3. Now they are 50. Lloyds get certificate that the ship is controlled by expert body. The ship owner says why goes to London, I create the classification society myself. Free market. EU has Directives and scrapped classification societies in Europe. Many Maritime IL Organization recognizes classification society and not State.

There is that mood from responsibility of the state to do, private actor to create problems of liability. Liability in cases of grave accidents. The first wave of claims against the classification society came the Accident in Baltic Sea in 1994, more than 100

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persons perished. Then Erika, the French Tribunal found some liability. When we say State responsibility it is responsibility of the State. There is no penal and civil responsibility of the State.

When we say responsibility of the State it is another Chapter in IL. It is commercial liability. Codification of State Responsibility in 2001. The Spanish government sued the American Bureau of shipping, because it gives certificate. The answer, we give certificate, but tomorrow we don't know. The ship owner has the contract with classification society. The court refuses to accept the claim of the Spanish government of prestige. Ship of the flag of convenience was Greek, a company has an office and a desk and nobody responds. We have a situation leaves to private actors for the state of the ship.

Different types of ship: 5 groups: containers, bulk carriers, tankers, ferries and cruise ships, specialist ships (supply oil to offshore rigs).

This is the life and death of the ship.

Protection and insurance: private clubs.

The International Seaborne Trade (IST): Since 2011, IST has almost tripled containers. Developed economies load less and unload more. Developing countries load more (raw materials) and unload less.

Only 100 deadweight ton: the capacity of the ship (DWT).

II- Implementation of Maritime Law

LOSC does not have global IO regarding the users of the sea. Interested parties do not have. There is already existing organization.

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What is competent organization, there must be the competent organization, IMO.

ILO, FAO, ICAO, UNEP, Governmental Oceanic Organization. The effort is to have flexible procedure. Some international organizations took initiative to modernize the law. IMO has modified several times international conventions elaborated within its organ without passing procedures for parties to ratify. IMO proceeds to amendment through Protocols and annexes.

One of the founding of international economic law: if you talk about soft law they are acts that are not legally binding. Now we have soft law plus: the case in which state abide by soft law without being obliged to do so. In international economic relations, shipping, soft law is upheld.

ILO is involved in LOS, not only seafarers, but relationships between labor. WTO is a mile away from the HQ of ILO. ILO has tried during the last 10 years to join in WTO to fix rules for both labor and trade. There is no common agenda. ILO is the best IO that I know, the most effective. In its every organ, from smallest to GA, is composed of three organs: government-employer and employees. ILO survived the WWII, as it brings together all components of labor. Pierre Blanchard, director, there are many categories of civil servants. There are people who take initiatives, others are reluctant as they are afraid of UNSC which nominates DG.

IMO has the burden of doing so in implementation

New actors are active in human rights, but not in LOS,

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this is the civil society. In the Council of Europe, the civil society takes part in all deliberations.

Civil society is non state that has activities in human rights. There are civil society organizations created by the States. The role of civil society in question related to the sea is limited.

IMO was created by the Club of the Rich, shipowners. Changes have taken place. Also professional organization. They are accepted as observers, they submit reports and take the floor. There are non state organizations, the spectrum is widening to the benefit of international community.

The Pillars for the Safety and Security of Navigation

- The 1974 SOLAS
- The 1973/1979 MARPOL. The 1966 International Convention for the Protection on Standards of Training, Certification, and Watch-keeping of Seafarers (SCTW). The 1972 Convention on International Regulations for the Prevention of Collision at Sea;

White list: during the elaboration of the convention, European countries decided to go alone to have administrative understanding between maritime authorities for the protection of the sea. In 1982, before adoption of LOSC they concluded the MOUs of Port State Control, concluded between European countries plus Canada. Port State control, and coastal states have the jurisdiction to control security in their TS. 13 international treaties of IMO and ILO, if ships do not meet the standards of the 13 international conventions, the ship will not be allowed to leave the port. There are States that are not parties to the convention, you have to abide by them. MOU shows that the

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port and the ship have internal love. My ship flying my flag respects the 13 conventions. The MOU followed by the Tokyo MOU.

The MOU has the obligation to control 25% of ships entering into port each year. You have a grey list, you must do something before leaving the port; black list, you enter the port and never leave the port.

Art. 218 of the convention stipulates the control by the Port State. There is a dispute about what could be a memorandum, is it legal binding treaty. It works and followed by another part of the world.

Mongolia has declared itself as a port state and already on the grey list.

Labor legislation and tax legislation are very low. There is no international standard regarding taxation. The volume of registration relates to taxation.

Registration companies are in the hand of government. The classification is in the hand of private companies.

60 to 70% of cruisers are registered in those small islands because of low taxes.

Costal States are required to control pollution, safety and labor conditions.

The ship has certificate and shows certificate to the port authorities.

The white list, grey list and black list are bout individual ship plus the flag.

There are no standard that you must follow to give a ship to fly your flag. The ship owners find flag that is more convenient

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to them.

There is a problem of fragmentation of IL, it is à la mode. One member of ILC has worked a text. *Le texte special prime sur le texte general.*

There are 960 international instruments on the protection of environment. Now you have the specialization of the specialization. Specialist about torture, protection of indigenous people etc.

The 1969 Vienna Convention on Treaties is the main normative instrument.

There is the discussion of the responsibilities of international organizations.

We live in a global world, c'est banal, but we are in the same boat.

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LECTURE 27:

ICJ AND ITLOS
MANDATES AND FUNCTIONS

1. What are the basic instruments, respectively, of ICJ and ITLOS? And what is the institutional framework?

Institutional framework of ITLOS

- Assembly of Parties
- ITLOS
- Ad hoc Tribunal
- Special Tribunal
- ISA
- CLCS

Cooperation between

ITLOS and other bodies are the bodies of the convention and have the task of implanting LOSC efficiently. Relations between ITLOS and CLCS. Can ITLOS take decision that CLCS cannot? ITLOS came up with the judgment, the two bodies must cooperate and address the problem. ITLOS has jurisdiction to delimit the outer limit of the CS. It was challenged by both parties.

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2. Do ICJ and ITLOS apply the same sources of law?

- Art. 38 of ICJ's statute
- Art. 293 of UNCLOS. For ITLOS the basic law is the LOSC. It cannot take decision on issues provided by the convention;
- Special agreement.
- ITLOS can go beyond the convention: ITLOS can go beyond the LOSC. The problem of sovereignty, ITLOS can go beyond; ICJ says ITLOS cannot get into the job of maritime delimitation, as it links to territory and you cannot go there.
- ITLOS has gone beyond the convention to move beyond the stalemate;
- The argument of maritime delimitation links to the land boundary;

3. Compare Art. 36 ICJ Statute and Art. 287 of UNCLOS on jurisdiction? Do they have the same scope?

- Article 36 of ICJ's statute
- Article 280 of UNCLOS

In theory:

- ITLOS/UNCLOS provides for compulsory jurisdiction in implementing LOSC.

- It has not turned out that way: a number of cases submitted does not really indicate compulsory jurisdiction under LOSC, case Number 14. Why discrepancy between compulsory jurisdiction in 1982 and practice?

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- The States do not feel comfortable with ITLOS, with jurisdiction. The reservation of opting out.

- The activities of ICJ and ITLOS:

- The problem is the provision of the convention, particularly Part XV are so complicated, full of exceptions, possibility of interpretation of jurisdictions of the Court. You cannot get home-based with Part XV. You are running into difficulty. There is uncertainty of jurisdiction. UNCLOS is too complicated to ensure smooth proceeding of the cases within convention.

- Counsel would prefer ICJ to ITLOS;

- *Pacta de Bogata – 1988.*

- ITLOS starts to be working in 1996.

4. Are the two jurisdictions in the same position as to forum shopping?

ITLOS: has a different jurisdiction than the Chamber.

The Chamber has jurisdiction in the jurisdiction.

The Convention, Art. 287: an article on Forum Shopping, the States can choose between the 4, if parties do not agree, go to arbitration, preferred judicial body.

Are the provisions on provisional measures identical? (ICJ's statute, Art. 41; UNCLOS, Art. 290).

ITLOS can provide provisional measures on protection of marine environment. It was in Malaysia/Singapore: danger to marine environment of the proposed extension by Singapore.

ITLOS has the authority to decide the provisional measures, without having the case itself, then to arbitration, on the Malaysia/Singapore. The difficult job of deciding provisional

measure, case on merits to arbitration. It has a difficulty, as ITLOS and arbitral tribunal, it goes to ICJ that has its own provisional measures. Bluefin tuna case, arbitral tribunal decided what ITLOS doing is wrong. Four cases, two of which were reversed by arbitral tribunal.

5. Are the provisions on intervention of third parties identical? (ICJ's statute, Arts. 62 and 63; ITLOS is Statute Art. 31).

Statute of ITLOS, Art. 290 of UNCLOS or the Convention on intervention. Rules of ITLOS on conditions on intervention.

Basic differences:

1. Intervention in case of ITLOS is always intervention on convention; the intervening State is bound by decision, in ICJ there are two types: State are not bound by final decision.
2. The ICJ accepts at a point an *ad hoc* judge, ITLOS does not accept at that point an *ad hoc* judge. ITLOS has more intervening party, but should allow *ad hoc* judge. The rule of the ITLOS is not adequate. Intervention is an important institution, as LOS has a lot of conflict, third party's right and interests (need *ad hoc* judge for third party).

Colombia /Nicaragua: delimitation in Western Caribbean: some 40 states, at least 4 are directly affected: Nicaragna, Honduras, Jamaica and Panama. They signed an agreement with Colombia, not Nicaragua. The ICJ turned down, provisions of Art. 59 of the Statute was enough to safeguard their rights.

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Lecture 28:

Arbitration

General Provisions, Art. 279 of UNCLOS: Peaceful means in accordance with Art. 2 (3) of the Charter of the United Nations. If not settle it as section 1, then compulsory procedure.

Section 3. Art. 286, some disputes.

Art. 287. Choice of procedures: 4 procedures: ITLOS, ICJ, Annex VII, Annex VIII.

Arbitration is default procedure: not declared, different choice, same choice.

Art. 87 (3). Two procedures lead to arbitration: not choose or different procedure chosen.

Since 1994, 6 cases brought to Annex VII.

- Bangladesh v. India, Oct. 2009: Judge Wolfrum, 3 judges in ITLOS;
- Ireland v. UK, 2001, terminated through, fell in the jurisdiction of EU, through a tribunal order (of the tribunal or president), no juris.
- Malaysia v. Singapore, 2003, terminated by award in 2005. Country can discontinue the arbitration or ask arbitration to give an award confirming the terms they agreed: award on agreed terms. It did not specify why they come to this terms;

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- Barbados v. Trinidad and Tobago, which initiated in 2004, decided by a final award in 2006;
- Guyana v Suriname, 2007, final award, the arbitration reached its own decision.

In the Southern Bluefin Tuna case, under WB, ICSID. Parties did not agree, then to arbitration. ICJ is not happy to have these procedures and tries to block. The judges sit there were former ICJ. They tries to block the decisions by ITLOS.

Why do we have in LOSC compulsory settlement procedures? USSR and socialist countries never accepted the compulsory, binding procedures. LOSC is an institution for Oceans, complicated, framework, never resolve issues, compromise. Countries who negotiated wanted to have coherent decision, and can be done through compulsory jurisdiction. To some degree the LOS can be implemented coherently. Why many? When LOSC was adopted, States did not like ICJ, France, Judge COT, France was against, USSR and Socialists did not like ICJ, like arbitration. LOS has so many different issues, special judicial body, ITLOS. Some categories are such special nature you need special arbitration. It results in Cafeteria Approach. There are provisions of LOS that apply to all: Procedures, applicable law, preliminary proceedings (Art. 294) – prima facie jurisdiction. In the whole history of ICJ they never ruled that they did not have jurisdiction; exhaustion procedure, binding decisions (Art. 296).

Annex VII. Arbitration

Art. 1. Institution of proceedings: written, indicate

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arbitrators you want to choose, Art. 2, list of arbitrators, maintained by SG of UN. Each party can nominate 4 persons; if government decides to choose.

Art. 3. You have 5 members. Each party can appoint 1 person from the list, may be from your country. The other party within 30 days should do the same, if not, President of ITLOS should make decision. If you are the party against which the procedure is started, the person selected is not your choice. The 3 remaining members are chosen by party and decide who is president. If fail in 60 days, President of ITLOS makes appointment.

Person to be selected should not be a national. Any vacancy can be filled in the same manner. In disputes involving more than 2 parties having the same interests, you choose one arbitrator. As Australia and NZ against Japan. Australia and NZ, 2 chosen by A and NZ, then another 4, as 1 by respondent.

Art. 6. Duties of parties to a dispute

Art. 7. Tribunal expenses are carried by parties, in equal share.

Art. 8. Decision by majority.

Art. 9. Failure to appear, they do not stop, the arbitration will hand final award.

Art. 10. The award is final. If the award is given by tribunal, the tribunal should specify how it arrives at decision.

Art. 12. Interpretation goes back to tribunal or parties can send to another judicial body.

In summarizing, if you decide on procedure, you have to determine, to what extent you can guess final results, ITLOS

procedures are similar to ICJ.

Under ITLOS procedures you can choose only one, the other 3 you can influence, if you fail, President chooses. You can go to arbitration from 5 arbitrators you have only one vote. Or if you are successful you have 2. There is president entity, the president can vote against you. People think that arbitration you cannot control. You can control only one person, the rest you gamble. Arbitraiton is expensive, lengthy, it is much less predictable.

Annex VIII. The special arbitration

Never implemented in practice

Art. 1. Fisheries, environment, MSR and navigation.

There are four types of experts retained for protection of environment UNEP, IMO navigation, MSR is the Oceanographic Commission.

Arbitrators nominated, there are 15 people or utmost 20. You have a group of people moving from one arbitration to another. You can nominate only 2.

Art. 3. Constitution: you can nominate 2 persons out of 5, within 20 days, may not necessary from your nationality, only one national.

If within 30 days no response, UNSG nominates 2 missing arbitrators. The 5th person is nominated by you or by UNSG.

This is how unpredictable sometimes.

Art. 5. This distinguishes special arbitration from regular is fact-finding mission, Art. 5, in fisheries, protection of environment. This is a basis for further proceedings. Not binding.

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The special tribunal has never been implemented.

What is other choice?

If you don't like arbitration, what are other options?

Art. 15. of Annex VI Special Chambers you can request ICJ or ITLOS.

Both ICJ and ITLOS can have all judges on board or special chamber. This judicial body is in demand by parties or established by request by country. 21 members of ITLOS, you can ask the Chamber to consider special case. US did not want Soviet judge to sit on proceeding and ask for a Chamber in Gulf of Maine. Both sides agree, but Legislative Bodies rejected the agreement.

You can go to ICJ or ITLOS, you don't want to have all judges, then you can request the special chamber to be established. The selection of member is done in consultation. The final decision is done by either tribunal or court. You can withdraw if you don't like the members. You can have predictability. You can go there only when you look at membership, you are confident that judges selected are impartial.

Another option, Special Chamber.

The Chamber Chile and EU: 5 judges. Judge Orrego Vicuna is judge *ad hoc*. You select 4 judges from Tribunal, the 5th is from your own country. 4 are members and 1 *ad hoc*. You can choose your own judge *ad hoc*, if you don't have judge of your nationality.

When you look for judicial procedure: a fair result. That depends on who is sitting. You can have arbitration or special chamber.

Bangladesh – Myanmar first went to arbitration. It was

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difficult to choose arbitrators, then go to Tribunal.

Any dispute within the LOS framework can be subjected to the Special Chamber.

You cannot get 100% of what you want. You can have same satisfaction as the other party. When the opponent says they win, the other party will not ratify, border in the Berring Sea. Neither Norway nor Russia say we are the winner.

Ruling Bangladesh-Myanmar, they are happy with the ruling. You cannot settle a dispute by claiming you are the winner.

If you decide to go for arbitration: you don't have machinery to support you. You use PCA, as somebody has to provide secretary support.

PCA established in the 1899 agreement, then 1907. In 1935 it had the first ruling. There are 2 principles: either through special agreement in ICJ (PCA) or a particular dispute.

In 1935, USA v China case:

PCA has standard rules, variety of rules, the first rule and various procedures under the rules. These Rules are optional, based on UNCITRAL rules. They are more or less the same as in ITLOS. Some variations.

How the judicial process works?

When a judge sits on the arbitral tribunal, they reach judgment, guided by the applicable law. They have similar cases of maritime boundary. They decide that they develop jurisprudence. If you decide to go to ICJ and have maritime delimitation, you can predict 90%. This type of cases you do this way. Formally judicial body claims that they are not

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bounded by the previous judgement, to have freedom. In practice, they want to move ahead. Now you have all kinds of courts. All of them have different practices, ICJ is consistent. Many other are not. European Court of Human Rights is not consistent. ITLOS was signed ICJ was furious. No need for ITLOS. Procedurally ICJ never refer to any other court at all. When you sign arbitration, there is no president. In inter-state, you know, tribunal arbriation are bound. Yes they do. You have the same judges who sit in ICJ or arbitration. From the point of application of law, arbitration is not much different. They will deviate only in application. There are some exception. The proceedings in Bluefin Tuna case, the convention provisional measures. Under convention, the decision on provisional measures is taken by ITLOS. ITLOS came to conclusion that it has prima facie jurisdiction. But arbitral tribunal composed from ICJ judges, that ITLOS does not have jurisdiction, and provision measures is not correct and decide to overrule the decision by ITLOS. Later on the decision by ITLOS is more cautious. The general part XV, in Bluefin, then the compulsory procedure is not applicable. This is the effort by ICJ to undermine ITLOS. This is not the body that is not connected to convention, not concerned by the application of the convention.

LECTURE 29:

ITLOS PROCEDURAL PRACTICES

The Charter of the UN requires states to settle dispute, Part XV of LOSC also requires. ITLOS has jurisdiction to settle dispute pertaining to interpretation and application. 21 judges elected from persons who have highest standards of fairness and integrity. They can be reelected. The Court is in the middle, rounded building. One woman, Judge Elsa Kelly from Argentina, among the 21.

President Judge Yanai from Japan, Judge Jessup. They representatives of the principles legal system of the world, equitable geographical distribution. 3 judges from each region determined by UN. In terms of meeting of State Parties in 1996, it was decided that each region that Africa should have 5, Asia 5, Eastern Europe has 4. Ratification from different region.

Jurisdiction: 'all the disputes in the convention and other agreements'.

Certain limitation: Art. 297: exempts States from submitting to coastal states sovereign rights in EEZ and discretionary rights MSR in EEZ or CS; Art. 298: opt out: maritime delimitation, historical title, military and law enforcement, UNSC.

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Access to Tribunal: States Parties; Entities other than States (ISA, State enterprise, natural or legal persons, EU); Entities (according to parties). The LOSC is specific, like EU.
Jurisdiction:
I. Contentious Proceedings:
II. Advisory Proceedings:
a. Only Seabed Chamber may give advisory opinion on seabed.

Cases that can be instituted to ITLOS;

- Choice of procedrures Art. 287;

I. ITLOS Procedure:

A. Under Art. 287

When States ratify agreements they choose procedures: ITLOS, ICJ, arbitration under Annex VII, special arbitration under Annex VIII.

Written declaration. Declaration under article 287. It is important, if both states agree to the same procedure. It goes to that. If not the same declaration, default procedure.

B. Art. 288 (1). A court or tribunal should have jurisdiction over the dispute.

II. On Basis of Special Agreement

- Concluded between parties - ***compromise***;
- Parties may agree to transfer to Tribunal a dispute instituted before an ***arbitral tribunal*** under article 287 (Saïga, Swordfish Stock Case; Bay of Bengal (by

separate declaration)).

- Parties may request a Special Chamber to deal with dispute.

III. On the basis of jurisdictional clauses

- **Tribual . In the ship wrecked Agreement.**

Jurisdictional clauses.

IV. On the basis of compulsory jurisdiction of the Tribunal

Prompt release

Provisional measures

Dispute concerning activites in the Seabed.

Procedures before the Tribunal

Procedure is governed by:

- UNCLOS
- State of the Tribunal
- Rules of Tribunal
- Resolution on Internal Judicial

Proceedings before Tribunal

- Written proceding
- Oral proceedings;
- Institution of Proceedings
- Written application
- Notification of special agreement
- Written application
- May be made unilaterally by a party to the dispute:
    - When provided for by an agreement between the parties;

- When both parties accepted the jurisdiction
- Must specify the legal grounds for Tribunal's jurisdiction;

Notification of special agreement

Steps after filing of application or notification

- Registrar:
- Parties: appoint Agents who act on their behalf. Address for service in Hamburg or Berlin;
- President: conducts consultations with parties on procedure (written pleading);
- Proceedings shall be conducted without unnecessary delay or expenses (Rules, article 49): 6 months for memorial, 6 months counter-memorial;
- Promote the speedy settlement of disputes: for urgent proceedings – less than a month. For 2 prompt release cases only 1 month.
- Organizing and managing the work of the parties and judges: ITLOS is more effective.
- Written Proceedings: Communication to Tribunal and parties of the pleadings:
- Memorials and counter-memorials and supporting documents
- Reply and rejoinder:

Pleadings

- Memorials: statement of relevant facts; statement of law; submissions;
- Counter-memorial: admission or denial of the facts in

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memorial; additional facts if necessary; observations concerning the statement of law in memorial; statement of law in answer thereto; submission. If parties submit to the Tribunal and is not up to standard, it will be referred back to parties;

Guidelines concerning the Preparation and Presentation of Cases

Formal requirements:

- Original of pleadings dated and signed by Agents;
- Pleading

Time-limits

- President determines time-limits for filing of pleadings (obtaining views of parties), 3 months;
- Time-limits for each pleading

Deliberations before hearing

- Each judge may within 5 weeks after disclosure of written proceedings prepare a brief note stating main issues in pleadings and points that need clarification.
- President within 8 weeks after disclosure prepare a working documents:
- Tribunal meets to exchange views on pleadings and conduct of case (Rules, article 75);

Oral Proceedings

- Tribunal fixes date for hearing;

- Hearings should commence within 6 months of closure of written proceedings;
- Prior to hearing each party submits
- Oral presentations should be brief: avoid merely repeating written submissions. Try to ask parties to repeat their written submissions;

Initial deliberations

- After hearing the President convenes brief meetings of Tribunal:
    - Judges to exchange views on the case
    - Discuss questions put and responses from the parties

Deliberations

- Deliberations shall take place in private and remain secret: 21 judges and *ad hoc* judge, 23 judges;
- Only judges and experts appointed under Art. 289 take part in judicial deliberations;
- Registrar, Deputy and other staff as required shall be present;
- Records shall only contain title or nature of subjects discussed and results of vote;
- Judge may request statement reflected in record (Rules, Art. 42);

If there is new evidence it should be brought to the President, who will introduce to the other parties.

Procès verbal (PV): records.

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Drafting Committee

- Tribunal sets up a drafting committee
- 5 judges (ICJ – 3) from the emerging majority opinion
- DC prepares a draft judgment within 3 weeks of it being constituted
- Draft should not only state majority

Draft judgment

- Tribunal discusses draft judgment (no later than 3 months after oral proceedings)
- First and second readings: para by para. In ICJ each para is read out in French and English. In ITLOS the President introduced a para, discussion or continue.
- Judges prepare separate or dissenting opinions
- President conducts a vote

Judgment

- Judgment is read at public sitting – time and date made known to parties
- Judgment is binding on parties on day of its reading
- Decision is final and must be complied with by the parties
- Any party may submit request to Tribunal for interpretation if there is a dispute as to meaning or scope of its decision

Revision

- Any party may request a revision of judgment if based on discovery of facts of a decisive nature

- Facts must have been unknown to Tribunal and requesting party at time of the judgment
- Ignorance of facts not due to negligence
- Request must be made within 6 months

Incidental proceedings

Six types of incidental proceedings

- Provisional measures
- Preliminary proceedings
- Preliminary objections:
- Counter-claims
- Intervention
- Discontinuance: Swordfish case.

Compulsory jurisdiction

- Urgent proceedings:
    - Prompt release of Vessels and Crew
    - Provisional Measures
- Disputes concerning activities in the Area submitted to the Seabed Disputes Chamber

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Lecture 30:

Ad Hoc Judges

The State appoints the judge, because it does not have the judges of its own nationality. At the beginning they had the tendency to appoint national judge. Now it is a mix. The trend is now to appoint the judge that is not of nationality, and to appoint formal international judge. They are members of the Club, and might have more influence on their friends, former Presidents, former counsels.

The institution of *ad hoc* judges is useful and objective:

Elly Lauterpact opinion of *ad hoc* juge:

Ad hoc judge is to ensure that the views of state appointed him, every points that have been made should be taken into account; and the vote of the *ad hoc* judge is independent from the position of the country.

The imbalance argument has been raised.

21 judges: adding on a new voice is not a consequences.

Another aspect of the *ad hoc* judge: the outcome of the judgment and the implementation of the judgment. If a party is not fully engaged, it will not be engaged in the implementation. Appointing an *ad hoc* judge will ensure the rule of the game will be fair. Enforcement of the judgment will depend on the party accepting the judgment and facing the consequences.

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There is no following up of international jurisdictions. Parties should feel that they are fairly represented.

99% of the judgments are implemented remarkably. Sometimes it takes a long time. There are few cases that take long time, because parties are not happy with the judgment. The UNSC never comes in to enforce the judgment. It is good for international law and international community.

An *ad hoc* judge would not make a fundamental difference.

If both sides are not on the tribunal, they either decide not to appoint or both to appoint the *ad hoc* judge.

The main reason for incidental proceedings, as *prima facie* jurisdiction, as it is compulsory, to reopen cases that you don't have jurisdiction, then you can have jurisdiction.

Advisory opinion: in ITLOS no point of giving for Tribunal, only seabed dispute Chamber on technical point on request of Seabed Disputes Chamber. ITLOS tries to give advisory opinion if the authorities, Assembly of States ask. The convention of the Statute provide for advisory opinion by ITLOS, it is questionable that that procedure will go through. There is small possibility for ITLOS to use Art. 138 of the rules.

The number of judges: all the issues of *ad hoc* judges, ITLOS is open to European Community. What happens when EU is the party. The opposing party, Chile can appoint an *ad hoc* judge. But all judges of EU except one has withdraw, because they are members of the party. All 7 judges withdrawing: 7 out of 21 withdraw. Chile is happy. The outcome of this is the Special Chamber constituted to allow EU to have a member, Chile a member, to have a fair balance in the Chamber.

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Ad hoc judge appointed by the lead counsel that make suggestion. When the state decides to appoint an international academic. But state continues to appoint national judge, the balance is political point, either to have truth representative to ensure public opinion, or to have influence on judges, they would appoint international judge. Two different types of *ad hoc* judges.

Can a practicing counsel be an *ad hoc* judge? He used to be able to do so. Lauterpact used to do so a counsel, and at the same time an *ad hoc* judge.

ICJ changed the rule, you cannot be at the same time as counsel and *ad hoc* judge, at least 3 years. ITLOS does not have that. But it has become the rule that either you are a counsel or a judge.

The pool of possible *ad hoc* judges has shrunk. There is no list of *ad hoc* judges. State can appoint anybody they deem suitable. The pool of counsels increase.

Ad hoc judge has to swear that he is independent: the Lauterpact's doctrine. High Court judge that is appointed can be in favor of the country (another extreme). Susanne Bastid an *ad hoc* judge voted against.

Ad hoc judge must act independently, seep through the arguments of the party appointing him, althrough he does not agree, take an intermediate position, stay in the legal position, sift through the arguments and find what arguments acceptable or not. *Ad hoc* depends on the profile, relation.

Relations between ad hoc judge and the appointing state: he cannot call up the counsel and say you should do this

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and do that. Others can have different practices. If his relationship with appointing state is known to the other party, the other party could challenge to get him out.

Ad hoc judge should be a counsel, not necessary a lawyer. There is a qualification. In European Court, you have to be a barrister to appear. In international tribunal, it is not the case for counsel. The Agent is either MFA or Ministry of Justice.

Judges: qualification in ITLOS.

At ICJ, you have to pass the rules of PCA, international lawyers propose names to government. In ITLOS we don't have the same rule as ICJ. ICJ has more academics. ITLOS you have more diplomats as judges.

In ITLOS, in land reclamation case, the two *ad hoc* judges came up with a joint individual opinions, then went on to arbitral tribunal and steered negotiations among parties and came up with solution close to the Tribunal. Oxman do the same thing in Case of Bengal with Mensah. Being appointed by the State they do know better than the other judges, what is the acceptable outcome.

The reality of international law is mixing politics and the law.

Part XV is a difficult part in negotiations. As a result Part XV is not very logical, clear-cut position.

ICJ is more predictable than ITLOS because the accumulated case law. ITLOS does not have enough case law.

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Lecture 31:

Military Activities and Warship Immunity

When LOS was negotiated, the immunity of warship was not important and warship and military activities were left at the end.

When LOSC was negotiated there were two blocs. They wanted to protect their navigation rights. You have to find the way to accommodate between the new provisions and the old approaches. LOSC reflects the compromise, you find the language, a young lawyer: you draw the text. You look at the same text and can interpret differently with different understanding. It does not help, when you apply the provisions you are in trouble.

Art. 29. The definition of warships. There is no reference to Navy, as it belongs to different countries and have different structures. Reference to armed forces not navy, an improvement. It is not organized by types of ship, but types of zones.

The convention uses the term ship and vessel, have the same meaning. In Russian there are two different words. Warship is not applicable to commercial ship.

Conceptually, if one looks at convention:

1. Warship do not enjoy a right of passage: historical waters, internal waters. In internal water, there is no right for foreign warship to go, consent of the coastal state, the coastal state can exercise of self-defense;
2. Suspendable right: territorial water. Art. 17. There is no distinction. Warship is included. Art. 19. Meaning of innocent passage, and the definition. Arts. 20 and 21. The coastal state can introduce laws and regulations. Foreign ships should respect the law, but coastal state should not block; Art. 22. Sea lane; facilitation rather than prevent. Section C. on warship. Art. 32. Immunities of warships and government ships. Art. 30. Warship is obliged to respect the obligations of coastal states, the flag state is responsible for damage. Art. 31. Responsibility of the flag State for damage. The term responsibility and liability means in the Convention. In the advisory opinion provided to Seabed authority. History of Art. 32. In Convention of TS, the terminology is different, since Art. 32. Nothing in this convention, and not in this section. Art. 95. The immunity of warship. Art. 32. Is applicable only to Territorial water. This excludes EEZ. Auxiliaries vessels. The question arises what is the meaning of innocent. There are two different approaches: (i) innocent by ship conducts in Territorial Water; (ii) you define the term innocent by ship flag's innocence. The US send Navy to exercise innocence. The mission is wrong, Iran send Navy to US, the US say it is not innocent because Iran is wrong.

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UNCLOS did not provide exception to innocent passage. Certain countries submitted declaration limiting the exercise of innocent passage through TS, some requires prior notification, other says the number of Navy vessel of the State should be limited, to some number. Some says they would consider warship with nuclear cargo and engine not innocent. North Korea establishes 150 nm zone beyond TS, no warship. Some provide innocent passage based on reciprocity. The majority of states rejected, as they are not in the LOSC. Unmanned vehicle, what you apply 19 (2) or 20. The warship going TS cannot take device, prohibited. If you treat unmanned vehicle as 19, then prohibited. If submarines are other vehicles, like the warship passing by then they enjoy the rights of innocent passage.

3. Strait used for international navigation:

Sunken warships

If the warship sank, but not captured by other military power, the flag state retains the property rights and immunity. If they other military power captured the ship, the immunity is destroyed.

Sunken warships in high sea, there is no disagreement. If in TS, some countries say that they don't have immunity in TS. President Clinton issued in 2001 a Declaration on Protection of Warship. The US sunken warships retain immunity and property rights no matter where they are located. The US detain titles in this ship indefinitely.

Art. 2 (8) of UNESCO. Apart from TS, innocent passage

can be exercised in some straits, Art. 45. There is no suspension of innocent passage through strait.

Art. 52. Right of innocent passage in archipelagic water, there can be suspension of the right, this is the different of the archipelagic water.

This is the distinction of innocent passage and the right of transit passage.

Art. 38. Right of transit passage on international navigation.

Art. 40. Research and survey activities: during the passage…

Art. 44. Duties of states bordering straits.

The question of archipelagic sea lane (ASL): there was one question discussed during the convention: how broad sea lane should be? Warships are not going through ASL alone, there are aircraft carriers. The ASL should be broad enough to allow warships to go through. Archipelagic states can establish these lanes in consultation with IMO.

EEZ

Art. 55. Specific legal regime of the EEZ. The rights and freedom of other states are governed by the relevant provisions of this Convention. There are two approaches: (i) the coastal states have sovereign rights; (ii) coastal states enjoy the rights and jurisdiction listed in the LOSC; and the other states have the freedom of the High Sea that we have before.

Art. 58. Rights and duties of other States in EEZ. (1). To confirm the freedom.

Article 88 is the article of the HS. The High Sea can be used for the peaceful purposes only. Can military exercise be

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conducted?

Freedom of HS include military manoeuvre, there are two opposing groups. Scholars hold the view that of freedom. The question of intelligence gathering. This is the freedom of high sea. Sometime collection of information pertaining of natural resources. How you distinguish?

Art. 59 is included for the purpose to say that the countries should find the way to resolve the problems, because the LOSC can be interpreted in one way and another.

Protection and Preservation of the Marine Environment

Art. 192. States have the obligation to protect and preserve the marine environment.

Art. 216. Enforcement with respect to protection of environment.

Art. 224. The enforcement can be done by warship and government ships.

Section 10. Sovereign Immunity

High Sea.

Article 86. Application

Article 87. Freedom of high seas: freedom of navigation and over flight.

The LOSC does not give answer, when the warships in HS, and on CS.

Professor Oxman in US delegation in negotiation: peaceful purpose is consistent with UN Charter.

Some countries say HS can be used for peaceful purposes only.

Warship and Piracy

Warship could be an object of piracy, warship could become piracy.

Art. 107. A seizure on account of piracy may be carried out only by warships or military aircraft. However, warships are not structured for enforcement. The drafters of the LOSC are not aware of it. They don't have any expertise. The practice of using warships for these purposes can backfire. If warships make mistake, the flag state is liable.

Art. 110. The Right of visit: is for warships.

Art. 111. Rights of hot pursuit. The US have launched a new initiative in 2003 on war against global terrorism: maritime interception and operation. You can stop foreign vessels and inspect. US says you need only agreement of the master. Britain disagrees as under UK law you need an agreement of the flag states.

A new development: for a number of countries of flag of convenience, the agreement of the master of the vessels is enough.

Art. 301. Peaceful uses of the seas.

Art. 302. Disclosure of information. This provision means that any information which is of security risk to your country, you are not supposed to disclosed: construction of your navy.

Dispute settlement. The Section C. You can exclude military activities, law enforcement, MSR, fisheries. The

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convention does not distinguish between military activities and law enforcement activities. Technically there is no limitation, the resolution of dispute according to the flag state.

Dr. Hang Chuon Naron

Dr. Hang Chuon Naron currently serves as a deputy head of the Senior National Economic Council and as the Minister of the Ministry of Education, Youth and Sport since 2013.

He received a Master's Degree (1988) and a PhD (1991) in International Economics from Moscow State Institute of International Relations (MGIMO) and a Degree in Insurance from Chartered Insurance Institute (CII) of England and Malaysian Institute of Insurance (MII). In 2012, he received a Master's Degree in International Law from Royal University of Law and Economics of Cambodia and University of Lyon II of the Republic of France. He also received a diploma in Oceans Law from Rhodes Academy of Oceans Law and Policy. In 2018, he achieved a PhD in Education Administration from Chulalongkorn University.

Dr. Hang Chuon Naron used to serve in a diplomatic mission as a researcher in many major research institutes and as a political and economic analyst. In 1999, he started working for the Ministry of Economy and Finance (MEF) and took charge of important positions including research coordinator of the Economic Council and the first deputy head of the Department of Budget and Finance.

Later he was appointed as deputy Secretary-General of the MEF in charge of policy including economic policy, inventory finance, ASEAN affairs, financial industry, economic analysis and coordinating with the International Monetary Fund (IMF)

and the World Bank.

From 2004 to 2010, Dr. Hang Chuon Naron was appointed the Secretary-General of the Ministry of Economy and Finance. He used to join the ASEAN + 3 Summits of Finance Deputy Ministers and Central Bank Governors from 2000 to 2010 and serve as Cambodia's representative in the G20 Summits of Finance Ministers and Central Bank Governors when Cambodia served as the ASEAN chair in 2012. He also worked as a coordinator of policy discussions between the Ministry of Economy and Finance with the Asian Development Bank (ADB), the International Monetary Fund (IMF) and the World Bank.

In the position as a deputy Chairman of the Supreme National Economic Council, which is the think tank of the economic policy of the Royal Government of Cambodia, Dr. Hang Chuon Naron wrote many policy documents and accompanied Samdech Moha Sena Paddei Techo Hun Sen, the Prime Minister of Royal Kingdom of Cambodia, to join international conferences such as United Nations General Assembly, Non-Aligned Movement, ASEAN Summits, East-Asia Summits and many other international forums.

Dr. Hang Chuon Naron has authored many books in Khmer, English and French about economic development in Cambodia and public finance and the latest book in khmer, entitled "A Contribution to the Studies of Khmer Literature in Reading Promotion in Cambodia".

By the Same Author

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