



## MODULE 1, LESSON 1

### INTRODUCTION TO PART XI OF UNCLOS AND THE 1994 AGREEMENT

#### LECTURE NOTES

##### Lesson outline:

This lesson aims to give you a general introduction to Part XI of the United Nations Convention on the Law of the Sea and the 1994 Implementation Agreement.

In this lesson, we shall first review the negotiating history of Part XI and the 1994 Implementation Agreement.

In the second part of the lesson, we shall identify the salient features of the regime for deep seabed mining.

And in the third and final part of the lesson we will look briefly at the International Seabed Authority and its role and mandate under Part XI and the 1994 Agreement.

##### Introduction

The Convention, or UNCLOS, is without doubt the most important source of the international law of the sea. It regulates almost every human activity on, in, over or under the sea.

Among its key features are the following:

- It defines the maritime jurisdictions of States and in doing so establishes the rights and duties of States within those zones, including their duties with respect to the conservation and management of marine resources.
- It reinforces for all States, including landlocked States, essential high seas freedoms such as navigation, overflight and the right to lay submarine cables, that are critical to modern life and development.
- It creates an unqualified obligation on States to protect and preserve the marine environment. It is worth noting that this obligation is unqualified and holistic, applicable to all zones of maritime jurisdiction and to all elements of the marine environment, including its biodiversity. It recognizes that it is scientifically and legally unsound to attempt to regulate only one component of the marine environment in only one part of the ocean.
- It defines 'pollution of the marine environment' in the broadest possible terms to prohibit not only pollution from human activities in the ocean, but equally the introduction of pollution from land-based and atmospheric activities, including plastics and anthropogenic CO<sub>2</sub> emissions, which are the cause of the main problems of the ocean today.
- It provides a comprehensive system for the peaceful settlement of disputes.
- It sets out a legal framework within which detailed norms may be developed to regulate the various uses of the seas and oceans.

However, its broad aims are even more ambitious, and this has led to its being described as the 'constitution for the ocean'.

According to its Preamble, UNCLOS aims at settling "all issues relating to the law of the sea" and establishing "a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment."

The Preamble goes on to state that achieving these goals will "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked."

In total, UNCLOS contains 320 articles, arranged into 17 parts, and supplemented by nine annexes. It is a mixture of codification and progressive development of the law of the sea.

In this lecture, we will look at just one part of UNCLOS, Part XI, which sets out the regime for the Area and provides the legal framework governing activities in the Area.

Part XI does not stand by itself. It must be read together with Annex III of UNCLOS, which contains the 'Basic Conditions of Prospecting, Exploration and Exploitation' with respect to the resources of the Area, and with Annex IV, which contains the Statute of the Enterprise, the operational arm of the International Seabed Authority, which may carry out activities in the Area.

Other related provisions of UNCLOS are also important, namely: Preamble, articles 1, 82(4), 84(2), 209, 256, 273, 286(3), 287(2), 305, 308(3), (4), and (5), 311(6), 314, 316(5), and 319(2)(a), (b), and (3).

Relevant provisions also appear in the Final Act of UNCLOS III, specifically in resolution I, on the 'Establishment of the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea' and resolution II, 'Governing Preparatory Investment in Pioneer Activities relating to Polymetallic Nodules.' These contained interim arrangements pending entry into force of UNCLOS but are important elements of the overall package and still influence some aspects of the regime today.

Also related to the seabed mining regime under Part XI are the provisions of Annex VI and in particular articles 14, and 35 to 40 concerning the establishment and composition of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.

### **Negotiating history of Part XI and the 1994 Agreement**

The negotiating history of Part XI and the 1994 Implementation Agreement lasted almost 30 years.

In the mid-1960s, predictions of untold wealth from polymetallic nodules on the deep ocean floor, combined with a notorious 1967 speech in the United Nations by the Maltese Ambassador Arvid Pardo provoked an extensive debate within the international community. This led the UN General Assembly, in 1969, to declare a "moratorium" on deep-sea mining until international rules were in place, although this was rejected by several industrialized countries and had little practical impact.

In 1970, the General Assembly adopted the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, which, among other things, declared the deep seabed and its resources to be “the common heritage of mankind” and called for the establishment of an international machinery to manage and exploit these resources.

The desire to create an international deep seabed mining regime, embodying the “common heritage of mankind”, was a main catalyst for UNCLOS III which took place from 1973 to 1982.

The negotiation of Part XI in the First Committee of UNCLOS III was a central part of the negotiations at the Conference and Part XI, with 58 articles, was eventually to become the longest part of UNCLOS. Unfortunately, the discussions were an ideological battleground, with profound disagreement over the existing international law on deep seabed mining.

For a few industrialized States deep seabed mining was a freedom of the high seas, not to be circumscribed by international rules. Others strongly disagreed, including the Group of 77, which sought to use the negotiations to advance its own interpretation of the Declaration of Principles. There was little, if any, middle ground between the two positions. Furthermore, until the latter stages of UNCLOS III there was little connection between the work of the First Committee and the work of the rest of the Conference, which addressed more traditional law of the sea issues and dispute settlement.

The result was unsatisfactory. The text of Part XI became so convoluted and detailed that it became unworkable. Matters came to a head in 1981 when the new U.S. administration put forward last-minute amendments to Part XI that were unacceptable to the Group of 77 and many other participants. Whilst UNCLOS was eventually adopted by a recorded vote in 1982, the United States and three other States voted against, and 17 industrialized countries abstained.

UNCLOS required 60 ratifications to enter into force. As the number of ratifications grew between 1982 and 1991, it became apparent that none of the industrialized countries would be prepared to ratify if Part XI remained in place as originally drafted. This would threaten the integrity of the Convention as a whole and so it became urgent to find a way to address the concerns of the industrialized countries prior to the expected date of entry into force of UNCLOS.

In 1990, the Secretary-General of the United Nations launched a series of informal consultations, led by Satya Nandan of Fiji, aimed at opening a dialogue between key industrialized States and the developing countries on the outstanding differences with respect to Part XI and with a view to ensuring universal participation in UNCLOS.

These negotiations initially took place between a small group of interested States, but from 1992 were opened to all delegations. By 1993 it was generally agreed that the stage had been reached that a text could be prepared in a form that could be a basis for negotiation.

In its final shape, that text took the form of a draft resolution to be adopted by the General Assembly with the Implementation Agreement annexed to the draft resolution.

The Implementation Agreement aimed to eliminate the more unrealistic provisions that had been developed at UNCLOS III. The changes were radical: greatly reduced costs for States Parties; postponement of the establishment of the Enterprise, and enhanced provision for joint ventures with the Enterprise; new decision-making procedures to safeguard special interests; omitting the provision

for a review conference; omitting provisions for mandatory transfer of technology; omitting production limitations; and postponing the elaboration of financial terms for deep seabed mining to a later date, based on comparable terms for land-based mining.

General Assembly resolution 248/263 was adopted on 28 July 1994. UNCLOS entered into force on 16 November 1994.

Since the primary objective of the 1994 Agreement was to create a single regime for deep seabed mining under UNCLOS, it contains innovative provisions designed to avoid a duality of regimes.

Any instrument of ratification or accession to UNCLOS following the adoption of the Agreement shall also represent consent to be bound by the Agreement. Furthermore, no State may establish its consent to be bound by the 1994 Agreement unless it has previously established or establishes at the same time its consent to be bound by UNCLOS.

A basic provision of the Implementation Agreement states that the provisions of the Agreement and Part XI 'shall be interpreted and applied together as a single instrument;' and that 'in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement shall prevail'. This is repeated in the rules and regulations adopted by the Authority.

By now, most, but not all, States Parties to UNCLOS are also Parties to the 1994 Implementation Agreement. A small number have not yet become Party to the Agreement, but in practice these non-parties participate in the work of the Authority on the same basis as all other members.

Having reviewed the negotiating history of Part XI and the 1994 Agreement, we will now look at the key features of the regime for deep seabed mining.

### **The legal regime for deep seabed mining**

Part XI applies to the Area. The Area is defined in Article 1(1) of UNCLOS as 'the seabed and ocean floor and subsoil thereof, beyond national jurisdiction'. The regime for the Area is applicable, therefore, to the seabed beyond the outer limits of the continental shelf established under Article 76 and Annex II of UNCLOS. While this part of the seabed was, like the waters above it, subject to the regime of the high seas, the Area is now subject to the provisions of Part XI (and Annexes III and IV) of UNCLOS and the 1994 Implementation Agreement. Neither Part XI nor any rights granted or exercised pursuant thereto affect the legal status of the superjacent waters or the air space above these waters.

The Area and its resources are considered the common heritage of mankind. The problem of how to redact this grandiose statement in meaningful treaty language lay at the heart of the struggles over Part XI during UNCLOS III.

The substantive content of the concept is spelt out in the provisions of Section 2 of Part XI, where it is provided that 'no State may claim or exercise sovereignty or sovereign rights over any part of the Area of its resources, nor shall any State or national or juridical person appropriate any part thereof', nor shall any such claim, exercise or appropriation be recognized. It is further provided that 'all rights in the resources are vested in mankind as a whole, on whose behalf the Authority shall act'; and, that no state or national or juridical persons shall claim, acquire or exercise rights over minerals from the area, except in accordance with Part XI. The Area shall be used exclusively for peaceful purposes and the conduct of all States in the Area shall be in accordance with the UN Charter and other rules of international law.

Activities in the Area, which are defined as exploration for and exploitation of mineral resources, shall be carried out for the benefit of mankind.

This implies that, except as provided for in UNCLOS or other rules of international law, activities other than exploration for and exploitation of mineral resources taking place in the Area fall under the regime of the freedom of the high seas. They must be conducted with reasonable regard for deep seabed mining activities.

Section 3 of Part XI, headed 'Development of the Resources of the Area', consists of a detailed policy programme to be fulfilled by the Authority; provisions on production policies; and the system of exploration and exploitation. The latter is expanded in more detail in Annex III, which contains quite prescriptive provisions governing contracts for exploration and exploitation of polymetallic nodules.

The system of exploration for and exploitation of deep seabed mineral resources set forth in Part XI of the 1982 UNCLOS and its Annexes III and IV was radically altered by the 1994 Implementation Agreement. Several of the more elaborate provisions of Annex III no longer apply by virtue of the 1994 Agreement, including article 13, on the financial terms of contracts and most of article 10, which dealt with forms of compensation to land-based mineral producers.

To implement this regime, the Authority has adopted an extensive set of rules, regulations and procedures governing activities in the Area and for the protection of the marine environment. These rules, regulations and procedures, together with associated standards and guidelines, will eventually form a comprehensive Mining Code to be administered by the Authority.

So far, regulations have been adopted governing exploration for three different types of mineral resources: polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts.

As of December 2022, the Authority had entered into 30 contracts for exploration (with 22 different sponsoring States). So far, there are no contracts for exploitation and no commercial recovery of minerals is taking place. There are also no unilateral claims to mine sites outside the Part XI regime, which is an important sign of the success of the regime. This slide shows the general location of marine mineral deposits in the Area and the location of the exploration contracts granted by ISA.

### **The International Seabed Authority**

Part XI establishes the International Seabed Authority as 'the organization through which States Parties shall, in accordance with [Part XI and the 1994 Agreement], organize and control activities in the Area, particularly with a view to administering the resources of the Area.' The Authority is an autonomous international organization. It is not a specialized agency of the United Nations.

The Authority has three principal organs: an Assembly, a Council, and a Secretariat (headed by a Secretary-General). In addition, there is the Enterprise, envisaged as an organ which would itself carry out activities in the Area. The role of the Enterprise was significantly affected by the 1994 Implementation Agreement, and I refer you to the lesson on the Enterprise for more information. Other important statutory organs are a Legal and Technical Commission (an organ of the Council) and a Finance Committee.

The powers and functions are 'those expressly conferred' by UNCLOS and the 1994 Agreement; in addition, it has 'such incidental powers, consistent with [UNCLOS], as are implicit in and necessary for

the exercise of those powers and functions with respect to activities in the Area.’ A particular characteristic of the Authority is the very careful balance that is struck between the powers and functions of its various organs. This was so from the outset, in 1982, but is greatly reinforced by the 1994 Implementation Agreement, especially as regards financial matters and decision-making in the Council.

There are also provisions on the financial arrangements of the Authority, its legal status, privileges and immunities, and the settlement of disputes and provision of advisory opinions by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. The Seabed Disputes Chamber has jurisdiction in relation to certain disputes concerning activities in the Area, as well as the power, under certain circumstances, to give advisory opinions at the request of the Council or the Assembly. While not an organ of the Authority, the Chamber ‘is part of the system in which the Authority’s organs operate, but its task within that system is to act as an independent and impartial body’.

Within this framework UNCLOS and the 1994 Agreement assign a specific and exclusive mandate to the Authority to:

- Manage the exploration and exploitation of the Area and its resources,
- Protect the marine environment and its biodiversity including against potential harmful effects of deep-seabed activities
- Promote and encourage marine scientific research in the Area and ensure the dissemination of the results when available
- Ensure that the monetary and non-monetary benefits are shared equitably

I will briefly discuss each of these in turn.

The first responsibility of the Authority is to manage exploration and exploitation activities in the Area.

Primarily, this is done through a system of regulation. Regulations are developed based on consensus, best available scientific evidence and transparency and all activities must be carried out in accordance with these rules, regulations and procedures. This also reflects a critical distinction between the Authority and other international organizations.

The Authority has exclusive regulatory competence.

A critical aspect of this is that all activities must be carried out under a contract with the Authority. Contracts must be sponsored by a State Party to UNCLOS. Contracts are of limited duration – 15 years in the case of exploration – and include stringent requirements for reporting, monitoring, due diligence and environmental protection.

The next part of the mandate of the Authority is to protect the marine environment. This stems from Article 145 of UNCLOS, which requires the Authority to take necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area.

These measures include direct regulation of contractors’ activities, mandatory baseline data collection during exploration, constant monitoring, adoption of environmental standards, and the development of regional environmental management plans, which include protected areas where no mining will take place.

Third, Articles 143 and 144, confer on the Authority a mandate to promote and encourage Marine Scientific Research in the Area and to coordinate the dissemination of the results. States Parties must cooperate through the Authority for this purpose. This is an important aspect of the way in which UNCLOS provides for a complete system of regulation of marine scientific research in the different maritime zones.

Capacity building is a very important part of this mandate and both the Authority and contractors with the Authority have done a great deal to develop specific training and programmes to enable developing States to participate in research programmes undertaken in the Area. The Authority has also committed to specific action to implement the objectives of the United Nations Decade of Ocean Science for Sustainable Development, in the form of an Action Plan for Marine Scientific Research.

Fourth, ISA is required to establish a mechanism that will ensure that all benefits derived from activities in the Area are equitably distributed.

A dedicated presentation will get into the specifics of this very important point. For the time being, let me just point out that benefits may be monetary or non-monetary.

With respect to the distribution of monetary benefits, derived from the royalties from mining, the question to be decided is really whether these would be distributed direct to beneficiaries through some sort of progressive formula or allocated to a global fund.

## **Conclusion**

The activity of the Authority to date may be viewed as falling into three phases: a largely organizational phase from 1994 to 2004; a phase from 2005 to 2015 which saw the expansion of the exploration activities to minerals other than polymetallic nodules; and a phase with increased public and commercial interest in deep seabed mineral exploitation from 2015 to the present. The Authority has also been active in capacity development and in encouraging marine scientific research in the Area.

The Authority has developed the rules, regulations and procedures necessary for a practical and stable legal regime under which deep seabed mining can be carried out with certainty and predictability. The inherently evolutionary design of Part XI and the 1994 Implementation Agreement allowed the Authority to adapt to changing commercial, economic, and scientific realities as well as new developments in international law, particularly in the field of marine environmental law. Fundamentally, we see that the regime is working and is achieving its objectives.