第２回 海洋法に関する国際シンポジウム

海洋資源の国際法

知の拡充・環境の保全・利益の衡平

－ 主催：外務省 －

日時：平成28年2月16日（火）14：00～17：00; 17日（水）10：00～17：00
場所：三田共用会議所 講堂（東京都港区三田2-1-8）

2nd INTERNATIONAL SYMPOSIUM ON THE LAW OF THE SEA

International Law for the Resources of the Sea

Scientific advances, preservation of environment, equity in benefit sharing

- hosted by the Ministry of Foreign Affairs of Japan-

Date : February 16 (14:00-17:00) & 17 (10:00-17:00), 2016
Venue : MITA KAIGISHO Auditorium (2-1-8, Mita, Minato-ku, Tokyo)

* 本シンポジウムの基調講演，サマリーを含むパネル報告及び質疑応答における議論で示される見解の全ては各個人のものであり，外務省及び日本政府の見解等を示すものではありません。

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* Views expressed in the keynote speech and the panel presentations including the written summaries and views expressed during the Q&A sessions of this symposium are those of the speakers or authors and do not reflect the views of the Ministry of Foreign Affairs or the Government of Japan.

プログラム

― 第一日 ―

2 月 16 日（火）

13:30	開場・受付開始
14:00	**オープニング・セッション**
14:00	**開会の辞** **黄川田　仁志** 外務大臣政務官
14:10	**基調講演** **柳井　俊二**　国際海洋法裁判所裁判官（前同裁判所所長）
14:30	**第一部　深海底の鉱物資源** コーディネーター：　:坂元　茂樹　同志社大学法学部教授
14:30	**マイケル・ロッジ**　国際海底機構（ISA）副事務局長兼法律顧問 「深海底鉱業のための規制レジームの発展」
	西本　健太郎　東北大学大学院法学研究科准教授 「深海底における海洋科学調査：公海自由と深海底活動との調整に関する法的問題の検討」
	エリ・ジャルマッシュ　仏首相府海洋本部事務局海洋法担当特別顧問 ISA 法律・技術委員会委員 「深海底における諸主体の権限：相互補完的か競合的か？」
15:30	コーヒーブレイク （於：　レセプションホール）
15:50	質疑応答
16:35	第一部終了
18:30	**岸田　文雄　外務大臣主催レセプション （於：　レセプションホール）**

Programme

– FIRST DAY –

February 16 (Tue)

13:30	Doors Open, Registration
14:00	**Opening Session**
14:00	**Opening Remarks** **Hitoshi KIKAWADA** Parliamentary Vice-Minister for Foreign Affairs
14:10	**Keynote Speech** **H.E. Judge Shunji YANAI** Judge and Former President of the International Tribunal for the Law of the Sea (ITLOS)
14:30	**Segment 1: Mineral Resources in the Area** Coordinator: Shigeki SAKAMOTO Professor, Faculty of Law, Doshisha University
14:30	**Michael LODGE** Deputy to the Secretary-General and Legal Counsel, International Seabed Authority (ISA) "Development of the Regulatory Regime for Deep Seabed Mining"
	Kentaro NISHIMOTO Associate Professor, School of Law, Tohoku University "Marine Scientific Research in the Area: Consideration of Legal Issues in Coordinating a High Seas Freedom with Activities in the Area"
	Elie JARMACHE Special Advisor on the Law of the Sea, Secretariat General of the Sea (France) Member of the Legal and Technical Commission of the ISA "Competences in the Area, complementary or conflicting?"
15:30	Coffee Break (at Reception Hall)
15:50	Q&A Session
16:35	End of the First Day
18:30	**Reception hosted by H.E. Mr. Fumio KISHIDA, Minister for Foreign Affairs (at Reception Hall)**

ー 第二日 ー

2 月 17 日(水)

9:30　開場・受付開始

10:00　**第二部　大陸棚(200 海里以遠の大陸棚を含む。)の資源**

コーディネーター:　奥脇　直也　明治大学法科大学院教授

10:00　**江藤　淳一**　上智大学法学部教授

「大陸棚制度概論(200海里内外の大陸棚の資源ガバナンスの違いを含む。)」

坂巻　静佳　静岡県立大学国際関係学部専任講師

「大陸棚限界委員会の勧告を得ていない 200 海里以遠の大陸棚の法的地位」

クライヴ・スコフィールド　ウーロンゴン大学
オーストラリア国立海洋資源・安全保障センター教授

「境界未画定の大陸棚における共同開発:協力の機会か，又は海洋ガバナンスの複雑化か？」

11:00　コーヒーブレイク　(於:　レセプションホール)

11:20　質疑応答

12:05　昼休み

14:00　**第三部　国家管轄権外区域の海洋生物多様性(BBNJ)**

コーディネーター:　河野　真理子　早稲田大学法学学術院教授

14:00　**ルーサー・ラングレジ**　インド外務省法規条約局上級法務官

「BBNJ に関するレジームの展開:予備的考察」

兼原　敦子　上智大学法学部教授

「BBNJ に関する『UNCLOS の下の』国際的な法的拘束力を有する文書とは何か？」

濵本　正太郎　京都大学大学院法学研究科教授

「国家管轄権区域外の海洋遺伝資源と知的財産権」

- SECOND DAY -

February 17 (Wed)

9:30 Doors Open, Registration

10:00 **Segment 2: Resources of the Continental Shelf (including Continental Shelf beyond 200 NM)**

Coordinator: Naoya OKUWAKI Professor, School of Law, Meiji University

10:00

Junichi ETO Professor, Faculty of Law, Sophia University

"Introduction to the continental shelf including differences in resource governance between the continental shelf within 200nm and beyond"

Shizuka SAKAMAKI Lecturer, University of Shizuoka

"The Legal Status of the Outer Continental Shelf without a Recommendation from the CLCS"

Clive SCHOFIELD Professor, Australian National Centre for Ocean Resources and Security (ANCORS) University of Wollongong

"Joint Development of the Continental Shelf where Maritime Delimitation is Pending: Cooperative Opportunity or Complication in Marine Governance?"

11:00 Coffee Break (at Reception Hall)

11:20 Q&A Session

12:05 Lunch Break

14:00 **Segment 3: Marine Biological Diversity beyond Areas of National Jurisdiction (BBNJ)**

Coordinator: Mariko KAWANO Professor, Faculty of Law, Waseda University

14:00

Luther RANGREJI Senior Legal Officer, Legal and Treaties Division, Ministry of External Affairs of India

"Evolving regime on Marine Biodiversity beyond National Jurisdiction: Some Preliminary Thoughts"

Atsuko KANEHARA Professor, Faculty of Law, Sophia University

"What Does a New International Legally Binding Instrument on BBNJ 'under the UNCLOS' Mean?"

Shotaro HAMAMOTO Professor, Faculty of Law, Kyoto University

"Intellectual Property Rights and Marine Genetic Resources of the Areas beyond National Jurisdiction"

アシュリー・ローチ　シンガポール国立大学客員研究員

「シンガポール国立大学・国際法センターBBNJ ワークショップの成果」

15:20	コーヒーブレイク （於: レセプションホール）
15:40	質疑応答
16:25	**クロージング・セッション**
16:25	総評
16:50	**閉会の辞** **黄川田　仁志** 外務大臣政務官
17:00	終了

	Ashley ROACH Senior Visiting Scholar, Centre for International Law (CIL), National University of Singapore "Outcomes of CIL Workshop 'Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction: Preparing for the PrepCom'"
15:20	Coffee Break (at Reception Hall)
15:40	Q&A Session
16:25	**Closing Session**
16:25	Concluding Remarks by Panelists
16:50	**Closing Remarks** **Hitoshi KIKAWADA** Parliamentary Vice-Minister for Foreign Affairs
17:00	End of the Symposium

パネル・プレゼンテーション要旨
Panel Presentation Abstracts

第一部　深海底の鉱物資源
Segment 1: Mineral Resources in the Area

Coordinator: Shigeki SAKAMOTO
Professor, Faculty of Law, Doshisha University

Developing a Regulatory Regime for Deep Seabed Mining

Michael LODGE
Deputy to the Secretary-General and Legal Counsel
International Seabed Authority

Part XI of the UN Convention on the Law of the Sea represents the fulfilment of a long-held dream that the mineral wealth of the deep seabed would be shared by all countries, including the landlocked and disadvantaged countries, as the common heritage of mankind.

This presentation will discuss the progress made by the International Seabed Authority towards the realization of that dream, to articulate a comprehensive legal regime for the exploitation of marine minerals from the seabed beyond national jurisdiction. The presentation will reflect on the most important milestones achieved by the Authority to date, as well as highlight some of the challenges for the future.

The first twenty years of the Authority's existence can be divided into three phases. During the first phase (1994-2000), the emphasis was on resolving the institutional issues necessary to ensure the independent functioning of the organization, including establishing the rules of procedure for the various organs bodies of the Authority, its operational procedures and putting its finances on a solid footing. The first major milestone in the work of the Authority was the adoption in 2000 of the first set of regulations governing exploration for polymetallic nodules. This also brought to an end the interim regime that had been established under resolution II of UNCLOS III whereby a number of existing claims to exploration sites had been registered pending the entry into force of the Convention and the adoption of a definitive system for exploration and exploitation. As a result of the adoption of the regulations in 2000, these pioneer investor claims were converted into legally binding contracts of limited duration in accordance with the unified legal regime of the Convention and the 1994 Agreement.

Between 2001 and 2010, there was a diminution in activity. Most of the former pioneer investors substantially reduced their exploration programmes in light of the general uncertainty around the future of deep seabed mining, with no new technology in sight and little commercial interest on the part of investors. During this period, the Authority worked on regulations governing prospecting and exploration for polymetallic sulphides and cobalt crusts. The adoption of regulations for these two resources in 2010 really marked the second major milestone in the life of the Authority because it opened the door for claims for exploration sites to be made in respect of resources other than polymetallic nodules, which had been the only subject of discussion during UNCLOS III.

The third phase of the Authority's existence (2011-2015) saw a dramatic increase in interest in deep seabed mining. A major milestone took place in 2011 when the Council of the Authority decided to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea for an Advisory Opinion on issues relating to the responsibilities and obligations of sponsoring States. This ground-breaking Advisory Opinion clarified the law on the obligations and responsibilities of sponsoring States and has had a major influence on the decisions of private capital to invest in seabed mining. The importance of the Advisory Opinion lies not only in the content of the Opinion itself but also in the fact that it demonstrated to the international community as a whole that the system for dispute settlement set out in Part XI is both effective and efficient.

The Authority has so far approved a total of 27 contracts for exploration covering areas of the seabed in excess of 1.3 million km^2. Nineteen of these contracts have been approved in the period since 2011. The contractors involved include States, state entities and private corporations sponsored both by developed and developing States, and exploration work is taking place in the Pacific, Indian and Atlantic oceans.

The next major task for the Authority is to develop the legal framework for exploitation of seabed minerals. This process has already begun and, in July 2015, the ISA Council approved an action plan to fast-track the development of a Mining Code.

Some major challenges lie ahead for the Authority. The most immediate challenge is to prepare a mining code that is commercially realistic, transparent and provides for effective environmental protection. Regulatory stability is important for investors and operators, but needs to be balanced against the regulator's need for flexibility, to be able to adapt to changing circumstances and learn from experience.

Several complex legal issues are likely to arise in formulating the regulations, especially with respect to the protection of confidential information, striking the right balance between protecting commercial interests and ensuring transparency and in relation to dispute settlement.

In 2015 the Assembly of the Authority decided for the first time to undertake a review of the way in which the regime for the Area has operated, pursuant to Article 154 of the Convention. The review is underway now, with an interim report expected in July 2016, and a final report in 2017. This is a timely development, but is likely to result in additional challenges over the next four years.

Marine Scientific Research in the Area: Consideration of Legal Issues in Coordinating a High Seas Freedom with Activities in the Area

Kentaro NISHIMOTO
Associate Professor, School of Law, Tohoku University

Marine scientific research (MSR) is important for the advancement of scientific knowledge of the oceans, which constitutes the premise for sound ocean management. In light of its mandate to regulate deep seabed mining and to ensure that the marine environment is protected from such activities, the International Seabed Authority (ISA) has been active in promoting and encouraging marine scientific research (MSR) in the Area. However, the mandate of the ISA, which is to "organize and control activities in the Area" (Art. 157), does not include the authority to regulate MSR. The term "activities in the Area" is specifically defined as "activities of exploration for, and exploitation of, resources of the Area" (Art.

1(1)(3)). States retain some of the high seas freedoms unrelated to the resources of the Area, such as the laying of submarine cables and pipelines, and MSR.

The coexistence of "activities in the Area" governed by Part XI of the United Nations Convention on the Law of the Sea (UNCLOS) and other activities by States give rise to a possibility of conflict between the different activities. The purpose of this presentation is to focus on MSR as one such activity, and to discuss the legal status of MSR in the Area, along with the rules governing the resolution of conflicts between MSR and activities in the Area. It will focus especially on the question of the rights and obligations of researching States conducting MSR in an area subject to an exploration or exploitation contract.

Art. 256 provides the right of all States and competent international organizations to conduct marine scientific research in the Area, in conformity with the provisions of Part XI. (Art. 256) This right is afforded to "all States," reflecting the freedom of MSR in the high seas (Art. 87(1)(f)). Article 256, however, makes it clear that the right to conduct MSR must be exercised "in conformity with the provisions of Part XI." In Part XI, Art. 143(1) provides generally that "[m]arine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit for mankind as a whole, in accordance with Part XIII." Art. 143(3) provides more specifically that "States Parties may carry out marine scientific activities" in the area, and this right is coupled with a obligation on States Parties to promote international cooperation in MSR in the Area by specific means. This obligation to promote MSR seems to be the only substantial additional obligation on States that apply to MSR in the Area. The provisions in UNCLOS allow for MSR in the Area to be conducted in parallel with resource-related activities in the Area, with no specific provisions on how to reconcile MSR and "activities in the Area".

However, Part XI contains a general provision for situations where resource-related "activities in the Area" and other activities by States coexist. Article 147 provides that "activities in the Area" and "other activities in the marine environment" shall be conducted with "reasonable regard" for each other. This parallels the requirement of "due regard" regarding the high seas freedoms (Art. 87(2)). Although the different term "due regard" is used in connection with the high seas freedoms in Art. 87, the fact that "reasonable regard" was the expression used in Art. 2 of the Convention on the High Seas corresponding to Art. 87 of UNCLOS suggests that the two terms point to a same principle governing the accommodation of possibly conflicting uses of the ocean.

Some guidance as to the meaning of the abstract concept of "reasonable regard" may be found in the judgment of the International Court of Justice (ICJ) in the Fisheries Jurisdiction Case, where it was found that an unilateral exclusion of the other constitutes an infringement of the requirement to pay reasonable regard. It saw neither rights as "an absolute one," and stated that "due recognition must be given to the rights of both parties." In the context of Art. 147, it may be argued by analogy that "reasonable regard" at least requires both parties not to unilaterally exclude each other's activities.

More practical guidance may be found in the recent work that has been done at the ISA with respect to reconciling laying of submarine cables on the high seas with activities in the Area. In ISA's Technical Study No. 14, the due regard requirement under UNCLOS is identified as requiring notice and consultation. This conclusion seems logical, given that "due regard" or "reasonable regard" necessarily implies that both parties must be aware of each other's activities and must conduct a certain balancing between the both activities. Notice and consultation does not mean that the parties are required to seek consent of the other party. However, it is unclear what consequences follow when the parties find themselves in a serious conflict of interests after consulting each other.

The nature of MSR activities may lead to such serious conflicts. Although UNCLOS makes a clear conceptual distinction between MSR and exploration of resources, both activities are aimed at collecting information. An especially difficult question arises when a State intends to conduct a purely scientific MSR, but the acquired data would lead to significant knowledge about the resources of an area under an exploration or exploitation contract. The contractors in this case might argue that, even if reasonable regard is given, the MSR activity could only be regarded as an infringement of their

"exclusive right" to explore or exploit the area (Annex III, Art. 16). The researching State may respond that the contractors' rights are only "exclusive" in the sense of excluding exploration or exploitation, and does not give them complete monopoly over information on the relevant maritime area. The question is a difficult one, although the parties may be able to work out a technical solution to their mutual satisfaction in practice.

Competences in the Area: complementary or conflicting?

Elie JARMACHE
Special Advisor on the Law of the Sea, Secretariat General of the Sea of France
Member of the Legal and Technical Commission of the International Seabed Authority

1-The Area is a unique place according to UNCLOS where the soil and the subsoil, as well as the natural resources are declared Common Heritage of Mankind. By such qualification, this maritime zone is taken away from States and from the traditional freedom of high seas. To manage the Area, UNCLOS creates the ISA as a sole organization having competences for all activities. This includes inter alia research, protection of marine environment, prospection, exploration, exploitation to say the obvious.

2-However, in the international community, nothing is possible without taking account the States competences. This principle is valid in the Area as well in other areas. Therefore it is natural to raise the question of both kind of competences:

- ISA's competences to manage the Area and the access to natural resources on one hand, and
- the competences of the States which are parties to UNCLOS and have something to do with the management of the Area. In particular because the entities which would like to undertake activities in the Area have a link with States.

3-To avoid conflicting competences in the activities in the Area, and also to avoid a vacuum in responsibility, the way adopted by UNCLOS is to bring the States cooperating with the ISA to give a kind of insurance with respect to the capabilities of an entity willing to work in the Area, provided this entity is under the control or has the nationality of that State. This principle is to be found in Article **139, para 1** "States Parties shall have the responsibility to ensure that the activities are carried out in conformity with this Part". The link between ISA and a contractor is provided by a State qualified as a **Sponsoring State**. Article 153 is key in organizing the cooperation between the Authority and the Sponsoring State. Its para 1 is very clear providing that "activities in the Area shall be organized, carried out and controlled by the Authority". The para 2 is about the action of States Parties in "association" with the Authority.

4-Two phases: the first one, nothing is possible without a direct link between the Sponsoring State and ISA; the second one, the contract is the direct link for ISA with an entity qualified as the contractor. It is a not a **pair** at each phase (ISA/Sponsoring State, ISA/contractor, Sponsoring State/contractor), but rather a **trio**. Because there is ground which confers to ISA the primacy, it is better to see the whole competences spectrum as a set of complementary competences.

5-The Convention does not say too much about this situation. Few references are made to the Sponsoring State's role and function. That is the reason why the decision was taken, by the Council in 2010, to ask the Seabed Disputes Chamber of the Tribunal to give an advisory opinion on the basis of Article 191of Section 5 (Settlement of disputes and advisory opinions) of Part XI of UNCLOS. Through

the three questions sent to the Chamber, the main issue was to have a better idea of what could be the nature and the scope of the responsibility or liability of such kind of State, in particular concerning developing States.

6-Other categories of States may have a role in the Area's activities e.g **Flag States** in case ships are used during specific activities at sea. At this stage, one must see the situation as a usual one well covered by the provisions of UNCLOS dealing with this issue: Article 91 on the nationality of ships and the following Articles, in particular Article 94 about the "Duties of the Flag State". Of course, this set of provisions should be completed and complemented with other international conventions, e.g MARPOL on the prevention of pollution from ships. But since the starting of the exploration phase based on contracts, in 2001, it seems that there is no incident reported involving a Flag State with respect to activities in the Area.

7-The situation may change at the future exploitation phase when the activities will reach a bigger intensity, mobilizing a large number of activities and equipment including ships but also other tools. A variety of legal questions would arise and the truth is that today one can just describes scenarios rather than provides legal answers with legal certainty. This situation makes the whole exercise of drafting the ISA's exploitation code very difficult. The drafters should be cautious. So many interests are at stake for the future of the Area.

8-The **contractor** is a key player in the Area. No contractor, no activity, no Part XI and 1994 Agreement. The paradox is that such a player has no competences strictly speaking like a State or an international organization. A contractor enjoys rights and has obligations or duties.

The contract is his charter, providing protection to his activities, allowing him to be part to the settlement of disputes mechanisms at the international level. The Seabed Chamber is the judge of the contract under certain conditions. This situation is original and must be underlined

9-Are the **international organizations** an issue in the Area? The current observations indicate that there are provisions in UNCLOS recognizing the role of competent organizations like IMO which appears as the main body for a set of activities or competences: shipping, marine environment protection, hosting specific instruments like the London Protocol on dumping at sea. It is important to congratulate ISA for having an agreement with IMO as reflected in document ISBA/21/C/10 adopted at the last session (2015). The challenge is to put flesh on the bones of the agreement.

10-The whole regime of the Area which is dedicated to the Common Heritage of Mankind cannot afford conflicting competences between the key players. The safeguard of the CHM should be the driving criteria for keeping away conflicts of competences and promote spirit of complementary competences.

第二部　大陸棚（200 海里以遠の大陸棚を含む。）の資源

Segment 2: Resources of the Continental Shelf (including Continental Shelf beyond 200 NM)

Coordinator: Naoya OKUWAKI
Professor, School of Law, Meiji University

Introduction to the Continental Shelf Including Differences in Resource Governance between the Continental Shelf within 200nm and beyond

Junichi ETO
Professor, Faculty of Law, Sophia University

Article 76(1) of the UN Convention on the Law of the Sea employs the concept of natural prolongation regarding outer limits of the continental shelf beyond 200 nm. This concept has been thus far used in various contexts: in relation to entitlement to the continental shelf, its delimitation and the delineation of its outer limits. The International Tribunal on the Law of the Sea in the Bay of Bengal case held that natural prolongation could not constitute "a separate and independent criterion" for delimitation of the continental shelf beyond 200 nm. However, this judgment does not totally deny the relevance of natural prolongation to entitlement of the continental shelf. The principle that the land dominates the sea, which underlies the concept of natural prolongation, is generally considered as the basis for the sovereign rights of coastal states. If that is the case, natural prolongation may affect the interpretation of the provisions of the revenue sharing requirements (Art.82) and the maritime scientific research regime (Art.246) in continental shelf areas beyond 200 nm. There is also a view that natural prolongation should play a role as a relevant circumstance in delimiting the continental shelf beyond 200 nm.

The Legal Status of the Outer Continental Shelf without a Recommendation from the CLCS

Shizuka SAKAMAKI
Lecturer, School of International Relations, University of Shizuoka

1. The Delineation of the Continental Shelf

The United Nations Convention on the Law of the Sea (UNCLOS) provides an objective definition of the continental shelf (CS). Under Article 76 of UNCLOS, coastal States are entitled to 200 nm of CS, or to the outer edge of the continental margin where it extends beyond that distance (the outer continental shelf: OCS). The outer edge of the continental margin is to be established according to the formula under paragraphs 4 to 6 of the Article. The UNCLOS innovatively established the Commission on the Limits of the Continental Shelf (CLCS) for the purpose of supporting and verifying the establishment of such limits. The CLCS, comprised of experts in the field of geology, geophysics or

hydrography, considers the submissions from coastal States in light of the formula in Article 76, and makes recommendations. The limits of the CS established by a coastal State on the basis of these recommendations will be "final and binding".

2. The Role of the CLCS in Delineating the Continental Shelf

In the North Sea Continental Shelf Cases, the ICJ remarked that "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land. [...] In short, here is an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed." Article 77 (3) of the UNCLOS also provides that "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

The judgment of the ICJ and the provision of UNCLOS make it clear that that a coastal State has an inherent entitlement to the CS. Moreover, this inherent entitlement is based on natural prolongation, and no distinction is made between the CS within and beyond 200 nm (Cf. Bangladesh/Myanmar case). Accordingly, the role and function of the CLCS is neither to establish nor to give rights to the CS beyond 200 nm. When the outer edge of their continental margin extends beyond 200 nautical miles, the coastal States already have an entitlement to the OCS, regardless of the procedure at the CLCS.

The CLCS plays an important role, however, with respect to the precise geographical scope of such inherent entitlements. The CLCS considers whether the coastal State has applied the formula contained in Article 76 to the acquired data on the CS in an appropriate manner, and makes recommendations concerning this scientific and technical process. Article 76(8) provides that the limits of the CS based on the recommendation from the CLCS are "final and binding". There are conflicting views on the meaning of "final and binding" in this provision, especially on whether the established limits are "final and binding" on third States or only with respect to the coastal State. In any case, pending a delineation of the OCS based on a recommendation from the CLCS, some coastal States have a claim to the OCS whose exact limits are left to be determined at a later point in time.

3. The Legal Status of the Outer Continental Shelf without a CLCS Recommendation

Until the process of delineation of the OCS is finally completed, there will be maritime areas beyond 200 nm from a coastal State whose legal nature is unsettled. With the slow pace of recommendations from the CLCS, coastal States may wish to exercise rights in the OCS before receiving a recommendation from the CLCS. Alternatively, a State might seek a contract with the ISA based on its view that the relevant areas falls outside the OCS and within the Area, although this may be a less realistic scenario. The obvious problem with actions based on a unilateral assessment of the legal status of the relevant area is that these actions may potentially constitute an exercise of sovereign rights in the Area in violation of Article 137, or a violation of the sovereign rights of the coastal States.

In cases where it is relatively certain that the maritime area falls within the natural prolongation of the coastal State, however, it may be reasonable to allow the coastal State to exercise its sovereign rights to the CS. In the Bangladesh/Myanmar case concerning maritime delimitation in the Bay of Bengal, ITLOS proceeded to delimit the OCS before the question of delineation of the OCS was considered at the CLCS, because there was no "significant uncertainty as to the existence of a continental margin in the area in question." For exceptional cases where similar assessments may be made, it might be argued that coastal States may proceed to exercise its sovereign rights without violating Article 137. An obvious caveat to this argument is that such assessments would necessarily be subjective, and that it might be inappropriate to draw on an analogy from an objective determination by an international tribunal.

For maritime areas with only potential claims, it would seem prudent for a coastal State not to exercise its sovereign rights. However, a possible argument that might be made is to draw on an analogy from the jurisprudence on the exercise of sovereign rights in an undelimited area. Relying on the arbitral award in the Guyana/Suriname case, it could be argued that coastal States may undertake activities of a transitory nature and not causing permanent physical change to the marine environment, such as exploration of mineral resources and exploitation of sedentary species.

When a State applies for a contract with the ISA in an area possibly falling under the OCS of a coastal State, the ISA should not allow activities to take place. The fact that the Area is defined negatively as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction," may be invoked as an additional reason for the ISA to keep out of areas whose legal status is unsettled. The practical implication of this policy is to conclude contracts outside the area included in the submissions to the CLCS. However, where the coastal State is a non-party or has not yet made a submission to the CLCS, there may be practical difficulties in identifying a potential OCS area.

Joint Development of the Continental Shelf where Maritime Delimitation is Pending: Cooperative Opportunity or Complication in Marine Governance?

Clive SCHOFIELD
Professor & Director of Research
Australian National Centre for Ocean Resources and Security (ANCORS)
University of Wollongong

Coastal State claims to maritime jurisdiction have expanded seawards significantly in recent decades. In large part inspired by the so-called Truman Proclamation of 1945 numerous coastal States began to assert claims to jurisdiction over maritime spaces far beyond the then generally narrow spatial confines of the territorial sea. This prompted efforts to clarify and codify the international law of the sea respecting maritime jurisdictional rights and obligations. This process led to the drafting of four Conventions, including the Convention on the Continental Shelf at the First United Nations Conference on the Law of the Sea (UNCLOS I) which took place in Geneva in 1958 and which ultimately led to Third United Nations Conference on the Law of the Sea (UNCLOS III) which, following negotiations from 1973, ultimately produced the landmark United Nations Convention on the Law of the Sea (LOSC) of 1982.

LOSC provides for clear spatial framework for the limits to national claims to maritime jurisdiction. The Convention provides for a series of national zones of maritime jurisdiction measured offshore from baselines along the coast. These zones include a territorial sea, with consensus being reached on a maximum limit of 12 nautical miles measured from baselines. Seaward of territorial sea limits LOSC also provides for coastal States to claim a contiguous zone out to a maximum limit of 24 nautical miles from baselines along the coast. In a significant development LOSC signalled the international community's acceptance of the concept of the exclusive economic zone (EEZ) out to 200 nautical miles from baselines as well as providing for complex criteria for the delineation of the outer limits of the continental shelf, which may lie substantially beyond 200 nautical mile limits.

The practical consequence of the significant expansion of maritime zones seawards has been a proliferation of overlapping maritime claims and potential maritime boundaries. For example, thanks to the introduction and general acceptance of the EEZ concept, coastal States up to 400 nautical miles distant from one another now require a maritime boundary to be delimited between them where once

this was not required. Perhaps inevitably these 'new' overlapping claims and undelimited ocean boundary situations have given rise to multiple maritime disputes. Indeed, to date only around 54% of potential maritime boundaries globally have been subject to agreement and many of those delimitation agreements are partially in character.

Against the backdrop of a profoundly incomplete maritime political map of the world and the existence of broad areas subject to competing maritime claims and often contentious disputes, alternative, cooperative shared management mechanisms at sea have been advanced and are increasingly being implemented. Such joint arrangements are often termed maritime joint development zones and arguably represent an important means to overcome deadlock in relation to maritime jurisdictional claims.

Although a number of these cooperative mechanisms predate LOSC, such joint maritime zones have predominantly been concluded since the Convention was opened for signature in 1982 and are in keeping with the third paragraphs of Articles 74 and 83, relating to the delimitation of the continental shelf and EEZ respectively, and which provide, in identical terms that:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

A number of joint zones have been defined in conjunction with agreed maritime boundary lines. However, the majority of maritime joint development zones have been established in the absence rather than in conjunction with the delimitation of a maritime boundary. Where deadlock in maritime boundary delimitation negotiations exists, provisional arrangements of a practical nature may offer considerable advantages. Fundamentally, they allow the parties concerned to sidestep seemingly intractable and contentious disputes in such a way that the pragmatic development or management of the resources or environment in the area of overlapping claims can proceed without delay. A further significant attraction of this approach is that with the inclusion of robust without prejudice clauses designed to safeguard existing claims, entering into a joint arrangement of this sort can be viewed as a "sovereignty neutral" approach allows joint activities to proceed without compromising jurisdictional claims.

That said, joint zones are not without costs and hazards in their negotiation, establishment and maintenance and such arrangements should therefore not to be entered into lightly. Institutional and political pressures can emerge as the establishment of such arrangements is often a sensitive and contentious issue while sustaining them over periods frequently measured in decades may require closer cooperation than their bilateral relationship can readily sustain. Consequently the joint arrangement can itself become a source of friction and discord. Further, the spatial definition of joint zones can be problematic. This is the case because, without prejudice clauses notwithstanding, the use of unilateral maritime claims as the limits of a joint area to an extent validates such claims, giving them practical impact and thereby a degree of endorsement and legitimacy which they may not, in fact warrant.

The paper outlines the need for and rationale for provisional arrangements of a practical nature. Notable advantages and key challenges associated with the establishment of joint management mechanisms are then explored, drawing on examples of such joint arrangements located in East and Southeast Asia. The paper then weighs the potential benefits and likely costs of entering into such arrangements as a cooperative opportunity or complication in oceans governance.

第三部　国家管轄権外区域の海洋生物多様性（BBNJ）

Segment 3: Marine Biological Diversity beyond Areas of National Jurisdiction (BBNJ)

Coordinator : Mariko KAWANO
Professor, Faculty of Law, Waseda University

Evolving regime on Marine Biodiversity beyond National Jurisdiction: Some Preliminary Thoughts

Luther RANGREJI
Senior Legal Officer, Legal and Treaties Division,
Ministry of External Affairs of India

The United Nations Convention on the Law of the Sea (UNCLOS) 1982 provides for a basic legal framework to regulate all activities at sea, which includes protection and preservation of various maritime zones and balancing the varying interests of states. Historically the law of the sea which guaranteed freedom of navigation and many other freedoms is today recognized as the basic constitution governing seas.

However, with changing science and technology states have engaged in massive, often uncontrolled exploitation of living resources. Having exhausted the natural wealth within their maritime zones a large number of developed states and their artificial entities have engaged in bioprospecting and various other scientific/non- academic activities in areas beyond their national jurisdiction. It was precisely for these reasons that Part XII of UNCLOS provides for a general obligation upon states to preserve and protect marine environment. Likewise, the UN General Assembly and the Rio+20 Conference, 2012 on the "The Future we Want" have called for drawing up of a legally binding international instrument for conservation and sustainable use of marine biodiversity beyond national jurisdiction. The General Assembly established an Ad-hoc open ended informal working group to study Marine Biodiversity Beyond National Jurisdiction. This working group has met since 2006, ten times and has recommended to General Assembly a number of important building blocks on which a future legal instrument can be built upon. These among others include protection of marine genetic resources, MPAs, EIA, Integrated coastal management, capacity building and transfer of technology to developing and lesser developing states and also negotiation of an Implementing Agreement. However, many countries have expressed views that existing treaty regimes suffice to preserve marine biodiversity beyond national jurisdiction.

The presentation would cover the above issues and also provide some insight and preliminary ideas on possible elements of draft text on a legally binding instrument for conservation and sustainable use of marine biodiversity beyond national jurisdiction, to be considered by the Preparatory Committee two times in 2016 and 2017.

What Does a New International Legally Binding Instrument on BBNJ "under the UNCLOS" Mean?

Atsuko KANEHARA
Professor, Faculty of Law, Sophia University

The resolution of the United Nations General Assembly 69/292 under Paragraph 1 decided to develop an internationally binding instrument (new instrument) under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). My presentation will focus on the high seas regime and will examine what the phrase "under the UNCLOS" means.

In order to answer the question, first, a clear understanding of the high seas regime under the UNCLOS is necessary. In this regard, the high seas regime under the UNCLOS has currently shown significant change and development. Then, based upon the recognition of the current achievement in the high seas regime, we will need to appropriately evaluate new agendas to be addressed beyond the current high seas regime under the UNCLOS for the purpose of the conservation and sustainable use of BBNJ.

From this perspective, my presentation will deal with two issues. First, there is a significant tendency for a change from the freedom of the high seas to high seas governance. Second, due to the nature of the common interest in the conservation and sustainable use of BBNJ, new agendas arise that need to be agreed on by members of international society.

Regarding the first issue, many scholarly writings, as well as the discussion within Ad Hoc Open-Ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ have repeatedly referred to "high seas governance" and "governance of the high seas." In my presentation high seas governance will be examined from two aspects: the regulation aspect and the aspect of the implementation of the regulations on the high seas.

With regard to the regulation aspect, the UNCLOS and the relevant international instruments regulate the uses of the high seas on a sector-specific basis, such as, navigation, fishing, marine scientific research, and uses harmful to the marine environment. It has been generally accepted that the high seas freedom is conditioned. High seas regulation is moving beyond simple compromise among individual uses in accordance with a combination between the traditional "laissez faire" principle and "due regard" requirement. The high seas regime has been and still is moving toward a new regime. In this new regime common interests are recognized on a sector-specific basis, such as the safety and security of navigation, conservation of living resources and marine environmental protection. For realization of these common interests, regulated freedom of uses may be exercised.

Concerning the implementation aspect, traditionally it has been expected that the flag State system that is combined with the freedom of the high seas principle, fulfills the function of maintenance of order on the high seas. The following factors show development in the decentralized mechanism of implementation of regulations on the high seas. Flag States not only have exclusive jurisdiction over vessels that are flying their flags. They have also the obligation to secure that these vessel do not conduct in violation with regulations on the high seas. To complement the insufficiency of the flag State jurisdiction, non-flag State measures have been adopted in the sectors, such as fishing regulation and marine environmental protection. In addition, international and regional organizations have utilized various enforcement measures. In sum, the fundamental idea throughout these developments is that every relevant State and every relevant international or regional organization is carrying on its shoulders the implementation of regulations on the high seas on a sector-specific basis.

A possible regime for the conservation and sustainable use of BBNJ should be envisaged based upon the current tendency for high seas governance.

In respect to the second issue that I will touch upon in my presentation, the new instrument will establish a new common interest in the conservation and sustainable use of BBNJ. To realize the new common interest the furtherance of the high seas governance is required.

The nature of the newly-established common interest is understood by considering the ecosystem that has developed largely as a management response to the decline in biodiversity and natural resources. Under the new instrument the ecosystem approach will be applied to all human activities on the high seas for the purpose of the conservation and sustainable use of BBNJ. The cumulative impacts that all human activities exert on the high seas will be assessed and regulated. Thus, the main point is that cross-sectoral or integrated regulations of uses on the high seas are required.

Here an issue arises concerning the nature and status of the common interest in the conservation and sustainable use of BBNJ. There are two options. First, the new common interest has an equal status with other common interests pursued in various sectors, and by a simple balancing of these interests, integrated regulation will be established. Or, second, the new common interest has supremacy over other common interests, and a balancing of the interests, placing weight on the former, creates the basis on which integrated regulation of the high seas should be established. Either way, international society has not yet reached an agreement concerning the nature and status of the new common interest in the conservation and sustainable use of BBNJ. Without the agreement, and without a necessary balancing of the interests based upon the agreement, the required integrated regulation of the high seas cannot be achieved. The UNCLOS does not provide any answers. Thus, this is the agenda that remains for future negotiations.

From the same aspect, after I briefly mention a precautionary approach, my presentation will address the issue of marine protected areas (MPAs) on the high seas. MPAs are said to be the most effective tool for the application of the ecosystem approach on the high seas. The existing MPA practices are fragmented depending on the purpose of the MPAs. A unified standard is necessary for the purpose of the conservation and sustainable use of BBNJ. Here again arises the issue of the nature and status of the new interest in the conservation and sustainable use of BBNJ.

The new interest in the conservation and sustainable use of BBNJ demands the furtherance of the high seas governance. That is true. However, the fundamental issues still remain to be negotiated and agreed upon by international society. The key issues are where international society should place this new interest among the various common interests, and how to achieve the necessary balancing of these interests.

Intellectual Property Rights and Marine Genetic Resources of the Areas beyond National Jurisdiction

Shotaro HAMAMOTO
Professor, Faculty of Law, Kyoto University

(To be added)

Preparing for the Preparatory Committee for an Implementing Agreement on BBNJ to the Law of the Sea Convention

Ashley ROACH
Senior Visiting Scholar, Centre for International Law (CIL)
National University of Singapore

On 3 and 4 February 2016, the Centre for International Law, National University of Singapore (CIL) hosted a workshop in Singapore to help governmental and non-governmental delegations prepare for the Preparatory Committee charged by the United Nations General Assembly to develop elements of an agreement in implementation of the Law of the Sea Convention regarding marine biological diversity of areas beyond national jurisdiction. The PrepCom's first meeting is scheduled to be held 28 March – 8 April 2016 at UN Headquarters in New York City. (The second session will now be held 26 August-9 September 2016.) Over 100 attendees, representing all interests, actively participated in the discussions during the seven sessions of the workshop and in informal discussions.

Summary

The workshop, held under the Chatham House Rule, examined each of the topics tasked of the PrepCom in resolution A/RES/69/292, 19 June 2015:

- the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole,
- marine genetic resources, including questions on the sharing of benefits,
- measures such as area-based management tools, including marine protected areas,
- environmental impact assessments and
- capacity-building and the transfer of marine technology.

Each session began with short presentations by subject matter experts followed by longer very constructive discussions among all the participants.

After Professor Tommy Koh's keynote address, and a session setting the background and context, the next five sessions addressed conservation and sustainable use of BBNJ, management tools and institutional arrangements, marine genetic resources (MGRs), asset and benefit sharing of MGR's, and capacity building and transfer of marine technology. The seventh session addressed the mandate and work programme of the PrepCom. The workshop closed after considering next steps.

Present during the workshop was the PrepCom Chairman Ambassador Even Charles. Satya Nandan who had led the negotiations for the 1994 and 1995 Implementing Agreements, was unable to attend for family reasons.

The full program, reading materials, and CIL's report are available at http://cil.nus.edu.sg/programmes-and-activities/past-events/conservation-and-sustainable-use-of-marine-biological-diversity-of-areas-beyond-national-jurisdiction-preparing-for-the-prepcom/