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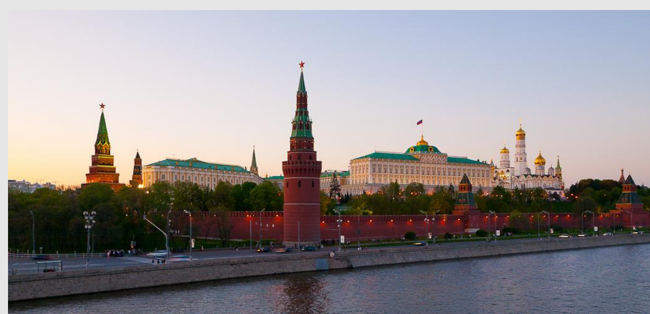

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Industrial area in Yangzhou, PRC. Image: https://commons.wikimedia.org/wiki/File:Yangzhou_-_industrial_area_west_of_Wenfeng_Temple_-_P1130239.JPG

Protection of the atmosphere before the ILC

InternationalLawGazette Editorial Team

The UN International Law Commission recently released the fourth report of Mr. Shinya Murase, Special Rapporteur on the protection of the atmosphere (A/CN.4/705). The report will be considered by the Commission at its sixty-ninth session, held in Geneva between May and August 2017. The topic 'Protection of the atmosphere' has been on the programme of work of the ILC since 2013, when it decided to appoint Mr. Shinya Murase as Special Rapporteur for the topic. In a move that was seen by some as a reflection of the political sensitivity of the topic, the ILC at the time gave a limited, narrow mandate to the Special Rapporteur, making clear that work on the topic should not interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The ILC also stressed that the work on the topic should not seek to "fill" gaps in the existing treaty regimes nor deal with issues such as liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries. In 2016, the Commission provisionally adopted 'draft guidelines' on the protection of the atmosphere.

The Special Rapporteur devoted his 4th report to the relationship between international law on the protection of the atmosphere and other fields of international law, namely, (i) international trade and investment law, (ii) the law of the sea, and (iii) international human rights law, considering that 'these fields of international law have intrinsic links with the law relating to the protection of the atmosphere itself'.

With respect to each of these three areas of international law, Mr. Murase formulated additional draft guidelines, basically stressing the need for a 'mutually supportive' approach to the relations between rules of international law relating to the protection of the atmosphere, on the one hand, and international trade and investment, the law of the sea and human rights, respectively. At the same time, he elaborated on the relevance of the concept of 'mutual supportiveness', originating in Agenda 21 and described as the search for 'a balance between the different branches of international law in light of the concept of sustainable development'. He suggested that 'States should develop, interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, with a view to resolving conflict between these rules and to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation'.

Whether the outcome of the ILC's consideration of the topic will reach beyond the stage of expression of good intentions and the formulation of general 'best practices' remain to be seen. In any event, the Commission's work on the topic so far has attracted mixed reactions from States. In October 2016, before the Sixth Committee of the UN General Assembly, the majority of delegations that expressed an opinion generally welcomed the work of the Commission, but a few delegations did express limited reservations (France, Czech Republic, China, Austria, Spain, Slovakia), with one delegation (United States) remaining sceptical. Most delegations agreed that the participation of scientific experts was very useful.

The next report, in 2018, will deal with issues of implementation (on the domestic legal level), compliance (on the level of international law), and specific features of dispute settlement relating to the law on the protection of the atmosphere.

It is to be noted that the ILC is currently working on another topic relating to environmental law, i.e. 'Protection of the environment in relation to armed conflicts', for which Ms. Marie G. Jacobsson has been appointed as Special Rapporteur in 2013.

International dispute resolution | Russia-Ukraine

Lessons in Lawfare from Crimea's Aftermath

Brian McGarry

The Graduate Institute, Geneva

The recent explosion of legal disputes arising from the conflict between Russia and Ukraine has opened new theatres of unarmed combat between these neighbours. Ukraine instituted proceedings against Russia in January 2017 before the ICJ in The Hague. Ukraine considers that, by its support for armed insurrection in Eastern Ukraine, Russia has violated the 1999 Terrorism Financing Convention. In Crimea, Ukraine contends that Russia's "deliberate campaign of cultural erasure" violates the 1965 Racial Discrimination Convention.

In April 2017, the ICJ ordered provisional measures. While Ukraine failed to persuade the Court of Russia's intention to finance terrorism, the Court favoured Ukraine's racial discrimination claims. It required Russia to "[r]efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions", and to "[e]nsure the availability of education in the Ukrainian language". The Court also ordered both States to refrain from aggravating their dispute.

Ukraine also instituted UNCLOS arbitration against Russia in September 2016, for which a tribunal was constituted in December 2016. While case details remain confidential, Ukrainian Deputy Foreign Minister Olena Zerkal laid out four grounds for a successful claim against Russia: seizure of continental shelf mineral reserves; unlawful fishing and fisheries regulation; unilateral construction of the Kerch Strait Bridge, pipelines, and cables; and nonconsensual research of archeological and historical sites. Nevertheless, Russia has excluded "disputes concerning military activities" from UNCLOS compulsory jurisdiction, and UNCLOS tribunals cannot decide land sovereignty disputes.

In addition to over 700 claims lodged by individuals concerning displacement in Crimea, Luhansk, and Donetsk, the ECHR in Strasbourg currently administers three applications lodged by the Ukrainian government. In the most recent application, Ukraine argues that Russia's effective control over these regions render it responsible for enforced disappearances, arbitrary arrests, use of force, and torture by armed groups. In 2015, Russian President Putin signed a bill to nullify international judgments if inconsistent with Russian law.

In Geneva, Russia and Ukraine are parties to three pending WTO cases. A panel was constituted in February 2017 to decide a case concerning Ukrainian anti-dumping duties on ammonium nitrate imports from Russia. Another panel was constituted in March 2017 in a case concerning Russian restrictions on railway equipment imports from Ukraine. The most recent proceeding concerns transit restrictions adopted by Russia in response to Ukraine's 2016 implementation of an FTA with the EU. Since Russia instituted these restrictions, Ukraine's trade with Central and Eastern Asia has dropped precipitously.

Russia has also sued Ukraine in English courts over its default on $3 billion in bonds purchased in 2013 from then-Ukrainian President Yanukovych. The English High Court issued summary judgment against Ukraine in March 2017, which Ukraine is expected to appeal.

Major arbitrations initiated by State-owned companies have also played a proxy role in the conflict. Ukrainian State-owned companies Oschadbank and Naftogaz have filed claims against Russia for an estimated $600 million in lost Crimean assets and against Russian State-owned Gazprom for $2.6 billion in gas charges.

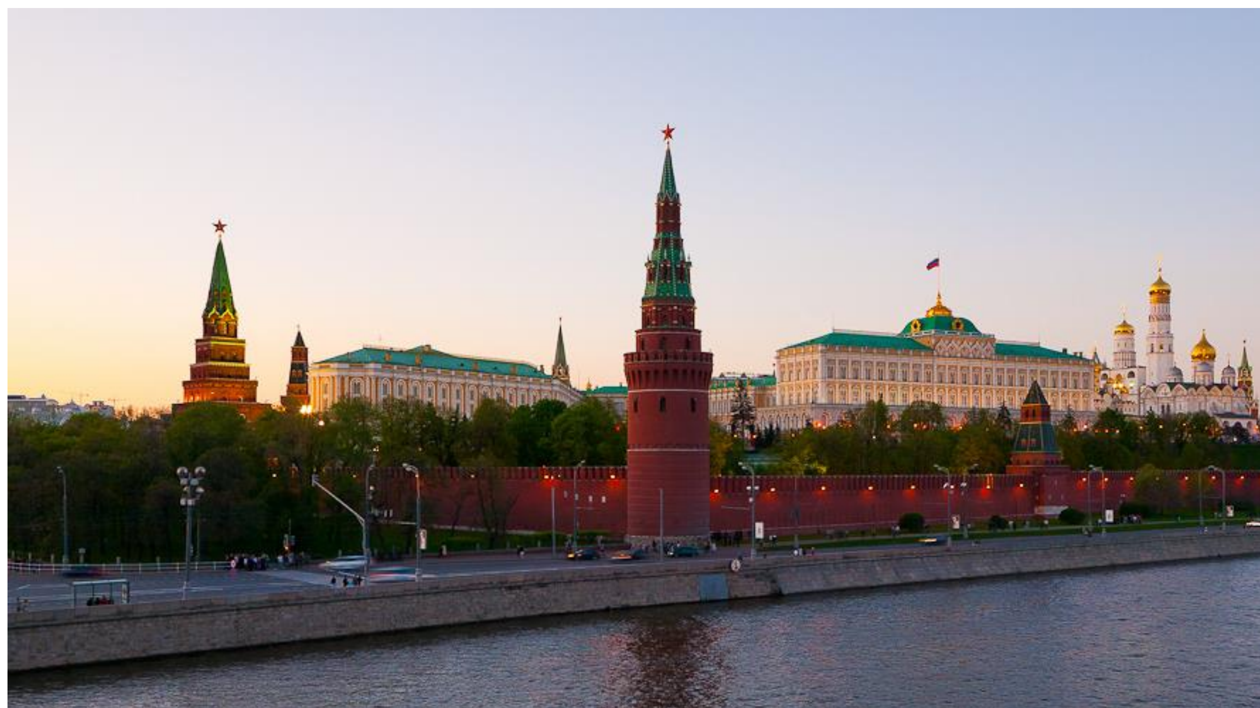

Image: Kremlin from Bolshoy kamenny bridge, by Alexander Gusev, alexandergusev.com (Wikimedia)

A tribunal was constituted in August 2016. Gazprom has filed a claim against Naftogaz for unpaid oil and gas supplies that may rise to $80 billion according to its statements in March 2017. These claims are administered by the SCC in Stockholm. Meanwhile, Naftogaz initiated arbitration in October 2016 over Russian expropriation of Naftogaz's Crimean assets.

Major arbitrations initiated by State-owned companies have also played a proxy role in the conflict.

Cases stemming from EU sanctions have been filed before the CJEU in Luxembourg, including challenges to sanctions on individuals' assets and travel. Russian businessman Arkady Rotenberg challenged sanctions on the basis that the European Council's publication of allegations breached EU data protection law. The CJEU dismissed this challenge in November 2016 following the Council's deletion of contested data. Russian State-owned company Rosneft also recently sought English court review of EU sanctions. The English High Court referred the matter to the CJEU, which in March 2017 held them to be reasonable.

In addition to claims brought by foreign companies with local business interests (such as an ICSID expropriation claim against Ukraine by Russian aluminum company Rusal's Dutch subsidiaries), six publicly known investor-State arbitrations initiated by Ukrainian companies are currently administered by the PCA in The Hague. Most of the six cases, which allege breaches of a 1998 Russia-Ukraine investment treaty, are brought by companies affiliated with Ukrainian oligarch Ihor Kolomoisky. In April 2017, DTEK Krymenergo, a large private power and coal producer owned by Ukraine's richest individual, Rinat Akhmetov, also threatened arbitration against Russia for over $500 million in lost Crimean mining assets. Russia has refused to participate in these arbitrations. In February 2017, identical tribunals in cases instituted by Aeroport Belbek and Finilon found they had jurisdiction to proceed under the 1998 treaty. In what appears to be the first ruling of its kind, the tribunals held that Russia assumed obligations to protect Ukrainian investors in Crimean territory from the date of its 2014 decree formally annexing Crimea. The tribunal in another of these cases, instituted by Everest Estate, reached the same conclusion in March 2017.

The Russia-Ukraine conflict has also led to difficulties enforcing awards in claims instituted prior to Crimean annexation. Russian petrol company Tatneft filed applications in US, UK, and Russian courts in recent months to enforce a $144 million award rendered in 2014 by an arbitral tribunal seated in France. This case arose from removal of Tatneft's participatory interest in a refinery owned by Ukrainian petrol company Ukrtatnafta. Russian republic Tatarstan, a minority owner of Tatneft, has also instituted proceedings arising from investments in Ukrtatnafta.

The question remains as to what extent the ICC in The Hague could intervene in the conflict, including in relation to the 2014 downing of Malaysia Airlines Flight MH-17. In November 2016, the ICC issued a report regarding Crimea and Eastern Ukraine, finding preliminary evidence of an international armed conflict in Crimea, irrespective of the lawfulness of Russian intervention. The ICC decided to further examine whether events in Eastern Ukraine may meet the same threshold. In response, Russia 'unsigned' the ICC's founding Rome Statute—a symbolic gesture, as it had never ratified the treaty.

Former Director General Pascal Lamy presiding over Russia's accession to the WTO, 2011. Credit: World Trade Organization, CC-BY-SA-2.0, via Wikimedia Commons.

Law of the sea | Marine environment

Negotiations on Marine Biological Diversity of Areas Beyond National Jurisdiction

The 3rd Session of the Preparatory Committee, New York, 27 March - 7 April 2017

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Courtesy of IISD/Earth Negotiations Bulletin

New York

The third session of the Preparatory Committee (PrepCom) on the elements of a draft text of an international legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) began on Monday, 27 March 2017, at UN Headquarters in New York. During the two-week session delegates met in informal working groups and in plenary to consider: marine genetic resources, including questions on benefit-sharing; measures such as area-based management tools, including marine protected areas; environmental impact assessments; capacity building and marine technology transfer; and cross-cutting issues, such as the scope of an ILBI, its relationship with other instruments, and its institutional arrangements.

PrepCom 3 continued the constructive exchange of increasingly detailed proposals on the possible elements of the ILBI. Largely seen as a positive step forward, PrepCom 3 concluded with delegations requesting the preparation of an updated Chair's non-paper structuring and streamlining submissions, as well as draft substantive recommendations for consideration by PrepCom 4 in July 2017, which is expected to recommend to the General Assembly whether to convene an intergovernmental conference to finalize negotiations of an ILBI.

REPORT OF THE MEETING

On Monday, 27 March, PrepCom Chair Carlos Sobral Duarte (Brazil), supported by many, paid tribute, to former PrepCom Chair Eden Charles (Trinidad and Tobago), and recommended building on the work done at prior sessions. Stephen Mathias, Assistant Secretary-General, Office of Legal Affairs, expressed appreciation for the contributions to the Voluntary Trust Fund from Finland, Ireland, the Netherlands and New Zealand.

ADMINISTRATIVE MATTERS: Delegates approved the provisional agenda (AC.287/2017/PC.3/L.1) and the programme of work (AC.287/2017/PC.3/L.2). Chair Duarte drew attention to the Chair's non-paper on elements of a draft text of an ILBI, based on submissions received up to December 2016, and a supplement with submissions received after that date.

MARINE GENETIC RESOURCES

This item was addressed in an informal working group, facilitated by Janine Coye-Felson (Belize), on Monday and Tuesday, 27-28 March; and in plenary on Tuesday, 4 April, based on an oral report from the Facilitator and a list of written questions circulated by the Chair. Discussions focused on: scope and definitions; principles and approaches; access; benefit-sharing; intellectual property rights (IPRs); and a clearinghouse mechanism (CHM).

SCOPE AND DEFINITIONS: The Group of 77 and China (G-77/China) called for defining access and benefit-sharing (ABS) and compliance. Mexico, speaking on behalf of Argentina, Brazil, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Uruguay, highlighted: common heritage as the guiding principle, supported by Pacific Small Islands Developing States (PSIDS); including fish as MGRs, supported by the European Union (EU); monetary and non-monetary benefit-sharing; CB&TT to facilitate access and utilization of MGRs; IPR considerations; and, with PSIDS and the African Group, traceability of MGRs. The Caribbean Community (CARICOM) noted that there is no consensus on the principles applying to MGRs of ABNJ.

The African Group considered a definition of MGRs necessary, noting that definitions should be consistent with UNCLOS, the UN Fish Stocks Agreement (UNFSA) and the CBD. Mauritius noted that MGRs in the water column above the extended continental shelf are not sufficiently covered by existing instruments, so the ILBI should clarify their legal regime.

Fisheries: Several delegations recommended distinguishing between fish as genetic resources, used for research and development purposes, and fish used as a commodity, with Fiji calling for also including geographical considerations. CARICOM called for the definition of MGRs to include fish used for their genetic properties. Argentina, supported by Mexico, called for including mollusks in the definition of MGRs. Brazil underscored the need for flexibility for

Michael Lodge, Secretary-General, International Seabed Authority (ISA), delivering his intervention, 31 March 2017. Photo by IISD/Francis Dejon (enb.iisd.org/oceans/bbnj/prepcom3/31mar.html)

Law of the sea

Marine environment

using genetic components of MGRs to improve food security.

The EU stressed that fish as biological resources are outside the mandate of the ILBI. Japan and China, opposed by Indonesia, favored excluding fish used as commodities, with Eritrea recommending establishing a scientifically defined threshold for MGRs as a commodity.Cautioning against prejudicing existing agreements, the Russian Federation opined that MGRs do not include fish and marine mammals.

The World Wide Fund for Nature (WWF) recommended including fish as a key component of biodiversity and all research, including fisheries research. The International Union for Conservation of Nature (IUCN) noted that fish are sometimes harvested as a commodity but subsequently used for research purposes. The Food and Agriculture Organization of the UN (FAO) pointed to distinctions on commodities and genetic resources under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the FAO Commission on Genetic Resources for Food and Agriculture.

Derivatives and data: The African Group, the Philippines, Colombia, Mexico and the FSM, opposed by China, Japan, the Republic of Korea and Canada, noted that definitions should cover derivatives. Costa Rica, supported by Argentina, proposed relying on the Nagoya Protocol definition of genetic resources including derivatives, and also addressing digital data. Brazil and IUCN, opposed by the Republic of Korea, recommended addressing digital sequence information.

Switzerland and Japan cautioned against discussing digital sequence information before concluding discussions in other fora, particularly the CBD. The US opposed sharing benefits from ex situ MGRs or genetic sequence data, cautioning against importing CBD negotiations into the BBNJ process. Brazil favored a dialogue between the PrepCom and the CBD. Argentina argued that the CBD Conference of the Parties (COP) is looking into digital sequence data within national jurisdiction.

PRINCIPLE AND APPROACHES: The G-77/China observed that the principle of common heritage must underpin the ILBI given its crosscutting nature and its benefit-sharing obligations. Bangladesh drew attention to UNCLOS Articles 312 (Amendment) and 314 (Amendments relating exclusively to activities in the Area) to allow consideration of MGRs under the common heritage regime. Argentina reiterated that MGRs in the Area fall under the common heritage regime. PSIDS underlined that MGRs of ABNJ are part of common heritage, with the FSM noting that MGRs of ABNJ should not be reserved for those with the capacity to explore and exploit them, and that future generations should also be considered. Nigeria called for flexibility to accommodate future scientific progress.

The US, the Russian Federation and Japan observed that mineral resources in the Area are part of common heritage but it would not be appropriate to apply this principle to MGRs of ABNJ. South Africa suggested that high seas freedoms apply to high seas MGRs, including benefit-sharing, while common heritage governs MGRs of the Area. Indonesia supported a sui generis regime. Nepal and others, opposed by Iceland, emphasized that freedom of the high seas and common heritage are not mutually exclusive. The EU called for setting aside discussions of the legal status of MGRs of

Leonito Bacalando Jr., Federated States of Micronesia, Plenary of 6 April 2017. Photo by IISD/Francis Dejon (enb.iisd.org/oceans/bbnj/prepcom3/6apr.html)

ABNJ, calling, with Australia, Chile and New Zealand, for a practical focus.

Mexico highlighted the sustainable use of resources, equitable benefit-sharing, transparency in access to information, and no claims for sovereignty in ABNJ. Iran pointed to the CBD principles of prior informed consent, and fair and equitable benefit-sharing. IUCN emphasized: the principle of common concern of humankind, with CARICOM noting that the common concern for humankind principle does not “go far enough”; the need for a clear set of rules and legal certainty for ABS and scientific research; and the opportunity to make access to MGRs of ABNJ for scientific research contingent on making data available.

ACCESS: The G-77/China supported developing a code of conduct for bioprospectors. CARICOM, PSIDS and the African Group recommended including MGRs accessed ex situ and in silico in the ABS regime. CARICOM noted the need for requiring notifications to ensure traceability and monitoring, without hindering MSR, with Argentina saying that this could be done by issuing “passports” for MGRs in ABNJ or relying on the Nagoya Protocol’s internationally recognized certificate of compliance. Jamaica and PSIDS noted that this would support the flow of information and strengthen marine technology transfer.

The Alliance of Small Island States (AOSIS) noted that regulating access to MGRs may be of value. Peru stated that access should not be left unregulated, stressing the need to distinguish between “access to” and “ownership of” MGRs. India underscored the need to regulate MGR access and use to prevent over-exploitation and promote benefit-sharing. The Federated States of Micronesia (FSM) referred to different access requirements for different actors, noting that access should be facilitated for collecting and using samples.

Delegate from Argentina, 3 April 2017. Photo by IISD/Francis Dejon (enb.iisd.org/oceans/bbnj/prepcom3/3apr.html)

The African Group favored an ABS mechanism under the ILBI COP to receive obligatory prior notification of bioprospecting in a centralized database, with Japan welcoming openness to consider notification, rather than prior informed consent. PSIDS: stressed the link between access and CB&TT; pointed to emerging consensus that MSR should be promoted and not impeded; underscored the need for reporting obligations for scientists; proposed a benefit-sharing trust fund to promote access and utilization of MGRs by developing countries, particularly small island developing states (SIDS); and supported a mechanism facilitating CB&TT in MGR analysis and utilization.

The EU said that access to MGRs for MSR should not be restricted. Australia, with New Zealand, highlighted that the ILBI should not stifle access for research and innovation. Japan recalled numerous unsuccessful attempts to define MSR, cautioning against unnecessary restrictions. Singapore preferred less regulation of access and expressed interest in exploring a notification obligation. The Russian Federation cautioned against establishing artificial barriers to accessing MGRs. China favored an open-access system of MGRs in situ, noting that states may provide, on a voluntary basis, notification through the CHM on the MGRs collected.

BENEFIT-SHARING: The G-77/China called for both monetary and non-monetary benefit-sharing, expressing willingness to discuss different monetary benefit-sharing modalities, pointing to the Nagoya Protocol annex and to different triggers, with: AOSIS requesting capacity building specifically targeted to SIDS and special consideration for SIDS in creating a benefit-sharing fund and recommended relying on royalties and mandatory payments to replenish an ILBI trust fund; PSIDS suggesting that mandatory monetary benefit-sharing could contribute to a trust fund to facilitate capacity building in developing countries, adding also voluntary contributions; and Peru drawing attention to the mechanisms under FAO and the World Health Organization (WHO).

The African Group called for: a benefit-sharing mechanism administered by the secretariat of the ILBI, and benefit-sharing to support the designation and management of MPAs and for CB&TT related to ABNJ. He further favored: compulsory monetary benefit-sharing upon commercialization; a sector-specific approach related to the added value of the commercialized product; and the channeling of proceeds through a benefit-sharing fund to support CB&TT, and training in developing countries.

CARICOM proposed sharing non-monetary benefits through a repository for samples from ABNJ, which should be open access, and for results of derivatives’ analysis, which would become open access at a later stage, without prejudice to certain notification measures. CARICOM: also supported, with Norway, Singapore, New Zealand and the Philippines, exploring different stages triggering monetary benefit-sharing; and suggested, with Brazil, that monetary benefits should arise upon commercialization. The FSM envisaged benefit-sharing upon sample collection, a fee to ensure exclusive access, and additional monetary benefit-sharing upon commercialization. Costa Rica supported advance fixed-amount payments or license fees, in addition to royalties.

Law of the sea BBNJ negotiations

The African Group said benefit-sharing should be inspired by Nagoya Protocol Article 10 (global multilateral benefit-sharing mechanism). Mexico said that the Nagoya Protocol, the CBD, the International Seabed Authority (ISA) and the ITPGRFA could provide inspiration. Bangladesh suggested extending and modifying UNCLOS Article 82 (payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles).

Expressing willingness to address a monetary benefit-sharing mechanism, China called for a pragmatic approach, prioritizing non-monetary benefit-sharing. The Russian Federation, the US, Canada, the EU, Switzerland and Japan called for focusing on non-monetary benefit-sharing, with the EU referring to readily available options for non-monetary benefit-sharing in UNCLOS provisions on MSR and marine technology. Canada clarified that focusing on the significance of non-monetary benefits does not mean excluding monetary ones from the discussion. The US, Japan and Norway cautioned that monetary benefit-sharing could be a disincentive to MSR, with Iceland noting that non-monetary benefit-sharing could encourage relevant investment. Norway and New Zealand noted that non-monetary benefits also have financial value. Australia proposed a functional, cost-effective benefit-sharing regime that encourages research, underscoring the importance of non-monetary benefits. Japan cautioned against discussing benefit-sharing modalities based on assumptions.

The Republic of Korea said the regime should be conducive to the conservation and sustainable use of MGRs. Switzerland emphasized the link between the ILBI objectives and an effective benefit-sharing system. Mauritius proposed priority for coastal states in benefit-sharing from MGRs in the water column above their extended continental shelf. Jamaica highlighted that common heritage is not intended to stifle innovation or focus exclusively on non-monetary benefits, and underlined that the ILBI should reflect the potential for benefits accruing from MSR. Singapore pointed to the clearinghouse under the Nagoya Protocol that could address non-monetary benefits and facilitate knowledge-sharing.

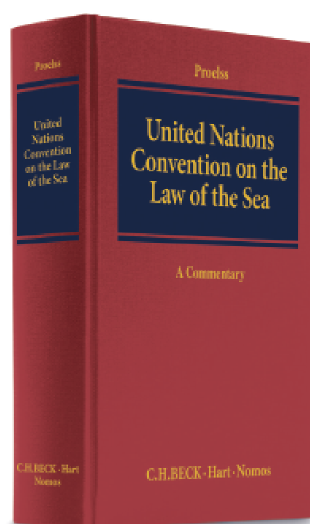
The Holy See proposed relying on contractual "earnout" provisions for MGRs, to provide additional compensation in the future if certain non-financial and financial milestones are reached, when it is difficult to estimate the value of MGRs at the time of access.

El Salvador and Japan called for the inclusion of private-sector actors in BBNJ discussions, with Japan stressing that the private sector, rather than governments, would share benefits. The African Group suggested that the private sector should be governed by relevant national legislation in ABNJ. PSIDS noted that the private sector may need incentives to engage.

WWF recommended viewing benefit-sharing as a continuum, where non-monetary benefit-sharing is applicable early in the process and monetary benefit-sharing at the commercialization stage. IUCN pointed to the need to include developing states, and safeguard the interests of the research and private sectors; and suggested sharing benefits through open access to raw data, targeted training and sharing of best practices, information on species identification, and MSP in ABNJ.

Advertisement

The constitution for the seas.



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The United Nations Convention on the Law of the Sea (UNCLOS)

entered into force in 1994. Meanwhile, it has been ratified by 166 parties, including all Member States of the EU and the EU itself. The Convention defines the rights and duties of States with regard to the use and protection of the ocean.

UNCLOS consolidates customary international law and various conventions previously adopted by the international community. As a framework agreement, this treaty, the most comprehensive ever concluded, is often referred to as 'the constitution for the seas'.

The commentary employs a systematic methodology whereby each provision is examined and analysed element by element. The issue of the suitability of the Convention to deal with the challenges facing the modern law of the sea, such as the exploration and exploitation of non-mineral resources or the protection of the marine environment in general, occupies a central focus of this work.

Pros at a glance:

- Comprehensive analysis of every individual article of UNCLOS, including its Annexes
- Element-by-element approach
- Experts from all-over the world

The Editor and Authors

Edited by Alexander **Proelss**, professor of public international law at the University of Trier, specialised in the law of the sea.

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IPRs: Arguing, with Honduras, that the ILBI should include IPRs, the African Group supported: with CARICOM and Nepal, developing a sui generis system; and, with Iran and Brazil, but opposed by Canada, establishing mandatory disclosure of the origin of MGRs in patent applications. Recognizing the World Intellectual Property Organization's (WIPO) key role, Mexico stressed that inventions, processes and products can be subject to IPRs, but MGRs per se cannot; and drew attention to potential changes of use.

Japan, Canada, the EU, Switzerland, Norway, Chile, Singapore and the US cautioned against IPR-related provisions in the ILBI, noting that they are addressed in other fora. Chile noted that WIPO focuses on IPRs in relation to genetic resources within national jurisdiction.

Traditional knowledge: CARICOM and Iran supported respect for traditional knowledge in the conservation and sustainable use of BBNJ. PSIDS noted that the use of traditional knowledge requires free prior informed consent, highlighting the opportunity to guarantee certain levels of benefits for traditional knowledge holders. Argentina highlighted the need to clarify the implications of including traditional knowledge under the ILBI.

Clearinghouse mechanism: The G-77/China called for establishing a CHM, with AOSIS recommending an accessible and easy CHM including a network or platforms for knowledge sharing. Canada supported a CHM for information sharing and for matching needs and available expertise. Brazil favored a CHM for sharing data and information, pointing, with Venezuela, to the Nagoya Protocol CHM. Argentina suggested sharing through the CHM information and genetic resources' samples, research results, training and study programmes, data analysis and publications. The FSM underscored the need for standardizing data collection and facilitating access to samples. Venezuela reflected on the CHM's role in managing information, and sharing best practices and lessons learned.

CARICOM noted that the ISA may have a role to play, supported by Tonga, who also recommended that the CHM: be accessible online, simple and user-friendly; include timely information; support transparent traceability; and address SIDS' needs. Canada pointed to taking optimal advantage of existing tools.

The EU drew attention to interlinkages between the different elements of the package, noting the CHM's potential role in promoting international collaboration and coordination on capacity building. Japan requested further discussion of the kind of data to be provided through a CHM and of recipients, as well as of the Intergovernmental Oceanographic Commission (IOC) Criteria and Guidelines on the Transfer of Marine Technology (IOC Guidelines), to prevent duplication. The IOC emphasized information-sharing as an enabler of benefit-sharing, pointing also to the Ocean Biogeographic Information System's (OBIS) existing network of institutions, quality control and standardization.

AREA-BASED MANAGEMENT TOOLS

This issue was discussed in an informal working group, facilitated by Alice Revell (New Zealand) on Tuesday and Wednesday, 28-29 March, and in plenary on Wednesday, 5 April, based on an oral report by the Facilitator and a list of written questions circulated by the Chair. Discussions focused on: objectives;

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Marine environment

principles and approaches; relationship with existing mechanisms; definitions; and governance. Delegates also engaged in discussions on governance models, considering three options suggested by Chair Duarte.

OBJECTIVES: The African Group suggested that ABMTs should aim at enabling cooperation and coordination among regional and sectoral bodies. AOSIS and others highlighted that ABMTs should contribute to the oceans' resilience, including to climate change. PSIDS proposed that ABMTs contribute to healthy, productive and resilient oceanic ecosystems, including through restoration. The EU stressed that: specific features of ecosystems may require different levels of protection; and a process to establish and manage a coherent MPA network in ABNJ will also contribute to the Aichi Targets and Sustainable Development Goal (SDG) 14 (life below water). CARICOM noted that the objectives of ABMTs must be linked to conservation and sustainable use, which are complementary.

Mexico proposed creating a global MPA network aimed at contributing to conservation and sustainable use. Costa Rica pointed to conserving the biomass of marine resources. Tonga and Fiji called for restoration and rehabilitation as key objectives. Venezuela supported addressing marine biodiversity stressors. Greenpeace noted that MPAs are effective tools for reversing current biodiversity loss trends.

Japan highlighted MPAs as a tool for long-term conservation, which should not be limited to marine reserves, and balancing conservation and sustainable use, which was supported by Norway, Nigeria and the Philippines. Canada prioritized identifying vulnerable marine ecosystems and building resilience to climate change. Australia said ABMTs should balance conservation with a diversity of sustainable uses. IUCN said there is a role for sectorally-focused ABMTs and comprehensively managed MPAs.

DEFINITIONS: The G-77/China emphasized the need to: consider definitions, including adapting existing ones to the ABNJ context; and to develop ABMTs criteria on the basis of existing international criteria, including uniqueness, ecological sensitivity and biological productivity, noting that varying needs may require measures of different stringency. China suggested including in an ABMT definition an objective, geographical scope and a function element. The FSM noted that each ABMT should take a holistic management approach, stressing that ABMTs in ABNJ should: not cause disproportionate burdens on coastal states; respect national and regional ABMTs; and, with Saudi Arabia, not affect coastal states' sovereign rights.

PSIDS and the EU called for defining ABMTs, noting that there is no universally-agreed definition, with the African Group proposing that ABMTs be defined as "spatial management tools to manage activities in the pursuit of conservation and sustainable use objectives." Tonga, with Monaco, urged that definitions include sectoral and cross-sectoral measures. Canada called for recognizing the range of ABMTs. The FSM suggested that ABMTs be considered a broader concept, of which MPAs are a subset. FAO stressed that: ABMTs need to be combined with other management measures to avoid negative impacts, such as overfishing in adjacent areas; and, with Fiji, the definition needs to be broad and flexible to cover different objectives, encompassing both ecological and socio-economic elements.

At the informal working group on environmental impact assessments (EIAs), 30 March 2017. Gabriele Goettsche-Wanli, Director, UN Division for Ocean Affairs and the Law of the Sea (UNDOALOS); René Lefeber, the Netherlands, Facilitator of the informal working group on environmental impact assessments; Yoshinobu Takei, UNDOALOS; and Michael Schewchuk, UNDOALOS. Photo by IISD/Francis Dejon (enb.iisd.org/oceans/bbnj/prepcom3/30mar.html)

Norway stressed that the purpose of an MPA definition should be clear. PSIDS, with Monaco, suggested that the definition of MPAs include their long-term objectives and, with the EU, Argentina, Uruguay and Morocco, proposed using CBD Article 2 (Use of Terms) as a basis. Morocco also supported using the IUCN definition, and Monaco called for consideration of Costa Rica's paper on working definitions in defining MPAs. Greenpeace, the Natural Resources Defense Council (NRDC) and the High Seas Alliance defined an MPA as a designated geographically-defined marine area where human activities are regulated, managed or prohibited, to achieve long-term nature conservation. The CBD noted that 71 out of 279 ecologically or biologically significant areas (EBSAs) are located in ABNJ, covering 21% of total surface area of ABNJ.

Reserves: PSIDS supported defining marine reserves, opposed by Argentina, who opined that their characteristics would be included under the ABMT definition. Greenpeace, NRDC and the High Seas Alliance argued that a separate legal definition of marine reserves is unnecessary if the MPA definition includes the option of areas where extractive and destructive human activities are prohibited.

PRINCIPLES AND APPROACHES: Many referred to the precautionary approach, ecosystem approach and best scientific evidence. The G-77/China highlighted transparency, accountability, and integrated management. The African Group and PSIDS highlighted inclusiveness, participatory approaches and transparency. Iceland suggested: increasing coordination and cooperation by establishing common guidelines and standards; and addressing threats at source and directly regulating economic activities, because closing parts of the ocean to human activity may shift unsustainable practices elsewhere.

PSIDS, Jamaica and Singapore highlighted flexibility and an adaptive management approach. The Cook Islands prioritized the need to balance long-term conservation and sustainable use, calling for an inclusive and flexible system, incorporating traditional knowledge and respecting coastal states' rights.

China highlighted proportionality in matching conservation measures with objectives and taking socio-economic factors into consideration. The Russian Federation emphasized cooperation, coordination and harmonization of competent international organizations, as well as high seas freedoms.

Monaco prioritized a coherent and integrated network to ensure the most fragile and important areas of marine ecosystems are fully conserved, based on best scientific evidence. Stressing that despite increasing threats, only 0.8% of the oceans are currently identified as MPAs, Eritrea highlighted socio-economic concerns in addition to ecological significance, underscoring distributive implications of ABNJ replenishment effects and stressing the need to address "who will benefit, by how much and why." WWF called for deploying the full range of tools in the ABMT toolbox, including integrated ocean management and MSP. Greenpeace and the High Seas Alliance pointed to the principles of stewardship, good governance, sustainability, equity and science.

GOVERNANCE: The G-77/China recommended review and monitoring of ABMTs, without undermining existing regional and sectoral organizations. Venezuela called for a compliance committee for MPAs. Sri Lanka preferred a horizontal approach to ABMT management, calling for a permanent scientific body. Tonga emphasized that climate change considerations should be incorporated in ABMT designation. Fiji called for science-based decision-making that takes into account special regional circumstances, consent by adjacent states, compatibility, and flexibility to anticipate future stresses, and includes traditional knowledge. Mauritius requested reference to different ABMT types, and consent of adjacent coastal states on ABMT establishment. CARICOM emphasized the need for: scientific criteria for designating ABMTs; modalities for consultation; with Tonga, interlinkages with capacity building and technology transfer; and recognition of other bodies deploying ABMTs in ABNJ, to address fragmentation.

The EU proposed inviting regional and sectoral organizations to submit proposals on the consultation process and for establishing a procedure for complementary measures or recognition of existing ABMTs, provided they comply with ILBI criteria. Singapore queried recognition modalities and possible effects of non-recognition, cautioning against substituting other organizations' decision-making with decision-making under the ILBI, and, with Fiji, called for a flexible process to allow coverage of future activities and incorporation of MSP.

Canada and the Russian Federation cautioned against a global approach and duplication of efforts, preferring implementation at the regional or sectoral levels following the UNFSA model. Japan warned against overriding the mandates of existing bodies like the International Maritime Organization (IMO) and regional fisheries management organizations (RFMOs), calling for consultation, cooperation and collaboration, with Iceland proposing to strengthen cross-sectoral cooperation and build RFMOs'

Law of the sea

BBNJ negotiations

capacity. Highlighting the role of the ILBI in contributing to coherence and coordination, Norway called for activating, utilizing and challenging existing mechanisms, including RFMOs. Argentina, with Greenpeace, underscored that RFMOs have a limited mandate and, with Costa Rica, did not support strengthening this mandate. FAO stressed that only a few ABNJ are not under RFMOs' management, calling for extensive consultations when establishing ABMTs under RFMOs' jurisdiction.

Submission of ABMT proposals: AOSIS, with Peru and Mexico, suggested that joint or individual proposals be made by states and relevant organizations. The EU recommended that MPA designation be triggered either collectively or individually by states, which should launch an initial time-bound consultation process. Japan, Argentina and China favored states submitting proposals, with Japan preferring that states share these proposals with other states, and China noting that submissions should be in consultation with stakeholders. Monaco called for the widest possible consultative process prior to states' submissions. Switzerland suggested that state parties triggering the designation process take into account existing processes, including the CBD EBSAs. Fiji cautioned against a cumbersome process for developing states, particularly SIDS.

Assessment of ABMT proposals: PSIDS recommended involving adjacent coastal states in decision-making. Indonesia suggested assessing proposals on technical, scientific and legal grounds, through an inclusive and transparent process. Switzerland and Fiji called for state parties to make decisions, preferably by consensus or qualified majority. Morocco emphasized that scientific assessments should precede any consensus decision by state parties on designation. Japan supported an ILBI COP, consensus-based decision-making, and a scientific committee composed of experts. CARICOM emphasized the need for a scientific or technical advisory committee, suggesting that it include representation from sectoral bodies and, supported by Tonga and Argentina, draw from the ISA Legal and Technical Committee. AOSIS supported a scientific process informing policy-making, ensuring full inclusivity of SIDS and recognizing traditional knowledge. PSIDS said the scientific committee must include traditional knowledge holders, pointing to relevant practice in the description of CBD EBSAs. The FSM added that a scientific body could be global or regional, and build upon the knowledge and expertise of the EBSA process. The EU called for creating a scientific subsidiary body to technically assess proposals. Mexico favored a technical and scientific subsidiary body, recommending, supported by Nepal, that it approve proposals following consultations and studies on existing MPAs, and make legally binding decisions for parties.

Argentina supported a technical body reporting to a consensus-based COP. New Zealand proposed: a COP providing process guidance for MPA designation; regional bodies, in consultation with others, involved in MPA implementation; and states reporting on implementation. Australia preferred a regional action-oriented process, including regional decision-making. Norway supported RFMOs and the ISA designating and implementing MPAs, through public hearings and consultations with adjacent coastal states, with the ILBI COP providing feedback to RFMOs.

Norway stressed that the purpose of an MPA definition should be clear. PSIDS, with Monaco, suggested that the definition of MPAs include their long-term objectives and, with the EU, Argentina, Uruguay and Morocco, proposed using CBD Article 2 (Use of Terms) as a basis. Morocco also supported using the IUCN definition, and Monaco called for consideration of Costa Rica's paper on working definitions in defining MPAs. Greenpeace, the Natural Resources Defense Council (NRDC) and the High Seas Alliance defined an MPA as a designated geographically-defined marine area where human activities are regulated, managed or prohibited, to achieve long-term nature conservation. The CBD noted that 71 out of 279 ecologically or biologically significant areas (EBSAs) are located in ABNJ, covering 21% of total surface area of ABNJ.

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Delegates from Latin America consulting, 4 April 2017. Photo by IISD/Francis Dejon (enb.iisd.org/oceans/bbnj/prepcom3/4apr.html)

The end of the report of the 3rd Session of the Preparatory Committee will appear in the next issue of InternationalLawGazette courtesy of

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Maritime law

Sustainable Use of Africa's Oceans and Seas

Representatives of maritime administrations of 33 African States gathered from 19 to 21 April in Abuja, Nigeria, under the auspices of the Association of African Maritime Administrations (AAMA). The theme of the annual conference was 'Sustainable Use of Africa's Oceans and Seas'. The conference aimed at boosting intergovernmental, regional and continental cooperation on maritime issues, setting up a continental program for positive peer review of maritime legislation, administration, regulation and enforcement and IMO instruments' implementation amongst member countries, and most of all at giving operational effect to the new AU Charter of maritime security, safety and development adopted by African heads of government in Lome, Togo in October 2016.

Nigeria as the host country of this conference took the opportunity to highlight its participation and commitment to the IMO, and its willingness to regain IMO Council membership. It cited its active participation in IMO meetings since it joined the organization in 1962, its capacity-building efforts (in particular the training of officials in maritime law), its ratification of 35 IMO Conventions and Protocols (and domestication of a number of these), and its national efforts aimed at enhancing maritime security and the safety of navigation in the Gulf of Guinea. Nigerian Armed forces face important challenges related to the rise of acts of piracy in the Gulf of Guinea in 2016, while global figures of piracy declined.

Law of the sea

Maritime zones

Conflicting maritime claims in the Gulf of Aden

Pierre-Emmanuel Dupont

Paris

On 11 February 2017, the Government of the Republic of Somaliland, which regards itself as the successor state to the British Somaliland protectorate and has de facto functioned as an independent entity since 1991 (albeit with limited international recognition), sent a letter to the UN Secretary-General signed by President Silanyo, claiming maritime rights including a 200-mile Exclusive Economic Zone (EEZ).

Stressing that this move would 'enable Somaliland to better police maritime territory and combat crime, including in relation to customs, immigration, and people and arms trafficking; protect natural resources, such as fisheries and oil and gas deposits belonging to the people of Somaliland; and support international efforts to promote peace and security in the Gulf of Aden', the Foreign Ministry of Somaliland announced that it will submit in due course the geographical coordinates and a chart of its maritime zones.

This appears to be one of the latest of a series of recent developments affecting a number of potential, or nascent, maritime disputes in the Gulf of Aden, a zone already deeply affected by major security threats including large-scale piracy (highlighted again by recent hijackings, despite the efforts of the EU launched its first ever maritime military operation in the area, despite the continued deployment of international naval forces) and illegal fishing.

Somalia itself had claimed an EEZ in 2014, and deposited with the UN DOALOS a list of co-ordinates defining the outer limits of this zone.

Map from Atlas of the Middle East (CIA, 1993)

It is striking to note that Somalia's EEZ encloses several islands pertaining to Yemen (see *Law of the Sea Bulletin* No. 85, 2015). This proclamation had prompted a protest lodged with the UN Secretary-General by the authorities of Somaliland, which had insisted that 'Somalia cannot and does not exercise jurisdiction or physical control over the waters and continental shelf off the coast of Somaliland' (press Release, 7 August 2014). Somalia's EEZ proclamation of 2014 has also met with a recent protest by the Republic of Djibouti (Letter to DOALOS, 31 January 2017), in which the latter challenges the geographical coordinates used as baselines from which Somalia's claimed EEZ is defined, and asserts that such EEZ extends to waters under sovereignty and jurisdiction of Djibouti. The Republic of Yemen had earlier protested Somalia's EEZ (Letter to DOALOS, 25 July 2014), noting that it violates 'Yemen's territorial waters and Exclusive Economic Zone'. Moreover, Yemen stressed that Somalia's claimed EEZ 'extends into areas where Yemen possesses sovereignty, sovereign rights and jurisdiction, fully encircling Yemen's islands of Socotra, Sambad and Add Al Kuri, together with the other islands belonging to Yemen in their vicinity' (Letter to DOALOS, 10 December 2014).

The delimitation of the other (southern) end of Somalia's claimed maritime zones, with Kenya, is currently pending before the ICJ, to which it has been submitted in August 2014 by Somalia. The latter seeks the delimitation of the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya, including the continental shelf beyond 200 nautical miles. Both Somalia and Kenya are parties to UNCLOS, and both have made declarations accepting the compulsory jurisdiction of the Court, although these exclude disputes in regard to which the parties have agreed "to have recourse to some other method or methods of settlement". On 2 February 2017, the Hague Court rejected preliminary objections raised by Kenya, revolving around the status of a bilateral memorandum of understanding to delimit their boundary by negotiation only after the completion of the Commission on the Limits of the Continental Shelf (CLCS) review of their submissions. and found that it has jurisdiction to entertain Somalia's application and that the latter is admissible. The time-limit for the filing of the Counter-Memorial of the Republic of Kenya in that case has been fixed to 18 December 2017. A final judgment may reasonably be expected during the course of 2018.

Maritime law

Upcoming Graduation Ceremony at IMO International Maritime Law Institute

The 2017 Graduation Ceremony of the IMO International Maritime Law Institue will take place on 27 May 2017 at the Malta Maritime Museum in Vittoriosa, Malta. IMO Secretary-General and Chairman of the IMLI Board of Governors Mr. Kitack Lim will deliver the Graduation Address.

IMLI was established in 1988 under the auspices of the International Maritime Organization (IMO), a specialised agency of the UN. The Institute's aim is to contribute to the development and dissemination of knowledge and expertise in the international legal regime of merchant shipping and related areas of maritime law and the general law of the sea, with a special emphasis on the international regulations and procedures for safety and efficiency of shipping and the prevention of marine pollution. IMLI is located on the campus of the University of Malta. Lectures at IMLI are delivered by the resident faculty and a number of visiting fellows who are world leading experts and practitioners from all fields of maritime law. They also include eminent academics from leading world universities.

Last year's IMLI Graduation Ceremony (2016)
with IMO Secretary-General and Chairman of the IMLI Governing Board Mr. Kitack Lim

Law of armed conflict

Syria

US airstrikes in Syria: A short discussion of the possible legal basis

Martin Polaine & Arvinder Sambei

London

The US Administration has remained resolutely silent in setting out the legal basis of its missile strikes (7 April 2017), save to say that it was a 'measured response'[1] to the use of chemical weapons by the Syrian government. Although the US action has enjoyed the support of its allies, with the strike being described as 'wholly appropriate'[2], no-one has agreed, or put forward, the legal basis.

An enquiry into possible legal, rather than moral, justification for the US military action in Syria

It is perhaps helpful to start with the general prohibition on the use of force by a State against another UN Member State, contained in Article 2(4) of the UN Charter, which provides as follows:

'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in the manner inconsistent with the purposes of the United Nations'

However, the general prohibition is subject to Article 2(7) , which permits the use of force where such action is authorised by the Security Council under its Chapter VII powers. In the present instance, there was no authorisation and, in any event, an attempt to secure such a mandate would undoubtedly have been met by a veto from Russia. This, then, leaves two other possible bases: individual or collective self-defence under Article 51 of the UN Charter; or, alternatively, the more controversial, humanitarian intervention.

Collective self-defence

Article 51 of the Charter provides that:

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

If the US is placing reliance on collective self-defence, one of the first criteria to be satisfied is an 'armed attack …..against a Member of the United Nations'; however grave and serious the attack allegedly committed by the Syrian government was, it cannot be construed as an 'armed attack' against the US, thereby excluding the prospect of justifying military action on the grounds of 'individual self-defence'.

If the action cannot be supported on the basis of 'individual self-defence', can we then place reliance on 'collective self-defence'? Article 51 preserves the right of a State to act (arguably under customary law) in self-defence until such time as the Security Council adopts measures to 'maintain international peace and security'. If reliance is being placed on customary law, US Administration would need to have satisfied itself that the criteria for collective self-defence (set out by the ICJ in the *Nicaragua*[3] case) are met, namely:

(i) Prior declaration by the State concerned that it has been the victim of an armed attack; and

(ii) Request by that victim State for assistance.

Neither has occurred in the present case. The only two recent examples of military action based on collective self-defence are: (i) Kuwait 1990, when the Kuwaiti government in exile sought assistance, following the invasion of Kuwait by Iraq (although this was subsequently authorised by UNSCR 678) and (ii) the military action taken by the US (and its allies) against Afghanistan following the events of 11 September.

Humanitarian Intervention

Intervention in the internal affairs of a State has long been prohibited both under customary international law and the UN Charter. However, there has been some debate as to whether a third state may intervene militarily in a State where there are concerns of serious human rights abuses against its own citizens, for instance, the alleged chemical attack on civilians in Syria.

The doctrine of humanitarian intervention is certainly not free of controversy, particularly when the threat or use of force by a third intervening State is predicated on the prevailing domestic situation of a State, which is protected (even in extremis, such as civil war) under the notion of 'territorial integrity or political independence' in Article 2(4) of the Charter.

At the same time, there is support by many in the international community for the legitimacy of intervention, under customary law, when oppression by a State of its citizens is of such magnitude and gravity that it warrants a military response and it is the only way to '*avert an overwhelming humanitarian catastrophe'*

Examples of military action based on humanitarian intervention include: The 'humanitarian corridors' created in north and south Iraq through 'no fly zones' to protect the Kurdish and Shia communities; and the Kosovo crisis of 1999. In the case of Kosovo, the gravity of the circumstances prompted NATO to conduct a bombing campaign without seeking to secure UN Security Council authorisation and it remains a stark example of support for the doctrine. Indeed, the then UK Secretary of State for Defence, George Robertson, expressed his views in the following terms: '*In international law, in exceptional circumstances and to avoid a humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken*' and that justification was echoed in the House of Commons by the then Prime Minister, Tony Blair.

Although 'humanitarian intervention' has not been accepted as a settled doctrine, it may be said that, by 1999, there was a measure of consensus that it was capable of being invoked as a legal basis for military action. That having been said, it has not subsequently been a catalyst for intervention in other humanitarian catastrophes around the world, including, of course, Syria. Whilst the use of chemical weapons in Syria has not gone unnoticed, or unreported, since at least 2012, it is perhaps been remarkable that acceptance of the doctrine has not resulted in military action, at least until now. Indeed, John Kerry, as US Secretary of State, pointedly chose not to rely on humanitarian intervention in August 2013 when President Obama had determined that there should be a military response (subsequently put on hold) to the use of chemical weapons in Eastern Damascus.

As a note of caution, however, humanitarian intervention should not be looked at in isolation, but

Image: at sea aboard USS Cape St George, 23 March 2003, during Operation Iraqi Freedom. Source: Wikimedia, at https://commons.wikimedia.org/wiki/File:USS_Cape_St._George_(CG_71)_fires_a_tomahawk_missile_in_support_of_OIF.jpg

CONTINUED ON PAGE 10

1 Colonel John Thomas, spokesman for the US Central Command
2 UK Defence Secretary, Michael Fallon

3 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986

Law of armed conflict

US airstrikes in Syria: A short discussion of the possible legal basis (Contd)

must also be viewed within the context of the 'Responsibility to Protect' (R2P), the global political commitment by all members of the UN that was announced at the 2005 World Summit and is intended to prevent international crimes (including ethnic cleansing). Notwithstanding the formal endorsement by Member States there is growing, but not unanimous, support for R2P. Importantly, the 2005 outcome document includes the possibility of military action:

'In this context, we [Member States] are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'

It will be noted that the outcome document is envisaging, under R2P, collective action under a Security Council mandate, rather than a single third State or coalition of States initiating a military response. It is, then, perhaps unsurprising that confusion has sometimes arisen as to the relationship between R2P and humanitarian intervention. For the sake of clarity, it should be had in mind that R2P consists of three 'pillars', only the last of which contemplates the use of force:

'(i) Every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. (ii) The wider international community has the responsibility to encourage/assist individual states in meeting that responsibility. (iii) If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.'

It is the case, then, that R2P may be distinguished from humanitarian intervention as follows:

i. Humanitarian intervention is concerned with a military response and foresees that taking place even in the absence of a Security Council mandate, but R2P is primarily a preventive initiative albeit with the prospect of military action as a last resort and subject to Security Council mandate.
ii. R2P was intended to be an expression of accepted international law, not a new or distinct doctrine. Conversely, humanitarian intervention is generally accepted to be a customary law doctrine that has evolved in relatively recent history.
iii. The focus of R2P is on the international crimes of genocide, war crimes, ethnic cleansing (although not in itself a crime defined under international law) and crimes against humanity. However, humanitarian intervention is not so confined.
iv. The jurisprudential basis for humanitarian intervention is that there is a 'right' to intervene", whereas R2P focuses on a series of 'responsibilities'. (That having been said, however, both R2P and humanitarian intervention carry an acceptance that sovereignty is not, in every circumstance, absolute.)

Finally, a word must be said about the notion of 'reprisal'; in other words, a limited and deliberate violation of international law by the use of military force in order to punish a State for its breach of international law. Given the provisions of Article 2(4) of the UN Charter (see the discussion, above), a reprisal (as opposed to a countermeasure) otherwise than in an armed conflict would be unlawful as it would not fall within one of the exceptional circumstances envisaged by the Charter where force may be used by a State against another State. Whatever the moral argument or imperative, therefore, even the sort of contained or limited strike that the US conducted in response to the chemical weapon attack, would be unlawful if carried out as a reprisal. Indeed, given the protective nature of international humanitarian law, post-1945, even a reprisal in wartime, effected by one belligerent party to force the other to abide by the laws of war, would be tightly constrained as to target and proportionality.

In brief

ICRC warns on breaches of IHL in Colombia

According to a ICRC release dated 24 April 2017, despite the overall improvement in the humanitarian situation in Colombia, in 2016 the organization has recorded 838 alleged violations of international humanitarian law (IHL) and other humanitarian principles that affected more than 18,600 people, including a significant proportion of women and children.

The ICRC noted that the bilateral ceasefire between the government and the FARC-EP brought about a significant reduction of armed confrontations. 'Some areas of the country that used to suffer the effects of continuous clashes now witness a situation that has improved significantly'. However, it also stressed that 'progress in humanitarian concerns needs more speed and concrete actions to respond to the victims. We need sustained political will for those affected by such a long conflict, so they may receive the response and attention they deserve'.

Among other priorities for the ICRC in Colombia, are the clarification of the whereabouts of thousands of people who have disappeared and continue to disappear today due to conflict and violence ; the situation of victims of sexual violence ; and the presence of improvised explosive devices and explosive remnants of war.

In recent months, the UN Mission in Colombia has continued receiving and storing in its containers weapons from FARC-EP combatants. The UN Mission is expected to deliver to the Government of Colombia certificates of the laying down of arms that will allow these members of the FARC to 'initiate the process to legality'. It has encouraged the Government of Colombia and the FARC-EP to conclude the talks started in the framework of the National Commission for Follow-up, Impulse and Verification of the Implementation of Peace Agreements (CSIVI).

POST GRADUATE DEGREE PROGRAMMES

The **IMO International Maritime Law Institute** (IMLI), building on its successful experience in offering annually - for over 27 years - the **IMLI Master of Laws (LL.M.) programme in International Maritime Law**, is pleased to announce the following new degree programmes:

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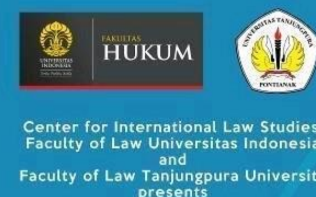

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United Nations **Agenda**

Top upcoming UN meetings

Pierre-Emmanuel Dupont

Paris

Conference on Disarmament, Geneva

The 2nd part of the 2017 session of the Conference on Disarmament (CD) is expected to start on 15 May at UNOG in Geneva. It should last until 30 June 2017. As is regularly deplored, the CD so far has not been able to undertake substantive work on its current agenda, due to absence of consensus on the CD's Programme of Work, despite the efforts and proposals put forward by a number of States towards this end. This persistent lack of consensus reflects divergences among States on the implementation of the multilateral disarmament agenda in the UN disarmament machinery, particularly in fulfilling the commitments on nuclear disarmament as set in the NPT. At the same time, however, nuclear disarmament is possibly regaining momentum since the 1st Committee of the UN General Assembly adopted Resolution L.41 (27 October 2016), which decided to convene in 2017 a "United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination'. Yet the CD has not been chosen as the forum to negotiate this instrument, which is being discussed in the framework of an ad hoc conference, whose first session was held in New York on 27-31 March 2017 in New York. This has led some groups (including the G21) to suggest that the CD was the appropriate forum, some countries, such as India, going as far as to refuse to take part in the discussions in New York, expressing the view that the CD has 'the mandate, the membership and the rules' for this process. The negotiations are set to resume between 15 June and 7 July 2017 in New York.

While little (if any) progress is thus to be expected on the CD agenda, this year's session has been the occasion for some participating delegations to express not only their frustration with the current stalemale, but also interesting views on new challenges related to recent technological developments, such as the prevention of an arms race in outer space, new types of WMDs and radiological weapons. A number of member States of the CD have also referred to some technology-related pressing issues such as ballistic missile defence (BMD), anti-satellite weapons, and autonomous weapon systems. It may be that the work of the conference this year be overshadowed by unfolding events of concern surrounding the security situation on the Korean Peninsula. Last year's session witnessed exchanges of letters by the interested parties, with the Republic of Korea expressing concerns over the launch of ballistic missiles by the DPRK, while the latter advocated replacing 'the Korean Armistice Agreement by a peace treaty'.

The CD was established in 1979 as a result of the first Special Session on Disarmament of the UN General Assembly. It is composed of 65 States and remains the main multilateral forum for negotiations on disarmament. The CD is the successor of the 'Eighteen Nation Committee on Disarmament' (ENDC) and the 'Conference of the Committee on Disarmament' (CCD). The CD and its predecessors have served as the forum for negotiation of some of the most important disarmament agreements, including the Biological and Toxin Weapons Convention (BTWC) opened for signature in 1972, the Chemical Weapons Convention (CWC) in 1993 and the Comprehensive Nuclear-Test-Ban Treaty (CTBT) in 1996. The CD is widely considered as having been dysfunctional and lost much of its credibility since at least twenty years, especially as concerns nuclear disarmament. This stalemate in the multilateral disarmament machinery is seen by some as rooted in political factors, while others countries blame it on structural features such as its restricted membership, obsolete rules of procedure (requiring consensus for all decisions) and contraction in available funding over the years.

International Law Commission, Geneva

The sixty-ninth session of the ILC has started on 1 May and will extend over 10 weeks to 2 June then from 3 July to 4 August 2017. The Commission this year will focus on a limited number of substantive topics, i.e. the immunity of State officials from foreign criminal jurisdiction, provisional application of treaties, protection of the environment in relation to armed conflicts, protection of the atmosphere, crimes against humanity and the issue of *jus cogens*. While the former three topics have been on the agenda of the Commission for some years, the three latter are relatively new, but obviously have not all progressed at the same pace. Thus, "Crimes against humanity" which was only added by the ILC to its current programme of work in 2014, has made significant advances. The Commission has indeed approved so far ten draft articles between its 2015 and 2016 sessions, and the topic now appears to be close to the point where it could be submitted to the General Assembly for it to consider the opportunity to adopt of a new global treaty on crimes against humanity (see Leila Nadya Sadat & Kate Falconer, 'The UN International Law Commission Progresses Towards a New Global Treaty on Crimes Against Humanity', *ASIL Insights* 21/2, 25 January 2017). Be it as it may, the third report of the Special Rapporteur, Sean D. Murphy, has just been made available (Doc. A/CN.4/704). Issues addressed in this report, which builds *inter alia* on the comprehensive debate on the topic within the 6th Committee of the General Assembly last year, include issues concerning extradition of persons believed to have committed crimes against humanity; non-refoulement; mutual legal assistance; the participation and protection of victims, witnesses and others; reparation for victims; the relationship to competent international criminal courts; obligations upon federal States; monitoring mechanisms and dispute settlement. By contrast, the issue of *jus cogens*, examined since 2014, is still at an early, if not preliminary, stage of work, and this year's second report of Dire Tladi, Special Rapporteur (A/CN.4/706), focuses on the criteria for identification of *jus cogens* (the first had addressed the nature and historical evolution of jus cogens). In the next report, in 2018, the Special Rapporteur intends to begin consideration of the effects or consequences of *jus cogens*.

Others (New York, Vienna, Geneva)

In the fields of human rights, the **Committee on the Rights of the Child** will hold its 75th Session from 15 May to 2 June 2017 at the headquarters of OHCHR, Palais Wilson in Geneva. The **Committee on Economic, Social and Cultural Rights** operating under ECOSOC will hold its 61st session (29 May to 23 June) in Geneva. The Committee will *inter alia* examine the reports (submitted in accordance with articles 16 and 17 of the Covenant) of Australia, Uruguay, the Netherlands, Liechtenstein, Sri Lanka and Pakistan. The **Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the impact of the activities of private military and security companies on the enjoyment of human rights** will convene for its 6th session (22-26 May) in Geneva.

Some important arms control-related meetings will take place in coming weeks in Vienna, including the 48th session of the **CTBTO Preparatory Commission** (22-23 June) and a closed meeting for the 16th regular session for participants to the **Hague Code of Conduct against Ballistic Missile Proliferation**, under the auspices of the Austrian government (6-7 June).

Vienna will also host the 60th session of the **Committee on the Peaceful Uses of Outer Space**, under the auspices of the UN Office for Outer Space Affairs (OOSA) from 7 to 16 June. The Committee was established by the General Assembly in 1962, and its current programme of work covers matters such as safe operations in orbit, space debris, space weather, the threat from asteroids, the safe use of nuclear power in outer space, climate change, water management, global navigation satellite systems, and questions concerning space law and national space legislation. The session will be preceded by a Briefing to Permanent Missions on the work of the Committee (18 May).

The 18th meeting of the **Open-ended Informal Consultative Process on Oceans and the Law of the Sea** will take place in New York (15-19 May). By Resolution 71/257, the General Assembly decided that this meeting would focus its discussions on the theme "The effects of climate change on oceans". The topic will be considered by a discussion panel, the format and outline of which have been made available as Doc. A/AC.259/L.18. It is to be noted that a significant number of contributions from UN agencies, programmes and bodies, as well as other intergovernmental organizations, on the issue of climate change and its effects on the oceans, have already been made public and are available on the website of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations.

We welcome information on any upcoming PIL-related meetings and conferences. Please contact us at contact@piladvisorygroup.org

The New Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC): A Brief Overview

Martin Polaine, CIArb

London

Following a public consultation on the draft, the Singapore International Arbitration Centre (SIAC) released its Investment Arbitration Rules (IARs) at the end of December 2016. They became effective on 1st January 2017 and represent an innovative initiative to attract investment arbitration business to an institution that has gained a strong reputation as both a preferred arbitral institution and a proactive proponent of international arbitration as a means of dispute resolution.

The IARs combine aspects of commercial arbitration with features familiar to those versed in ICSID arbitration and, in so doing, attempt to address the recurring difficulties of, inter alia, achieving a cost-effective and efficient process, implementing a summary mechanism for disposing of claims that are without merit, creating a transparent procedure (including third party intervention) and recognising and accommodating third party funding. At the same time, investment arbitration, as envisaged under the IARs, is not subject to the ICSID requirement of being a dispute arising directly out of an investment and will only be subject to such jurisdictional constraints as might be contained within the underlying contract or applicable instrument (i.e. an investment treaty).

It is perhaps apt to describe the IARs, as some have, as an investment/commercial arbitration hybrid and it is noticeable that one of the ‘selling points’ to parties is the use of SIAC commercial arbitration mechanisms to expedite the resolution of a dispute. It is, after all, typically the case that an ICSID arbitration will take in the order of 4 years to reach final award, whereas those going to commercial arbitration in Singapore might reasonably expect to reach that some stage in about 12 months.

The principal mechanisms aimed at timeliness and efficiency are:

- The imposition of strict time limits on the appointment of arbitrators, thus removing an obvious delaying ploy. (See IARs 6.2, 7.2 & 9)
- The compilation by the SIAC of a list of potential arbitrators, taking into account the parties’ views and the circumstances of the case. (See IAR 8)
- The presiding arbitrator may make procedural rulings alone (subject to revision by the tribunal), unless the parties have agreed otherwise. (See IAR 16.5)
- The requirement that the submission of written statements be by way of memorial/counter-memorial, rather than by pleadings, thus providing for the statement of facts, legal argument, witness statements and expert reports to be submitted at the same time (IAR 17.2)
- The ability of the tribunal to appoint an expert, unless the parties have agreed otherwise. (See IAR 23.1)
- The availability of a procedure for early (summary) dismissal of a claim/defence, on one of the following grounds: being manifestly without merit, being manifestly outside the jurisdiction of the tribunal, or being manifestly inadmissible. (See IAR 26)

In addition, and although not in itself an efficiency provision, it should be noted that an express sovereign immunity waiver clause will find favour with investors; unsurprisingly, however, the waiver does not extend to immunity from execution.

As for the IARs generally, many will probably conclude that they represent a concerted effort to create a practical and workable framework. In so doing, they have managed to address head-on many of those issues that remain current topics of debate. In particular, and complementing Singapore’s legislative amendment (passed in January 2017) to its Civil Law Act to allow for third party funding, the IARs specifically give the tribunal power to order disclosure of the existence of third party funding and/or the identity of such funder (IAR 24(l)) and to take account of third party funding when apportioning costs (IAR 33.1).

Additionally, and with lessons from commercial arbitration clearly in mind, the IARs provide for engagement of an emergency arbitrator and the granting of interim and emergency interim relief prior to the constitution of the tribunal (IAR 27); the application of the competence-competence principle (IAR 25); and confidentiality of both proceedings and award, subject to the parties agreeing otherwise (IAR 37).

Conversely, the IARs have also addressed a consideration that looms increasingly large in investment arbitration: the locus of a third party to make submissions. It is, after all, the case that wider issues of public international law over and above international investment law, such as international human rights or environmental law, may arise, or that matters of social or cultural impact have a direct bearing on one or more aspects of the dispute. With all this in mind, IAR 29 contains detailed provisions that allow for (i) a non-disputing contracting party to make written submissions as to treaty interpretation, and (ii) subject to leave being given, either a non-disputing contracting party or a non-disputing party to make written submissions as to any matter within the scope of the dispute (with the prospect of an elaboration/examination hearing thereafter). IAR 29 (at 29.8) also provides for a carefully delineated framework allowing access to material for such parties.

Time will tell whether SIAC becomes an investment arbitration hub. Given that it has shown itself to be both effective and efficient in international commercial arbitration and adept at addressing contemporary issues of public international law, it might well be the case that investment treaties and agreements specifically refer to the SIAC’s IARs. In the meantime, we wait to find out whether parties in state-investor disputes will agree between themselves that the practical advantages of the IARs hold more attraction than the self-contained ‘de-localised’ ICSID framework.

The Mauritius Convention on transparency in ISDS to come into force

InternationalLawGazette Editorial Team

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention"), adopted in June 2014, is due to enter into force on 18 October 2017, following its ratification by Switzerland. The Convention had already been ratified by Mauritius (5 June 2015) and Canada (December 2016). During the signing ceremony held at Port Louis, Mauritius on 17 March 2015, eight States (Canada, Finland, France, Germany, Mauritius, Sweden, the United Kingdom and the United States) signed the Mauritius Convention on Transparency. Since then, the Convention has been signed by a further ten States: Belgium, Congo, Gabon, Italy, Luxembourg, Madagascar, the Netherlands, Iraq, Switzerland and Syria. The Mauritius Convention aims at addressing concerns related to the opacity in the conduct of investor-State dispute settlement (ISDS) proceedings, by extending the scope of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration to investment treaties concluded before the Rules entered into force (1 April 2014). The Rules on Transparency provide procedural rules that ensure transparency and public accessibility to treaty-based investor-State arbitration, taking into account both the public interest in such arbitrations and the interest of the parties to resolve disputes in a fair and efficient manner.

In a recent research report published in Geneva, Gabrielle Kaufmann-Kohler and Michele Potestà have suggested that the Mauritius Convention could serve as a model for a broader reform of the ISDS framework (*Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?* Geneva Center for International Dispute Settlement, June 2016).

Recent ICSID cases

Diana Moise

London

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19) Decision on Annulment (5 May 2017)

The Annulment Committee, composed of Prof. Dr. Klaus Sachs, Mr. Rodrigo Oreamuno and Sir Trevor Carmichael, rejected Argentina's application for annulment of the Award dated 9 April 2015, together with the associated Decisions on Jurisdiction and Liability. The Tribunal had found that Argentina had breached the fair and equitable treatment standard for interference with a water concession granted during Argentina's privatisation program. Argentina had then argued that the measures it took amounted to necessity due to the severe economic crisis, and that the Tribunal should consider the State's human rights obligation to grant access to water. The Tribunal granted a USD 400 million award to the investors.

Argentina sought to annul the Award and Decisions under four grounds. First, Argentina argued that the Tribunal was not properly constituted as Prof. Kaufmann-Kohler was appointed as director of UBS, a bank that held shares and interests in the investors. Also, the Tribunal has manifestly exceeded its powers by applying the MFN clause to the Argentina-Spain BIT, enabling the Claimant to circumvent the domestic remedies requirement, which also constituted a serious departure from a fundamental rule of procedure. Furthermore, the Tribunal failed to state the reasons on which it based its decision, failed to state the legal standards, and to consider Argentina's evidence on necessity. Finally, Argentina contested the Tribunal's valuation of damages.

The Committee rejected all four of Argentina's claims, considering that the Tribunal's decision not to disqualify Prof. Kaufmann-Kohler was not unreasonable so that it would meet the threshold for a ground of annulment. Regarding manifest excess of powers, which it considered that it needed to be an obvious, evident and substantially serious act that is result determinative, the Committee considered that Argentina failed to meet the threshold. Considering the Tribunal's reliance on the ILC Articles on Responsibility of State when determining necessity, and its analysis of the "only way" and "non-contribution" requirements on the basis of evidence on which it exercised a legal assessment beyond re-evaluation of the Committee or any experts, the Committee rejected Argentina's arguments. Lastly, the Committee rejected Argentina's arguments on valuation, as it failed to show that the Tribunal committed an annullable error.

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB 12/20) Award (26 April 2017)

The Tribunal, composed of Mr. Christer Söderlund, Prof. George Bermann and Ms Loretta Malintoppi, declined jurisdiction under the Barbados-Venezuela BIT in relation to an alleged expropriation of the investors' tourism and hospitality business. The Tribunal ordered the Claimants to pay USD 1.7 million in legal costs and expenses.

First, Venezuela argued that it was not a party to the ICSID Convention at the time when the claim was filed, as it had denounced the Convention on 24 January 2012. The offer contained in the BIT can no longer be considered an expression of consent. Also, the six months period of effet utile, provided for in Article 71 of the ICSID Convention, refers to other obligations incumbent on States and is not an extension of the consent to arbitrate. The investors claimed that Venezuela's denunciation of the ICSID Convention did not take effect until after the expiration of the six months period, and thus the consent is valid as the request for arbitration was filed on 25 June 2012. Also, Venezuela's consent under the BIT cannot be withdrawn unilaterally. The Tribunal found that the denunciation of the Convention takes place after the six months period, and that the agreement to arbitrate formed before the expiration of this period.

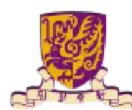
Further, Venezuela argued that the Blue Bank is owned by Qatar Trust, which has no legal personality. In any case, the real investors are Venezuelan nationals, and Qatar Trust was established following restructuring in order to seek protection of the BIT. Lastly, Venezuela argued that even if Blue Bank indirectly controls the investment in Venezuela, indirect investments are not covered by the BIT. The investors argued that there is no basis in the BIT or in the Convention to look beyond the place of incorporation in order to determine the nationality of the investor. The Tribunal agreed with the investors with respect to nationality considering that Blue Bank is the legal owner of Qatar Trust, as a trustee, and moved on to the central question of whether there is an investment. However, the Tribunal considered that Blue Bank, as a trustee, does not have legal ownership of the assets of Qatar Trust. Also, Qatar Trust is a customary beneficiary trust created for the benefit of a particular person, but Blue Bank did not act with the independence associated with such a trust.

In conclusion, the Tribunal considered that the claimant lacks standing due to the lack of assets invested in the host State.

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36) Award (4 May 2017) - available in Spanish

The Tribunal, composed of Prof. John Crook, Dr. Stanimir Alexandrov and Prof. Campbell McLachlan, ruled that Spain was in breach of the fair and equitable treatment standard under the Energy Charter Treaty (ECT) following reforms in the renewable energy industry. The Tribunal awarded USD 140 million in damages in favour of the investors. The Award comes after Spain's success in the Energy Charter Treaty arbitration in Charanne I v Spain, an SCC award dated 21 January 2016 relating to the same reforms affecting the solar power sector. However, the Eiser case referred to a further measure taken by the Spanish Government in relation to electricity tariff deficit, which the Charanne case does not address. In its Award, the Tribunal frequently referred to Charanne and carved out distinctions.

The Tribunal rejected Spain's challenges on jurisdiction in relation to intra-EU claims within the ECT, together with the arguments that the case does not regard an investment in the objective meaning of the ECT Article 1(6) and Article 25 of the ICSID Convention, that shareholders cannot bring claims under the ECT, and that the ECT does not cover claims in relation to taxation measures, among other. Based on the drastic measures adopted by Spain in 2013 and 2014, the Government adopted regulations that eliminated the financial bases of the investments, substantially reducing the profit expected. The new system had not been tested before and it was based on hypothetical targets in evaluating the efficiency of a power plant. Furthermore, Spain did not provide any explanation for changing its policy between 2007 and 2013. Thus, the Tribunal found that Spain violated Article 10 of the ECT on fair and equitable treatment.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Centre for Financial Regulation and Economic Development, Faculty of Law, CUHK
Asian Development Bank
World Economic Forum

10 May 2017, Wednesday, 5:00-6:45p.m.
The Warren Chan Moot Court, CUHK Graduate Law Centre, 2/F Bank of America Tower, 12 Harcourt Road, Central

Agenda

PIL Events

Selected PIL events this summmer

InternationalLawGazette Editorial Team

This page features certain upcoming meetings, seminars and conferences of interest to public international lawyers.

Arbitration Academy (Paris)

3-21 July 2017

The 2017 Session of the Arbitration Academy will be focusing on investment arbitration. It will feature *inter alia* a general course on 'Investment Arbitration: General Principles', by Gary Born, and specialized workshops on ICSID Arbitration Practice (Aurelia Antonietti, Senior Legal Adviser, ICSID) and PCA Arbitration Practice (Brooks W. Daly, Deputy Secretary-General and Principal Legal Counsel, PCA). The applications are now closed. Fore more information see **www.arbitrationacademy.org**.

Paris, Place Vendôme. (Wikimedia Commons)

Summer School on International Humanitarian Law (The Hague)

9-15 July 2017

The Kalshoven-Gieskes Forum on IHL will host the 2nd annual IHL Summer School: "International Humanitarian Law in Theory and Practice". The course is designed by Dr. Robert Heinsch, in cooperation with the colleagues from the Grotius Centre for International Legal Studies (Leiden) and in close cooperation with the Netherlands Red Cross. This programme, which brings together students and professionals from a wide range of backgrounds, experience and perspectives, aims to give a broad overview of the laws of armed conflict, and offers a range of opportunities to test the acquisition of knowledge through interactive exercises. For more information on the programme and how to apply for the IHL Summer School 2017, please visit the Leiden University website at **www.summerschool.universiteitleiden.nl/courses/international-humanitarian-law-in-theory-and-practice**.

Last year, the first annual IHL Summer School brought together a number of IHL experts, including Judge Christopher Greenwood (ICJ) and the Head of the Legal Section of the International Committee of the Red Cross, Dr. Knut Dörmann, who gave the 28 participants from 20 countries insights into the theory and practice of international humanitarian law. The IHL Summer School 2016 included visits to the archives and the tracing unit of the Netherlands Red Cross and the International Criminal Tribunal for the Former Yugoslavia as well as a simulation of applying IHL rules in practice.

European Union and the Law of the Sea (EULoS) Summer School 2017 (Genoa)

28 August-8 September 2017

The EULoS summer school, to be held this year in Genoa, Italy, from 28 August to 8 September 2017, aims to attract doctoral and postdoctoral students, as well as researchers and young professionals not only in law, political science and international and European studies, but also from other sea-related sectors, such as maritime economics and marine science, to reflect on the impact of EU law on the law of the sea. The EULoS programme is directed by prof. Lorenzo Schiano di Pepe (Università degli Studi di Genova).

Among the (confirmed) speakers this year will be the Head of the Legal Office and Deputy Registrar-elect of the International Tribunal for the Law of the Sea and personnel from the Italian Coast Guard and from the Italian Navy's Hydrographic Institute, in addition to practitioners and academics from various European Universities. More information at www.eu-los.eu.

The 3rd London International Boundary Conference

5-6 June 2017

The 3rd London International Boundary Conference, convened by King's College London (Department of Geography) and Volterra Fietta, will take place on 5-6 June 2017 at King's (Strand campus). The speakers will examine recent developments in 'hotspots' around the world, and discuss new and emerging ideas for the resolution and management of territorial issues from legal, geopolitical, technical, commercial and other viewpoints. The conference will examine how these issues affect such issues as: energy transportation; hydrocarbon and mineral exploration and extraction; migration; indigenous peoples; inter-State boundary and sovereignty disputes. Panel topics for LIBC 2017 include: Brexit, Falkland/ Malvinas, Gibraltar and the future; Oil concessions and territorial definition; Fences, borders and mobility; Whatever happened to our borderless world/The state of borders in 2017; Hydrocarbons and boundaries; Indigenous peoples and boundaries; Transboundary pipelines; Borderlands and borderscapes. In addition, two workshops offering practical training in the technical aspects of maritime boundary delimitation and on submissions to the UN Commission on the Limits of the Continental Shelf will take place on the mornings of 6 and 7 June. More information at **www.londoninternationalboundary conference.com**.

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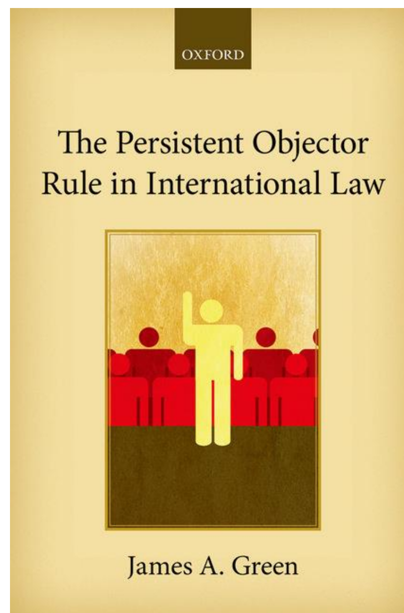
New Books and Journals

Publications

Recent works on international custom

InternationalLawGazette Editorial Team

The book by Professor James A. Green, *The Persistent Objector Rule in International Law* (Oxford UP 2017) explores an important aspect of international law i.e. the controversial, yet used in practice, rule according to which a State which objects to a rule of customary international law while it is in a formative stage, and which persistently maintains its objection, is not bound by the new rule. The ILC Special Rapporteur on 'Identification of customary international law', Sir Michael Wood, describes in the preface the rule, in the eyes of States having recourse to it, as 'a safety valve within the customary international law process'. The author addresses the origins of the concept and its use both in State practice and the case law, before and after 1945. The heart of the work lies in the comprehensive analysis of the criteria of application of the rule (objection, persistence, consistency, and timeliness), as well as in valuable developments on the relationship between the persistent objector rule and peremptory norms of international law (*jus cogens*). Professor Green, who was initially skeptical about the very existence of the rule, has come to the conclusion that the rule, while often misunderstood, is of enduring value and benefits, not only to objecting States, but



also to the international community, as it has the potential to 'reduce the costs that state opposition to an emerging norm would entail for the wider international legal system'.

In relation to customary law more generally, the publication of *Custom's Future: International Law in a Changing World* (Cambridge UP 2016) is also to be mentioned. The book is edited by Curtis A. Bradley (Duke University) and offers contributions such as 'Customary international law as a dynamic process' (Brian D. Lepard), 'Custom, jus cogens, and human rights' (John Tasioulas), 'The growing obsolescence of customary international law' (Joel P. Trachtman), 'The strange vitality of custom in the international protection of contracts, property, and commerce' (C. L. Lim), 'The decline of customary international law as a source of international criminal law' (Larissa van den Herik), 'Customary international law and public goods' (Niels Petersen), 'Reinvigorating customary international law' (Andrew T. Guzman & Jerome Hsiang), 'The evolution of codification: a principal-agent theory of the International Law Commission's influence' (Laurence R. Helfer & Timothy Meyer), 'Custom and informal international lawmaking' (Jan Wouters & Linda Hamid), *inter alia*.

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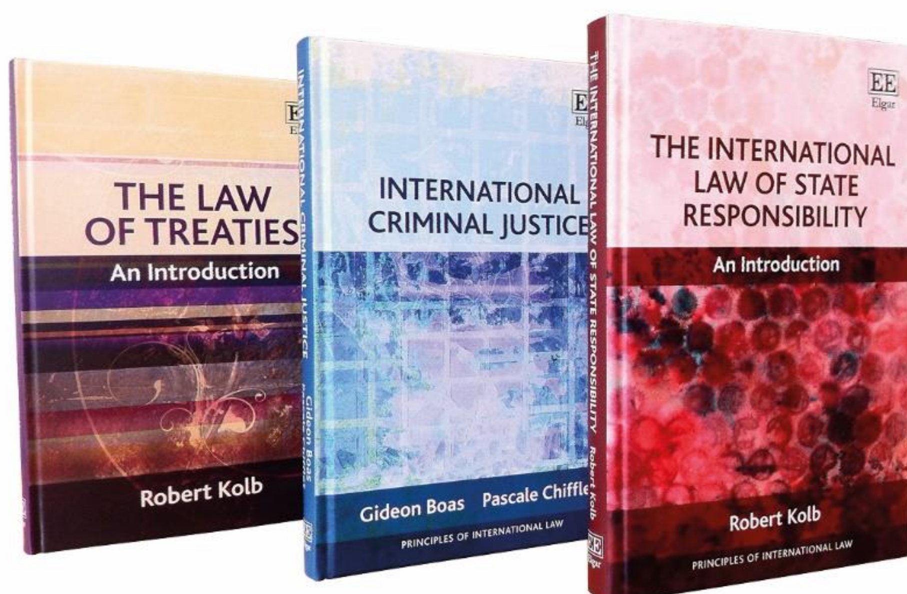

The Law of Treaties
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Robert Kolb, University of Geneva, Switzerland
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2017 Paperback 978 1 78536 016 9 £22.50

International Criminal Justice
Gideon Boas and Pascale Chifflet,
La Trobe University, Australia
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People

Publication

A tribute to professor Djamchid Momtaz

Djamchid Momtaz at the BBNJ PrepCom3, New York, 30 March 2017. Photo by IISD/Francis Dejon (enb.iisd.org/oceans/bbnj/prepcom3/30mar.html)

InternationalLawGazette Editorial Team

In few days, on 18 May 2017, on the occasion of his 75th birthday, professor Djamshid Momtaz will be handed over in Paris the first copy (a special edition) of the volume of essays in his honour, entitled *The International Legal Order: Current Needs and Possible Responses* (Brill/Nijhoff, 2017), co-edited by Judge Crawford (International Court of Justice), Judge Koroma (World Bank Administrative Tribunal), Professor Mahmoudi (Stockholm University) and Professor Pellet (Professor Emeritus at Université Paris Nanterre).

Djamchid Momtaz was born in 1942 in Izmir, Turkey, to a family of diplomats. As the co-editors of the volume recall in the preface, *'[h]is father and his grandfather served as Iran's ambassadors en consular agents to several countries including Russia, France, Turkey and Egypt. His grandfather was a member of the Iranian delegation to the Hague Conferences in 1899 and 1907. Ths influenced Djamchid Momtaz in later years to choose international law as his academic major and career*'. He studied at the Faculty of Law and Economics of the University of Paris where he earned a degree in public law (1966). Then he graduated from the Institut d'Etudes Politiques de Paris (Sciences Po) and received his PhD in public law at the Faculty of Law, Economics and Social Sciences of Panthéon-Assas University (1971). He started his career as Assistant Professor at the University of Paris X-Nanterre, then joined the University of Tehran in 1974 where he served as professor until his retirement in 2010. From 1979 to 1982, he chaired the Center for International Studies of the University of Tehran. During his career, professor Momtaz taught in a number of top level universities around the world, and authored a significant number of publications on various fields of international law, in Persian, French and English. He was called to deliver a course on international humanitarian law applicable to non-international armed conflicts at the Hague Academy of International Law in 2000 (*Recueil des cours [Collected courses] de l'Académie de droit international*, vol. 292, Martinus Nijhoff, 2002), then the general course in public international law entitled 'Ranking of the International Legal Order' (2014), which has unfortunately not yet been published.

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Djamchid Momtaz has been active in the field of international law and international relations for nearly four decades. He served as a legal advisor to the Ministry of Foreign Affairs of the Islamic Republic of Iran for many years. In that capacity, he has often appeared before the 6th Committee of the UN General Assembly, and represented his country in a number of international conferences, including the 1982 UN Law of the sea Convention. It is also noteworthy that, while the main area of specialization of Professor Momtaz has been international humanitarian law, he has also always demontrated a strong interest in the law of the sea. His thesis at Paris II University concerned the legal regime of the seabed and of areas beyond national jurisdiction (*Le Régime juridique du fond des mers et des océans au-delà des limites de la juridiction nationale : Inventaire et solutions possibles*, 1971), and he has remained involved to this day in the very same LOS issues (*inter alia*), lastly as representative of Iran in the Preparatory Committee established by the General Assembly to develop an instrument under the UNCLOS 'on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction'.

As a legal adviser, professor Momtaz was called to address legal aspects of such important international controversises as the *United States Diplomatic and Consular Staff in Tehran* case (1979-80) before the ICJ, the conduct of the Iran-Iraq war (1980-88), and the crisis related to the Iranian nuclear programme (from 2003 to 2015), among others. Professor Momtaz also appeared as counsel of Iran before the ICJ in the *Oil Platforms* case. The co-editors of the volume have expressed the view that in most of these international law issues, *'the wisdom, experience and knowledge of Djamchid Momtaz were of great help to the Iranian Foreign Ministry, which had to tackle the problems professionally, sometimes under the chaotic conditions that so often characterize a post-revolutionary era'*.

Professor Momtaz was elected at the UN International Law Commission in 2000, and served as its chair in 2005. Among other commitments, he is a Fellow of the Institute of International Law (Institut de Droit International), a member of the Permanent Court of Arbitration, of the Curatorium of the Hague Academy of International Law, of the Group of International Advisers of the International Committee of Red Cross (ICRC), and has served in the Commission for the Settlement of Disputes Related to Confidentiality of the Organisation for the Prohibition of Chemical Weapons (OPCW).

J. Crawford, A. G. Koroma, A. Pellet & S. Mahmoudi (eds), *The International Legal Order: Current Needs and Possible Responses [Essays in honour of Djamchid Momtaz]* (Leiden: Martinus Nijhoff, 2017).