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The Evolving Law Governing EIAs and the Marine Environment

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Organization

- 1. UNCLOS Provisions on Transboundary Pollution**
- 2. 1992 Rio Declaration on Environment & Development**
- 3. Judicial Decisions on EIAs & Duty to Cooperate**
- 4. Development of EIA Obligations for Activities in the Area by 1994 Implementation Agreement and by ISA**
- 5. 2011 Advisory Opinion of ITLOS Seabed Disputes Chamber**
- 6. Proposed New Implementation Agreement and EIAs to protect Biodiversity Beyond National Jurisdiction (BBNJ)**

PART 1

1982 UNCLOS

Provisions on Transboundary Pollution

Importance of UNCLOS

- **1982 United Nations Convention on the Law of the Sea (UNCLOS)**
- **Universally accepted – 167 parties including the EU**
- **Parties must accept Provisions on Environment in Part XII**
- **Provisions of UNCLOS being interpreted in light of developing principles of international environmental law**

UNCLOS definition of “Pollution of the Marine Environment”

- Article 1. **“pollution of the marine environment”** means the introduction by man, directly or indirectly, of substances or energy into the **marine environment**, . . . which results or is likely to result in such deleterious effects as
harm to living resources or marine life,
hazards to human health,
hindrance to marine activities, including fishing and other legitimate uses of the sea
impairment of quality for use of sea water
and reduction of amenities

Article 194. Measures to prevent, reduce and control pollution of marine environment

- Article 194(1) imposes a general obligation on States to take all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities. . .

Obligation re Transboundary Pollution

- Article 194(2) . States shall take all measures necessary to ensure that activities under their jurisdiction and control are so conducted as not to cause **damage by pollution** to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction and control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

Marine Biological Diversity

- **Article 194(5).** The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species or other forms of marine life.

Obligations “to ensure”

- Provisions in UNCLOS establishing a responsibility to ensure set out obligations that States Parties must fulfil by exercising their power over entities under their jurisdiction and control, such as ships flying their flag or companies subject to their national jurisdiction.
- Must be read in light of the reasoning in the 2011 Advisory Opinion on Responsibility of Sponsoring States.
- The Advisory Opinion defines the “responsibility to ensure” as one of “due diligence”.

Part XII on EIAs

Section 4 Monitoring and Environmental Assessment

- Article 204 Monitoring of the Risks or Effects of Pollution
- Article 205 Publication of Reports
- Article 206 Assessment of Potential Effects of Activities

Article 204. Monitoring of the Risks or Effects of Pollution

- 1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.
- 2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Article 205. Publication of Reports

- **States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.**

Article 206. Assessment of Potential Effects of Planned Activities

- When States have reasonable grounds for believing that planned activities under their jurisdiction or control **may** cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

Semi-Enclosed Seas - Cooperation

Article 123. Cooperation of States Bordering Enclosed or Semi-Enclosed Seas

- States bordering an enclosed or semi-enclosed sea **should cooperate** with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
 - (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
 - **(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;**
 - (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
 - (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

PART 2

1992 Rio Declaration on Environment & Development

Principle 2, Rio Declaration

- States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 17, Rio Declaration

- Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 19

- States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

PART 3

Judicial Decisions on EIAs & Duty to Cooperate

ITLOS: Duty to Cooperate

MOX Plant Case

- **MOX Plant Case** (Ireland v. United Kingdom, Provisional Measures, 3 December 2001)
- 82. Considering, however, that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention;

ITLOS: Duty to Cooperate Land Reclamation Case

- **Land Reclamation Case** (Malaysia v. Singapore, Order for Provisional Measures, 2003)

- 92. Considering that, as this Tribunal has stated:

the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention (The MOX Plant Case, Order of 3 December 2001, paragraph 82);

ITLOS: Duty to Cooperate Land Reclamation Case

Land Reclamation Case: Joint Declaration of Judges Ad Hoc Hossain and Oxman

- Our decisions to join in supporting the unanimous Order of the Tribunal are informed by a fundamental principle on which the Convention is built.
- The right of a State to use marine areas and natural resources subject to its sovereignty or jurisdiction is broad but not unlimited.
- It is qualified by the duty to have due regard to the rights of other States and to the protection and preservation of the marine environment.

ITLOS: Duty to Cooperate & EIA Land Reclamation Case

- 95. Considering that an assessment concerning the impact of the land reclamation works on waters under the jurisdiction of Malaysia has not been undertaken by Singapore;
- 96. Considering that it cannot be excluded that, in the particular circumstances of this case, the land reclamation works may have adverse effects on the marine environment;
- 97. Considering that, in the view of the Tribunal, the record of this case shows that there was insufficient cooperation between the parties up to the submission of the Statement of Claim on 4 July 2003;

Rio Principle 19 and Duty to Cooperate

Principle 19.

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith

ICJ and EIA Pulp Mills Case

Pulp Mills Case (Argentina v. Uruguay, Judgment of 20 April 2010)

- the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a **requirement under general international law** to undertake an **environmental impact assessment** where there is a risk that the proposed industrial activity may have a **significant adverse impact in a transboundary context**, in particular, on a shared resource.

PART 4

Development of EIA Obligations for Activities in the Area by 1994 Implementation Agreement and by International Seabed Authority

Common Heritage of Mankind

Article 136. Common Heritage of Mankind

- The Area and its resources are the **common heritage of mankind**.

Article 133. Use of Terms

- For the purposes of this Part:
- (a) "**resources**" means all solid, liquid or gaseous **mineral resources** in situ in the Area at or beneath the seabed, including polymetallic nodules;
- (b) resources, when recovered from the Area, are referred to as "minerals".

UNCLOS Provisions Part XII

Article 209. Pollution from Activities in the Area

- 1. International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.
- 2. Subject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.

UNCLOS Provisions Part XII

Article 215. Enforcement with Respect to Pollution from Activities in the Area

- **Enforcement of international rules, regulations and procedures established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.**

Protection of the Marine Environment in the Area

Article 145. Protection of the Marine Environment

- Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end **the Authority shall adopt appropriate rules, regulations and procedures** for inter alia:
 - (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
 - (b) **the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.**

1994 Implementation Agreement

- **1994 AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982**
 - Adopted in New York, USA on 28 July 1994
 - In effect made substantial amendments to Part XI of 1982 UNCLOS on The Area
 - The Annex to the 1994 Agreement contained the amendments to Part XI

Powers of the Council of the ISA under the 1994 Agreement

- Article 162 (2) (o) (ii)
- (ii) adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto, taking into account the recommendations of the Legal and Technical Commission or other subordinate organ concerned. These **rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area** and the financial management and internal administration of the Authority.

1994 Implementation Agreement, Annex, paragraphs 7 & 15

- 7. An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies in accordance with the rules, regulations and procedures adopted by the Authority.
- 15. **The Authority** shall elaborate and adopt, in accordance with article 162, paragraph 2 (o) (ii), of the Convention, **rules, regulations and procedures** based on the principles contained in sections 2, 5, 6, 7 and 8 of this Annex, as well as any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploration or exploitation, in accordance with the following subparagraphs

ISA Regulations on Prospecting and Exploration

- **2000 International Seabed Authority Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (approved on 13 July 2000 and amended on 25 July 2013)**

Definitions in ISA Regulations

- (c) “**Marine environment**” includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof;
- (f) “**Serious harm to the marine environment**” means any effect from activities in the Area on the marine environment which represents a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices.

Regulation 5. Protection & preservation of the marine environment during prospecting

- **1. Each prospector** shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from prospecting, as far as reasonably possible, applying a precautionary approach and best environmental practices. In particular, each prospector shall minimize or eliminate:
 - (a) Adverse environmental impacts from prospecting; and
 - (b) Actual or potential conflicts or interference with existing or planned marine scientific research activities, in accordance with the relevant future guidelines in this regard.

Regulation 5. Protection & preservation of the marine environment during prospecting

- 2. Prospectors shall cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the potential impacts of the exploration for and exploitation of polymetallic nodules on the marine environment.
- 3. A prospector shall immediately notify the Secretary-General in writing, using the most effective means, of any incident arising from prospecting which has caused, is causing or poses a threat of serious harm to the marine environment. Upon receipt of such notification the Secretary-General shall act in a manner consistent with regulation 33.

ISA Nodules Regulation 31, para 6,

31. Protection and Preservation of the Marine Environment

6. Contractors, sponsoring States and other interested States or entities shall cooperate with the Authority in the establishment and implementation of programmes for **monitoring and evaluating the impacts of deep seabed mining on the marine environment. When required by the Council, such programmes shall include proposals for areas to be set aside and used exclusively as **impact reference zones** and **preservation reference zones**.**

LTC Recommendations for Guidance of Contractors

- **Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002)**

PART 5

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 141

141. The obligation of the contractor to conduct an **environmental impact assessment** is explicitly set out in section 1, paragraph 7, of the Annex to the 1994 Agreement as follows:

- “An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities ...”.
- The sponsoring State is under a **due diligence obligation** to ensure compliance by the sponsored contractor with this obligation.

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 142

- 142. Regulation 31, paragraph 6, of the **Nodules Regulations** and regulation 33, paragraph 6, of the **Sulphides Regulations** establish a direct obligation of the sponsoring State concerning environmental impact assessment, which can also be read as a relevant factor for meeting the sponsoring State's **due diligence obligation**. . . .
- The sponsoring State is obliged not only to cooperate with the Authority in the establishment and implementation of impact assessments, but also to use appropriate means to ensure that the contractor complies with its obligation to conduct an environmental impact assessment.

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 143

- 143. Contractors and sponsoring States must cooperate with the Authority in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment, particularly through the creation of “**impact reference zones**” and “**preservation reference zones**” (regulation 31, paragraphs 6 and 7, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations).
- A comparison between environmental conditions in the “impact reference zone” and in the “preservation reference zone” makes it possible to assess the impact of activities in the Area.

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 144

- 144. As clarified in paragraph 10 of the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002), certain activities require “**prior environmental impact assessment**, as well as an **environmental monitoring programme**”.
- These activities are listed in paragraph 10 (a) to (c) of the Recommendations.

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, Paras 145-146

- 145. It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.
- 146. As regards the Convention, **article 206** states the following:

...

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 147

- 147. With respect to customary international law, the ICJ, in its Judgment in **Pulp Mills on the River Uruguay**, speaks of:
 - a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an **environmental impact assessment** where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. . . . (Paragraph 204)

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 148

- 148. Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations.
- The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind.
- Thus, in light of the customary rule mentioned by the ICJ, it may be considered that **environmental impact assessments** should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction".

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 149

- 149. It must, however, be observed that, in the view of the ICJ, general international law does not “specify the **scope and content of an environmental impact assessment**” (paragraph 205 of the Judgment in Pulp Mills on the River Uruguay).
- While article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area.

ITLOS Seabed Disputes Chamber 2011 Advisory Opinion, para 150

- 150. In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning **environmental impact assessments** extend beyond the scope of application of specific provisions of the Regulations.

Conclusions

- With respect to the Area, the provisions in 1982 UNCLOS were updated in the 1994 Implementation Agreement in light of the development of international environmental law
- The ISA and its LTC have continued to incorporate modern principles of environmental law into the regulations and guidance to contractors
- The 2011 Advisory Opinion of the Seabed Disputes Chamber further incorporated the principles of international environmental law by declaring that the obligations concerning EIAs extend beyond the scope of the regulations

PART 6

Proposed Implementation Agreement and EIAs to protect BBNJ

Are there gaps in the legal regime?

- ISA governs threats to BBNJ from activities in the Area
- Gap to protect marine biodiversity in seas beyond the 200 nm EEZ - above the extended continental shelf and above the Area
- IMO regulations apply to ships and dumping
- FAO regulations apply to fishing activities
- Submarine cables are not a threat to biodiversity

Possible Gaps?

- **Seabed Activities on the extended continental shelf** that may cause harm to the marine environment or biodiversity in the water column
 - regulation is responsibility of flag State or authorizing State
 - national laws to be no less effective than “global and regional” rules & standards
- **Activities in the water column above the extended continental shelf and the deep seabed** – due diligence obligation on State with jurisdiction and control over its ships and nationals:
 - Marine scientific research
 - Geoengineering
 - Military activities

Bioprospecting in High Seas

- Does the ISA have the authority to regulate bioprospecting for marine genetic resources in the water column above the Area?
- Article 145 of UNCLOS gives the ISA the authority to regulate:

(b) the protection and conservation of the **natural resources of the Area** and the prevention of damage to the **flora and fauna of the marine environment**

Q: could genetic resources in the sea from vents in seabed be regarded as **natural resources of the Area** ?

Q: could the ISA regulate the exploration and exploitation of genetic resources in order to protect the **flora and fauna of the marine environment** ?

The Sargosso Sea Approach

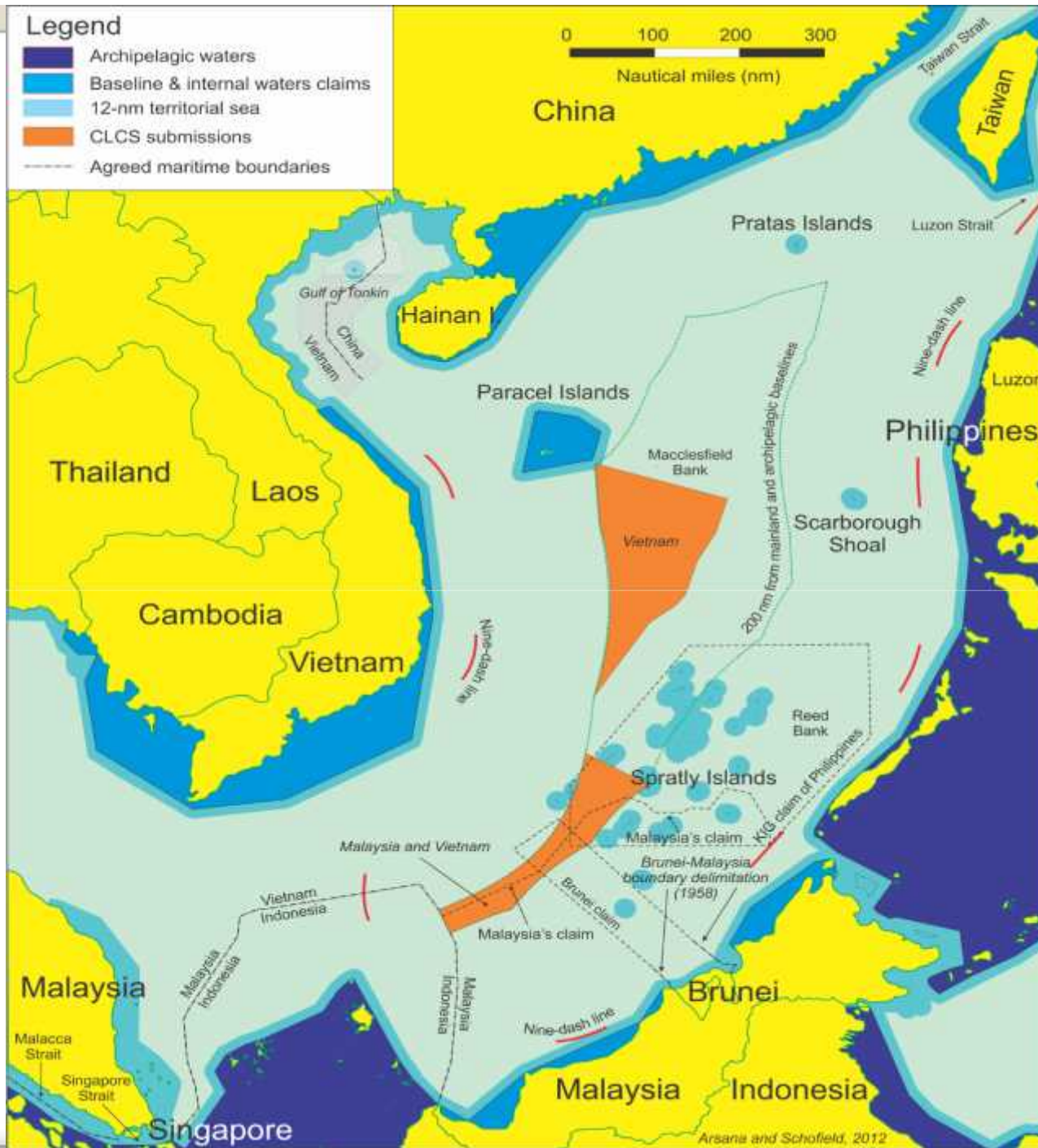
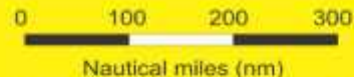
- **Partnership of Governments and non-government actors with a commitment to environmental protection in the Sargosso Sea**
- **Small secretariat in IUCN office in Washington DC**
- **Approach: Identify the most important threats and seek to address them with the relevant existing international or regional sectoral organization**
 - **Fishing – relevant RFMOs**
 - **Shipping – IMO**
 - **Seabed mining - ISA**

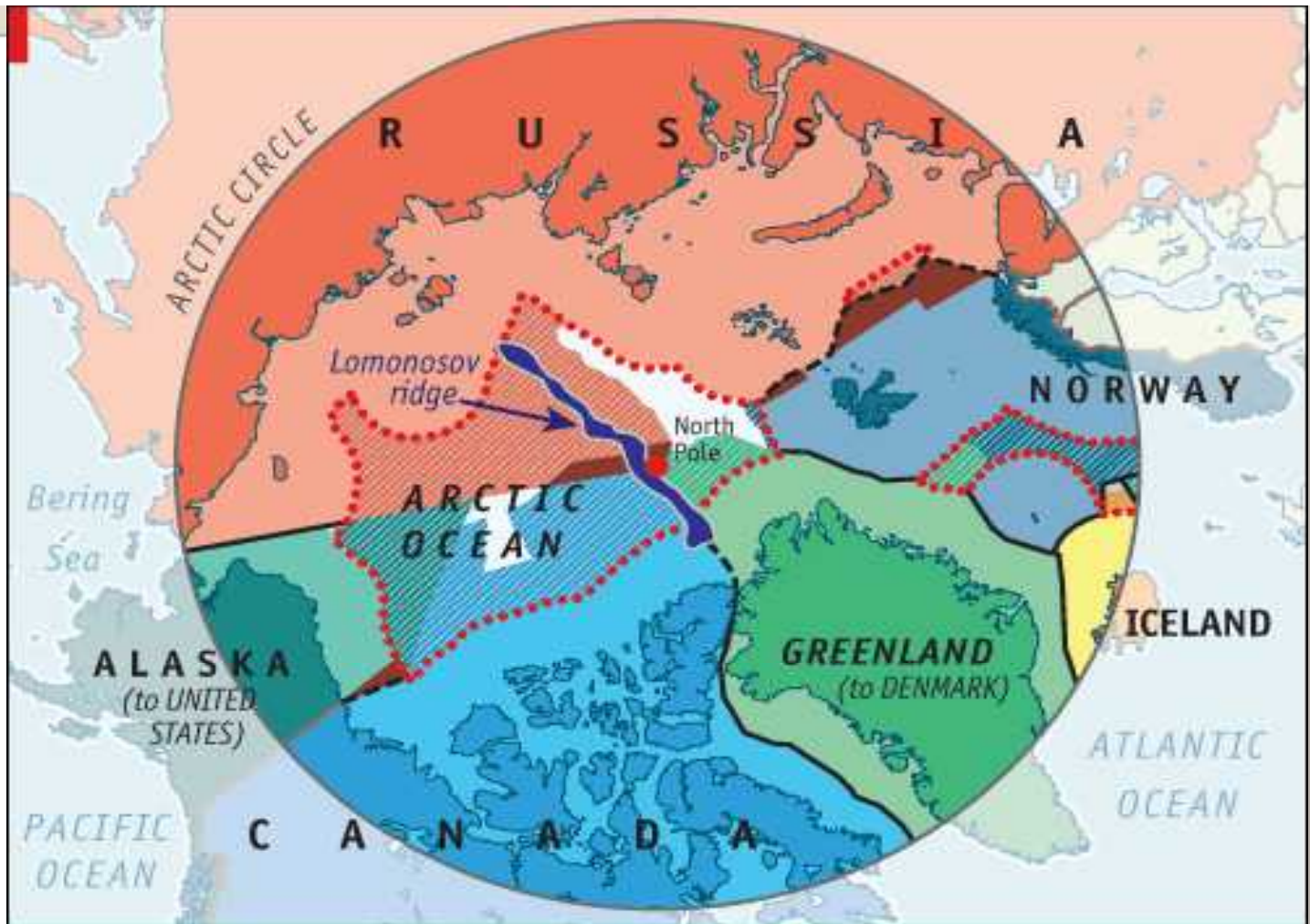
Sargasso Sea



Legend

- Archipelagic waters
- Baseline & internal waters claims
- 12-nm territorial sea
- CLCS submissions
- Agreed maritime boundaries





Territories and claims within the Arctic Circle

	Russia	Norway	Iceland	Denmark	Canada	United States
EEZ*, internal and territorial waters						
Claimed/potential continental shelf						

- Agreed national borders
- Equidistant lines
- 200-nautical-mile limit
- Disputed/potentially disputed areas
- Unclaimed/unclaimable areas

Source: IBRU, Durham University

*Exclusive economic zone

Issues

- Can the issues be addressed on a sectoral level without interfering with the mandates of existing bodies such as the IMO and RFMOs?
- Can this be done without infringing on the rights and freedoms of others in the high seas?
- Can this be done without infringing on the principle that ships on the high seas are subject to the exclusive jurisdiction of the flag State ?

Thanks for your attention

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