The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment: Taking Stock and Prospects

Le Tribunal international du droit de la mer et la protection et la préservation du milieu marin: état des lieux et perspectives d'avenir

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Abstract

This article takes stock of the contribution of the International Tribunal for the Law of the Sea (ITLOS) to the development of international environmental law. It examines in this regard the jurisdiction of the tribunal and provides an overview of its environmental jurisprudence. It then assesses the potential role of ITLOS in relation to some marine environmental challenges ahead. In particular, it considers the possibility of a request for an advisory opinion on climate change, the settlement of disputes regarding deep seabed mining, and the potential role of the tribunal under a new legal instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

Résumé

Cet article fait le point sur les contributions du Tribunal international du droit de la mer (Tribunal) au développement du droit international de l'environnement. Il examine à cet égard la compétence du Tribunal et donne un aperçu de sa jurisprudence environnementale. Il évalue ensuite le rôle potentiel du Tribunal par rapport à certains défis environnementaux marins à venir. En particulier, il envisage la possibilité d'une demande d'avis consultatif sur les changements climatiques, le règlement de différends concernant l'exploitation minière des grands fonds marins, et le rôle potentiel du Tribunal en vertu d'un nouvel instrument juridique portant sur la conservation et l'utilisation durable de la biodiversité marine des zones ne relevant pas de la juridiction nationale.

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Mots-clés: Biodiversité marine des zones ne relevant pas de la juridiction nationale; changement climatique; *Convention des Nations Unies sur le droit de la mer*; droit de la mer; droit international de l'environnement; environnement marin; exploitation minière des grands fonds marins; Tribunal international du droit de la mer.

Introduction

The 2019 United Nations General Assembly's (UNGA) resolution on the oceans and the law of the sea expresses serious concern at the current and projected adverse effects of climate change and ocean acidification on the marine environment and marine biodiversity, emphasizing the urgency of addressing these issues. It further identifies overfishing and pollution as other pressures and adds that sea-level rise and coastal erosion are serious threats for many coastal regions and islands, particularly in developing countries. It reiterates its deep concern at the serious adverse impacts of certain human activities on the marine environment and biodiversity, particularly vulnerable marine ecosystems and their physical and biogenic structure. It observes that climate change continues to increase the vulnerability of coral reefs and mangroves and weakens the ability of reefs to withstand ocean acidification. It further notes with concern that the World Meteorological Organization, in its statement on the state of the global climate in 2018, highlighted that the world also continued to see increasing ocean temperatures, rising sea levels, and concentrations of greenhouse gases, while global sea ice shrinking continues to contract the cryosphere.[1] In light of these concerns, the UNGA calls upon states and international

[1] *Oceans and the Law of the Sea*, GA Res 74/19, UN Doc A/RES/74/19 (20 December 2019) at 4 [GA Res 74/19]; Meeting of States Parties (SPLOS), *Report of the Twenty-Ninth Meeting of States Parties*, Doc SPLOS/29/9 (8 July 2019) at 17-18, paras 97-101. See also O Hoegh-Guldberg et al, eds, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Geneva: Intergovernmental Panel on Climate Change, 2018); International Law Commission, "Sea-level Rise in Relation to International Law," online: <https://legal.un.org/ilc/guide/8_9.shtml>; International Law Commission, "Sea-level Rise in Relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law," UN Doc A/CN.4/740 (28 February 2020), online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/053/91/PDF/N2005391.pdf?OpenElement>; International Law Association (ILA), "International Law and Sea Level Rise" (2018), online: <www.ila-hq.org/index.php/committees>; ILA,

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organizations to urgently take further action to address destructive practices that have adverse impacts on marine biodiversity and ecosystems.[2]

Furthermore, the resolution recognizes the importance of the mandate of the International Seabed Authority (ISA) in ensuring the effective protection of the marine environment from harmful effects that may arise from mining activities in the "Area,"[3] while welcoming the development of the draft exploitation regulations on deep-seabed mining.[4] In this regard, it should be noted that exploitation of minerals in the Area raises concerns for the likely impacts upon the marine environment, habitats, and biodiversity. Moreover, the increase in underwater noise, the use of underwater lights, and induced changes in temperature from deep-sea mining operations are likely to further impact flora and fauna.[5] It has also been emphasized that biological and mineral resources are intrinsically linked in deep-sea ecosystems.[6] The need to protect and to preserve the marine environment and the importance of the *United Nations Convention on the Law of the Sea* (*UNCLOS*) to achieving sustainable development cannot be stressed too emphatically.

UNCLOS in its Part XII establishes important provisions aimed at protecting and preserving the marine environment, which is one of its primary objectives.[7] The convention plays a significant role in ensuring that states have recourse to a compulsory and binding dispute settlement mechanism, hence emphasizing the importance that the International Tribunal for the Law of the Sea (ITLOS or tribunal) could have in the settlement of disputes relating to the protection and preservation of the marine environment.[8]

"Committee on International Law and Sea Level Rise," Resolution 5/2018, online: <www.ila-hq.org/index.php/committees>.

[2] GA Res 74/19, *supra* note 1 at para 262.

[3] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*]. The "Area" is defined as comprising "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (art 1(1)(1)) and its "resources" as "all solid, liquid, or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules" (art 133(a)). The Area together with its resources are the common heritage of mankind (art 136).

[4] GA Res 74/19, *supra* note 1 at paras 63, 65, 68.

[5] Julia Guifang Xue & Xiangxin Xu, "Deep Seabed Mining: Environmental Concerns and Improvement of Regulations" in Keyuan Zou, ed, *Global Commons and the Law of the Sea* (Leiden: Brill Nijhoff, 2018) 168; International Seabed Authority (ISA), *Biodiversity, Species Ranges, and Gene Flow in the Abyssal Pacific Nodule Province: Predicting and Managing the Impacts of Deep Seabed Mining*, ISA Technical Study No 3 (Kingston, Jamaica: ISA, 2018).

[6] United Nations University-IAS, "Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects" (2005) at 31, online: <www.cbd.int/financial/bensharing/g-absseabed.pdf>.

[7] *UNCLOS*, *supra* note 3, preamble.

[8] José Luís Jesus, "OLDEPESCA XX Conference of Ministers" (2009), online: <www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/oldepesca_020909_eng.pdf>.

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On many occasions, ITLOS has reaffirmed and developed the basic principles relating to the protection of the marine environment, including the precautionary approach, duty to cooperate, duty to conduct environmental impact assessments (EIA), and duty of due diligence, thereby contributing to the development of international environmental law.[9]

This article first considers the "environmental" provisions of *UNCLOS*. It then examines the jurisdiction of ITLOS and its "environmental" cases. It finally offers some observations on the prospects for the (potential) future work of the tribunal with respect to environmental challenges, with a focus on climate change, deep seabed mining, and the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

Protection and Preservation of the Marine Environment and *UNCLOS*

Part XII of *UNCLOS* provides the international legal framework governing the protection and preservation of the marine environment. Article 192 places upon all states a general obligation to protect and preserve the marine environment. This obligation is balanced with the sovereign right of states to exploit their natural resources.[10] In particular, *UNCLOS* focuses on pollution of the marine environment. Among others, states are obliged to take all measures necessary to prevent, reduce, and control pollution of the marine environment from any source and to ensure that activities within their jurisdiction and control do not cause damage to other states or their environment.[11] States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.[12] They should cooperate on a global and regional basis in the task of adopting rules and standards,[13] exchange relevant information and data

The International Tribunal for the Law of the Sea (ITLOS) is not the only forum available to states parties to *UNCLOS*. They are free to choose one or more of the following fora for the settlement of disputes under *UNCLOS*: ITLOS, the International Court of Justice (ICJ), an Annex VII arbitral tribunal, or an Annex VIII special arbitral tribunal. If both parties to a dispute have accepted the same procedure for the settlement of the dispute, either of them may submit the dispute to this forum. In the absence of declarations or concurrent choice, the dispute may be submitted only to arbitration (*UNCLOS*, *supra* note 3, art 287). Further, note that the tribunal's jurisdiction is subject to the limitations and exceptions contained in Articles 297 and 298 of *UNCLOS*.

[9] See Tafsir Malick Ndiaye, "The International Courts and Tribunals, the Protection and Preservation of the Marine Environment" (2018) 3 J L & Judicial System 21.

[10] *UNCLOS*, *supra* note 3, art 193.

[11] *Ibid*, art 194(1)–(2).

[12] *Ibid*, art 195.

[13] *Ibid*, art 197.

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acquired about pollution of the marine environment,[14] continue to monitor the risks or effects of pollution,[15] and assess the potential effects of planned activities on the marine environment.[16] On pollution from seabed activities subject to national jurisdiction,[17] from activities in the Area,[18] from dumping,[19] and from vessels,[20] *UNCLOS* requires internationally accepted rules, standards, and recommended practices and procedures to be applied as minimum standards in the formulation and enforcement of national laws, regulations, and measures. In the adoption of laws and regulations relating to pollution from land-based sources[21] and from or through the atmosphere,[22] internationally agreed rules, standards, and recommended practices and procedures are to be taken into account. States are responsible for the fulfillment of the international obligations concerning the protection and preservation of the marine environment.[23]

Beyond Part XII, many other provisions of *UNCLOS* are dedicated to the protection of the marine environment. Article 1(4) provides a definition of "pollution of the marine environment" as follows:

> [T]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and 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.

In their territorial sea (Part II of *UNCLOS*), coastal states may interdict or prevent the passage of a foreign ship when it is engaging in any act of wilful and serious pollution contrary to *UNCLOS*.[24] They may adopt laws and regulations relating to innocent passage in respect of the preservation of the environment and the prevention, reduction, and control of pollution thereof.[25] While

[14] *Ibid*, art 200.

[15] *Ibid*, art 204.

[16] *Ibid*, art 206; see also art 205.

[17] *Ibid*, art 208(3).

[18] *Ibid*, art 209(2).

[19] *Ibid*, art 210(6).

[20] *Ibid*, art 211(5).

[21] *Ibid*, art 207(1).

[22] *Ibid*, art 212(1).

[23] *Ibid*, art 235.

[24] *Ibid*, art 19(2)(h).

[25] *Ibid*, art 21(1)(f).

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exercising the right of transit passage in straits used for international navigation (Part III), ships shall, *inter alia*, comply with generally accepted international regulations, procedures, and practices for the prevention, reduction, and control of pollution from ships.[26] In the exclusive economic zone (EEZ) (Part V), coastal states have jurisdiction with regard to the protection and preservation of the marine environment.[27] They are required, *inter alia*, to ensure that maintenance of the living resources in the EEZ is not endangered by over-exploitation,[28] to maintain or restore populations of harvested species at the maximum sustainable yield,[29] and to promote the objective of optimum utilization of the living resources concerned.[30]

On the continental shelf (Part VI), coastal states may not impede the laying and maintenance of submarine cables, subject to their rights to take reasonable measures for the prevention, reduction, and control of pollution from pipelines.[31] On the high seas (Part VII), flag states are required to take necessary measures to ensure that the master, officers, and crew of vessels are fully conversant with and required to observe the applicable international regulations concerning the prevention, reduction, and control of marine pollution, among others.[32] States are under a duty to adopt with respect to their nationals measures for the conservation of the living resources of the high seas[33] and to cooperate with other states in the conservation and management of such resources, including through the establishment of regional fisheries management organizations.[34] In particular, they must take measures designed to maintain or restore fish populations at levels that can produce the maximum sustainable yield, taking into account associated or dependent species when agreeing on such measures for living resources.[35] States bordering enclosed or semi-enclosed seas (Part IX) should cooperate with each other, in particular, with respect to the management, conservation, exploration, and exploitation of the living

[26] *Ibid*, art 39(2)(b).

[27] *Ibid*, art 56(1)(b)(iii).

[28] *Ibid*, art 61(2).

[29] *Ibid*, art 61(3).

[30] *Ibid*, art 62(1).

[31] *Ibid*, art 79(2).

[32] *Ibid*, art 94(4)(c).

[33] *Ibid*, art 117.

[34] *Ibid*, art 118.

[35] *Ibid*, art 119(1).

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resources of the sea and the protection and preservation of the marine environment.[36]

In the Area (Part XI), coastal states are entitled, in a manner consistent with Part XII, to take measures to prevent, mitigate, or eliminate grave and imminent danger to their coastlines from pollution, threat of pollution, or other hazardous occurrences in connection with activities in the Area.[37] Furthermore, the ISA, which is responsible for organizing and controlling activities in the Area, particularly with a view to administering its resources,[38] is instructed to adopt appropriate rules, regulations, and procedures for the protection and conservation of the natural resources of the Area and the prevention of damage to the marine environment.[39] As for marine scientific research (Part XIII), coastal states may withhold their consent to the conduct of a marine scientific research project in their EEZ and on their continental shelf where the project might introduce harmful substances into the marine environment.[40] Finally, Article 293(1) of *UNCLOS* should be mentioned, under which ITLOS, if it has jurisdiction under Part XV, shall apply other rules of international law not incompatible with the provisions of *UNCLOS*.

Jurisdiction of ITLOS and Environmental Cases

Composed of twenty-one members, ITLOS is an international judicial body established under *UNCLOS* for both the settlement of disputes and the deliverance of advisory opinions concerning the interpretation and application of *UNCLOS*.[41]

Jurisdiction over any dispute concerning the interpretation or application of *UNCLOS* and other agreements

ITLOS has competence to settle disputes concerning the interpretation or application of *UNCLOS*[42] — including any dispute related to the protection and preservation of the marine environment — and any other agreement

[36] *Ibid*, art 123(a)–(b).

[37] *Ibid*, art 142(3).

[38] See *ibid*, art 153.

[39] *Ibid*, art 145(b).

[40] *Ibid*, art 246(5)(b).

[41] *Statute of the International Tribunal for the Law of the Sea* (Annex VI to *UNCLOS*, *supra* note 3), art 21, online: <www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf> [*ITLOS Statute*]; ITLOS, *Rules of the Tribunal*, Doc ITLOS/8 (25 September 2018), art 138, online: <www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_25.09.18.pdf> [*Rules of the Tribunal*].

[42] *UNCLOS*, *supra* note 3, art 288(1); *ITLOS Statute*, *supra* note 41, arts 21–22.

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conferring jurisdiction.[43] One example is the 1995 *United Nations Fish Stocks Agreement* (*UNFSA*).[44] Under Article 30(1)–(2), the provisions relating to the settlement of disputes set out in Part XV of *UNCLOS* apply *mutatis mutandis* to disputes concerning the interpretation or application of *UNFSA* as well as disputes concerning the interpretation or application of a sub-regional, regional, or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which the parties to the dispute are party, including any disputes concerning the conservation and management of such stocks. *Ratione personae*, for the purposes of the settlement of disputes, the application of Part XV of *UNCLOS* extends to all states parties to *UNFSA*, "whether or not they are also Parties to *UNCLOS*."[45]

PROMPT RELEASE OF VESSELS AND CREWS

A detaining state is obliged to promptly release a vessel arrested for an alleged fishery offence upon the posting of a reasonable bond or other security.[46] *UNCLOS* also provides for the release of the vessel upon the posting of a bond when the vessel has been detained for alleged violation of legislation for the protection and preservation of the marine environment.[47] A special procedure for the prompt release of vessels is accordingly established in Article 292 of *UNCLOS*. It states that, where the authorities of a state party have detained a vessel flying the flag of another state party and it is alleged that the detaining state has not complied with the provisions of *UNCLOS* for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to ITLOS if, within ten days from the time of detention, the parties have not agreed to submit it to another court or tribunal.[48] To date, ITLOS has had nine prompt release cases, but there have been no applications for prompt release of vessels and crews detained for alleged marine pollution offences.

[43] ITLOS, "International Agreements Conferring Jurisdiction on the Tribunal", online: <www.itlos.org/en/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/>.

[44] *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001) [*UNFSA*].

[45] *Ibid*, art 30(1)–(2).

[46] *UNCLOS*, *supra* note 3, art 73(2)–(3).

[47] *Ibid*, arts 220(6)–(7), 226(1)(b).

[48] *Ibid*, art 292(1).

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PROVISIONAL MEASURES

ITLOS may prescribe provisional measures under Article 290 of *UNCLOS*. This may arise in two possible scenarios. First, the tribunal has a general power to prescribe such measures. If a dispute has been duly submitted to it and if it considers *prima facie* that it has jurisdiction under Part XV, it may prescribe any provisional measures that it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.[49] The "prevention of serious harm to the marine environment" constitutes one of the justifications for the prescription of such measures, hence recognizing the need to preserve the common interests of the community of states.[50] Second, ITLOS enjoys a special residual compulsory jurisdiction to prescribe such measures, pending the constitution of an Annex VII arbitral tribunal to which a dispute is being submitted and if, within two weeks from the date of a request for provisional measures, the parties do not agree to submit the request to another court or tribunal. ITLOS may prescribe such measures if it considers that, *prima facie*, the arbitral tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires.[51]

The procedure for the prescription of provisional measures has until now served as the basis for referral to ITLOS of several cases dealing with the protection and preservation of the marine environment. On many occasions, the tribunal has underlined the parties' obligations resulting from the protection and preservation of the marine environment. In *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Australia and New Zealand requested the prescription of provisional measures intended to prevent Japan from undertaking unilateral experimental fishing of southern bluefin tuna, maintaining that "the scientific evidence available shows that the amount of southern Bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock."[52] ITLOS characterized the conservation of the living resources of the sea as an element of the protection and preservation of the marine environment.[53] It further

[49] *Ibid*, art 290(1); *ITLOS Statute*, *supra* note 41, art 25(1); see also *UNFSA*, *supra* note 44, art 31(2).

[50] See Rüdiger Wolfrum, "Provisional Measures: International Tribunal for the Law of the Sea (ITLOS)," *Max Planck Encyclopedia of International Procedural Law* (2019) at paras 11–13, online: <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3507.013.3507/law-mpeipro-e3507>.

[51] *UNCLOS*, *supra* note 3, art 290(5).

[52] *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Cases No 3 & 4, Provisional Measures, [1999] ITLOS Rep 280 at para 74.

[53] *Ibid* at para 70.

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called on the parties to act with "prudence and caution" to ensure that effective conservation measures are taken to prevent serious harm to the stock concerned.[54] The tribunal prescribed that the parties should make further efforts to reach agreement with other states and fishing entities engaged in fishing for southern bluefin tuna to ensure conservation and to promote the objective of optimum utilization of the stock.[55]

In *MOX Plant (Ireland v United Kingdom)*, Ireland initiated urgent proceedings for the purpose of restraining the United Kingdom from authorizing the operation of a mixed oxide fuel (MOX) plant (that is, a nuclear fuel manufacturing facility) since "once plutonium is introduced into the MOX plant and it commences operations some discharges into the marine environment will occur with irreversible consequences."[56] ITLOS laid emphasis on the duty to cooperate, stating that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of *UNCLOS* and general international law."[57] It also considered that "prudence and caution" require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate.[58] The tribunal ordered the parties to cooperate to exchange information on the consequences of the operation of the plant and monitor the risks resulting from it.[59]

In *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)*, Malaysia initiated urgent proceedings with a view to preserving its rights relating to the preservation of the marine and coastal environment as well as the right of maritime access to its coastline.[60] ITLOS considered 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"[61] and, thus, "prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned."[62] Among other things, the tribunal unanimously

[54] *Ibid* at para 77.

[55] *Ibid* at 299.

[56] *MOX Plant Case (Ireland v United Kingdom)*, Case No 10, Provisional Measures, [2001] ITLOS Rep 95 at para 68.

[57] *Ibid* at para 82.

[58] *Ibid* at para 84.

[59] *Ibid* at 211.

[60] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Case No 12, Provisional Measures, [2003] ITLOS Rep 10 at para 61.

[61] *Ibid* at para 96.

[62] *Ibid* at para 99.

ordered both parties to cooperate to establish promptly a group of independent experts with a precise mandate and exchange information on, and assess risks or effects of, Singapore's land reclamation works.[63]

In *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Côte d'Ivoire requested provisional measures aimed at suspending all ongoing oil exploration and exploitation operations in the disputed area to prevent serious harm to the marine environment.[64] With regard to its request for such measures to prevent serious harm to the marine environment, the Special Chamber found that Côte d'Ivoire "ha[d] not adduced sufficient evidence to support its allegations that the activities conducted by Ghana in the disputed area are such as to create an imminent risk of serious harm to the marine environment."[65] However, it noted that "the risk of serious harm to the marine environment is of great concern to [it]"[66] and that the parties should in the circumstances "act with prudence and caution to prevent serious harm to the marine environment."[67] It ordered, *inter alia*, that Ghana carry out strict monitoring of all activities undertaken in the disputed area to ensure the prevention of serious harm to the marine environment and that the parties cooperate to take all necessary steps to prevent serious harm to the marine environment in the disputed area.[68]

ADVISORY OPINIONS

Pursuant to Article 138 of the *Rules of the Tribunal*, ITLOS has jurisdiction to give an advisory opinion on a legal question when certain conditions are met, as further detailed below.[69] In 2013, a request was made by the Sub-Regional Fisheries Commission (SRFC), a West-African fishery organization, on the obligations of states with respect to illegal, unreported, and unregulated (IUU) fishing. On 2 April 2015, ITLOS rendered an advisory opinion (Case no. 21) in which it clarified the said obligations. In doing so, it contributed to the interpretation of *UNCLOS*, particularly Article 192.[70] The tribunal stated that this article applies to all maritime areas.[71] Clarifying the

[63] *Ibid* at para 106.

[64] *Dispute Concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v Côte d'Ivoire)*, Case No 23, Provisional Measures, [2015] ITLOS Rep 146 at paras 65–66.

[65] *Ibid* at para 67.

[66] *Ibid* at para 68.

[67] *Ibid* at para 72.

[68] *Ibid* at 166.

[69] See also *ITLOS Statute*, *supra* note 41, art 21.

[70] *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No 21, Advisory Opinion, [2015] ITLOS Rep 4 at para 77 [*SRFC* (Advisory Opinion)].

[71] *Ibid* at paras 111, 120.

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"due diligence" obligation of the flag state, it said that the latter is obliged, in light of Articles 58(3), 62(4), and 192 of *UNCLOS*, to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities within the EEZs of the SRFC's member states.[72] It further held that the flag state, in fulfillment of its obligation to effectively exercise jurisdiction and control in administrative matters under Article 94 of *UNCLOS*, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the SRFC's member states' EEZs that undermine the flag state's responsibility under Article 192 of *UNCLOS*. It observed in this regard that conserving marine living resources is an integral element of protecting and preserving the marine environment.[73] It added that, pursuant to its general obligation to protect and preserve the marine environment, the flag state has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC's member states.[74] Moreover, it noted that, in exercising their rights and performing their duties under *UNCLOS* in their respective EEZs, the SRFC's member states and other states parties to *UNCLOS* must have due regard for the rights and duties of one another as they flow, *inter alia*, from their obligation to protect and preserve the marine environment.[75]

THE SEABED DISPUTES CHAMBER (SDC)

The SDC is a permanent chamber formed within ITLOS to deal with disputes arising from activities in the Area.[76] It has described itself as "a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of *UNCLOS* and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area."[77] The SDC is composed of eleven members selected by a majority of the elected members of ITLOS from among themselves.[78] It has contentious jurisdiction to settle different categories of disputes referred to in Article 187 of *UNCLOS* with respect to activities in the Area,[79] which will be further

[72] *Ibid* at para 124.

[73] *Ibid* at para 120.

[74] *Ibid* at para 136.

[75] *Ibid* at para 216.

[76] *UNCLOS*, *supra* note 3, Part XI, s 5; *ITLOS Statute*, *supra* note 41, art 14.

[77] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No 17, Advisory Opinion, [2011] ITLOS Rep 10 at para 25 [*Responsibilities and Obligations of States* (Advisory Opinion)].

[78] *UNCLOS*, *supra* note 3, Annex VI, art 35(1)–(2).

[79] *Ibid*, arts 187–90.

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elaborated below. Provisional measures may also be prescribed by the SDC.[80] No dispute has been brought to it under its contentious jurisdiction so far.

The SDC may deliver an advisory opinion under Article 191 of *UNCLOS*.[81] A request for an advisory opinion on the question of the responsibility and liability of states that sponsor entities undertaking mining activities in the Area was made by the ISA Council in 2010, on the basis of a proposal made by the Republic of Nauru.[82] On 1 February 2011, the SDC unanimously issued its first advisory opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Case no. 17). From the point of view of international environmental law, the SDC's ruling is regarded as "historic."[83] In this advisory opinion, the SDC explained that sponsoring states have two kinds of obligations under *UNCLOS* and related instruments. The first is an obligation of due diligence[84] — that is, an obligation "to exercise best possible efforts" to secure compliance by the sponsored contractors with the terms of the contract and the obligations set out in *UNCLOS* and related instruments.[85] This due diligence obligation requires the sponsoring state to make laws and regulations and take administrative measures within its legal system.[86] While the SDC observed in this regard that *UNCLOS* leaves it to the sponsoring state to determine what measures will enable it to discharge its responsibilities,[87] it nevertheless provided indications as to the required contents of those national measures.[88] For instance, in regard to the protection of the marine environment, it held that the laws and regulations and administrative measures of the sponsoring state cannot be less stringent than those adopted by the ISA or less effective than international rules, regulations, and procedures.[89]

The second form of obligation is "direct" — that is, an obligation with which sponsoring states must comply "independently of their obligation to ensure a certain conduct on the part of the sponsored contractors."[90] The

[80] *Ibid*, art 290; *ITLOS Statute*, *supra* note 41, art 25.

[81] See also *UNCLOS*, *supra* note 3, art 159(10).

[82] *Responsibilities and Obligations of States* (Advisory Opinion), *supra* note 77 at para 4.

[83] David Freestone, "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area" (2011) 105 Am J Intl L 755 at 759.

[84] *Responsibilities and Obligations of States* (Advisory Opinion), *supra* note 77 at paras 107–16.

[85] *Ibid* at para 110.

[86] *Ibid* at paras 118–19, 213–17.

[87] *Ibid* at para 227.

[88] *Ibid* at paras 227–41.

[89] *Ibid* at paras 240–41.

[90] *Ibid* at paras 121, 123.

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SDC listed the most important among these as including the obligations to assist the ISA in the exercise of control over activities in the Area, to apply a precautionary approach, to apply best environmental practices, to take measures to ensure the provision of guarantees in the event of an emergency order by the ISA for protection of the marine environment, to ensure the availability of recourse for compensation in respect of damage caused by pollution, and to conduct EIAs.[91] In particular, the SDC noted that the due diligence obligation of the sponsoring state to ensure compliance by the sponsored contractor with its obligation to conduct an EIA is a direct obligation under *UNCLOS* and a general obligation under customary international law.[92] It also identified the precautionary approach as one of the direct "due diligence" obligations of the sponsoring state.[93] It observed that its incorporation into a growing number of international treaties and other instruments, many of which reflected the formulation of Principle 15 of the *Rio Declaration*, has initiated a trend towards making this approach part of customary international law.[94] While both the "due diligence" obligation and direct obligations apply equally to all sponsoring states, whether developing or developed,[95] the requirements for complying with the obligation to apply the precautionary approach may be stricter for developed than for developing sponsoring states.[96]

With respect to the standard of liability, the SDC pointed out that, if the sponsoring state has not failed to meet its obligation of due diligence, there is no room for its liability under Article 139(2) of *UNCLOS* even if the activities of the sponsored contractor have resulted in damage.[97] It observed that, in the event of damage to the Area and its resources and damage to the marine environment, the ISA, entities engaged in deep seabed mining, other users of the sea, and coastal states may be entitled to claim compensation.[98] Finally, it drew the attention of the ISA to the option of establishing a trust fund to cover such damages that are not otherwise covered.[99]

[91] *Ibid* at paras 122, 124–50, 236.

[92] *Ibid* at paras 141, 145.

[93] *Ibid* at paras 125–35.

[94] *Ibid* at para 135; *Rio Declaration on Environment and Development*, 13 June 1992, (1992) 31 ILM 874.

[95] *Responsibilities and Obligations of States* (Advisory Opinion), *supra* note 77 at para 158.

[96] *Ibid* at para 161.

[97] *Ibid* at para 189.

[98] *Ibid* at para 179.

[99] *Ibid* at paras 205, 209.

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Prospects for the Role of ITLOS in the Environmental Challenges Ahead

The following discussion will consider the role that ITLOS could potentially play in relation to some topical environmental challenges — in particular, climate change, mineral exploration activities in the Area, and the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.

climate change

UNCLOS is not the primary regime for climate change mitigation,[100] but it remains nonetheless relevant to climate change in that greenhouse gas emissions cause marine pollution and harm to the marine environment and induce a rise in sea levels. In any event, particular attention has been focused on the potential roles of the International Court of Justice (ICJ) and ITLOS with respect to climate change.[101] In the discussion of a suitable forum for addressing climate change issues, ITLOS has been described as having "among its main potentials [that] of becoming a forum for future climate change litigation,"[102] further considering that a request based on

[100] See e.g. Karen N Scott, "Legal Aspects of Climate Change" in Dirk Werle, Paul R Boudreau & Mary R Brooks, eds, *The Future of Ocean Governance and Capacity Development* (Leiden: Brill Nijhoff, 2018) 169; Margaret A Young, "Climate Change Law and Regime Interaction" (2011) 2 Carbon & Climate L Rev 147.

[101] See Tim Stephens, "See You in Court? A Rising Tide of International Climate Litigation" (2019), online: *Lowy Institute*<www.lowyinstitute.org/the-interpreter/see-you-court-rising-tide-international-climate-litigation>; Margaretha Wewerinke-Singh & Diana Hinge Salili, "Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change" (2020) 20:6 Climate Policy 1; Alan Boyle, "Litigating Climate Change under Part XII of the LOSC" (2019) 34 Intl J Marine & Coastal L 463 at 474–80; Sandrine Maljean-Dubois, "Climate Change Litigation," *Max Planck Encyclopedia of Procedural Law* (2019), online: <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3461.013.3461/law-mpeipro-e3461>; Benoit Mayer, *The International Law on Climate Change* (Cambridge: Cambridge University Press, 2018) at 242–43; Millicent McCreath, "PSIDS Request for an ITLOS Advisory Opinion on the Content of UNCLOS Climate Change Obligations" (ILA Biennial Conference, Sydney, 2018), online: <https://cil.nus.edu.sg/wp-content/uploads/2018/09/McCreath-ILA-Presentation.pdf>; Daniel Bodansky, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections" (2017) 49 Arizona State LJ 1; Philippe Sands, "Climate Change and the Rule of Law: Adjudicating the Future in International Law" (2016) 28 J Envtl L 19 at 33; Lucas Bergkamp, "Adjudicating Scientific Disputes in Climate Science: The Limits of Judicial Competence and the Risks of Taking Sides" (2015) 3 Environmental Liability: Law, Policy and Practice 80; William CG Burns, "Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement" (2007) 7:2 Sustainable Development L & Policy 34.

[102] Roda Verheyen & Cathrin Zengerling, "International Dispute Settlement" in Kevin R Gray, Richard Tarasofsky & Cinnamon Carlarne, eds, *The Oxford Handbook of International Climate Change Law* (Oxford: Oxford University Press, 2016) 417 at 417, online: <https://doi.org/10.1093/law/9780199684601.003.0019>.

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the precedent of Case no. 21 is the "most likely and promising short-term scenario."[103] The following sections consider this scenario.

Jurisdiction

Under Article 138 of the *Rules of the Tribunal*, ITLOS may give an advisory opinion on a legal question if an international agreement related to the purposes of *UNCLOS* specifically provides for the submission to the tribunal of a request for such an opinion. The request must be transmitted to ITLOS by a body authorized by, or in accordance with, the said agreement. It has to be noted that the advisory jurisdiction of the tribunal in Case no. 21 was contested by some states,[104] mainly because *UNCLOS*, including its Annex VI, did not expressly provide for such jurisdiction. Yet, in the same case, ITLOS unanimously confirmed its advisory jurisdiction as a full tribunal, which certainly constitutes an established jurisdiction.

Unlike the ICJ, where the request for an advisory opinion has to come from an organ or agency having the competence to make it,[105] there are no designated entities entitled to request such opinions from ITLOS.[106] This notwithstanding, an international agreement concluded by an international

[103] *Ibid* at 440. Apart from resorting to international courts (in particular, by requesting an advisory opinion), two other options might be considered. One avenue that *UNCLOS* explicitly provided for would be to amend *UNCLOS* itself (*UNCLOS*, *supra* note 3, arts 312–13). Yet attempting to amend the convention would be like opening Pandora's box. To make the argument for a formal amendment of the convention is an admittedly difficult path due to the legal and political complexities it may entail (David Freestone & Alex G Oude Elferink, "Flexibility and Innovation in the Law of the Sea: Will the LOS Convention Amendment Procedures Ever Be Used?" in Alex G Oude Elferink, ed, *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Leiden: Martinus Nijhoff, 2005) 169 at 173–83). Another option would be to adopt an implementing agreement under *UNCLOS* on climate change-induced sea-level rise. The risk, however, would be ending up with a watered-down agreement, let alone the length of the negotiations required to reach such an agreement. For further discussion on available options, see Moritaka Hayashi, "Sea-Level Rise and the Law of the Sea: Future Options" in David Vidas & Peter J Schei, eds, *The World Ocean in Globalisation: Challenges and Responses* (Boston: Martinus Nijhoff, 2011) 187 at 199–205.

[104] See e.g. *SRFC* (Advisory Opinion), *supra* note 70, Written Statement of Australia, China, France, Ireland, Portugal, Spain, Thailand and the United Kingdom, online: <www.itlos.org/cases/list-of-cases/case-no-21/>; see also SPLOS, *Report of the Twenty-Fifth Meeting of States Parties*, Doc SPLOS/287 (13 July 2015) at 6, para 23.

[105] *Charter of the United Nations*, 26 June 1945, 1 UNTS 15, art 96 (entered into force 24 October 1945); *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7, arts 65–68 (entered into force 24 October 1945).

[106] See Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea" (2010) 9 Chinese J Intl L 565.

organization could provide for recourse to ITLOS's advisory procedures,[107] as done by the SRFC in Case no. 21.[108] It has also been argued that the procedure is open to states.[109] Taken this way, an international organization (or, presumably, some states suffering the consequences of climate change and sea-level rise) might enter into an agreement that specifically entitles a body to request an advisory opinion of ITLOS. Alternatively, it has been suggested that *UNCLOS*'s Meeting of States Parties (SPLOS) could conclude an agreement specifically conferring advisory competence upon ITLOS in the form of a decision adopted at a meeting.[110] Arguably, such a request for an advisory opinion requires "general agreement"[111] and, failing this, a "two-thirds majority of the States parties present and voting, provided that such majority includes a majority of the States parties participating in the Meeting."[112]

While the nature of the requesting body does not matter, a "sufficient connection" between the functions of this body and the question asked is required.[113] In other words, the question posed in the request has to come "within the scope of the activities" of this body.[114] ITLOS cited ICJ jurisprudence and, in particular, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in introducing the "sufficient connection" requirement.[115] In

[107] See e.g. Rüdiger Wolfrum, "Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?" in Rüdiger Wolfrum & Ina Gätzschmann, eds, *International Dispute Settlement: Room for Innovations?* (Heidelberg: Springer, 2013) 35 at 54; Ndiaye, *supra* note 106 at 583; José Luis Jesus, "Article 138" in P Chandrasekhara Rao & Philippe Gautier, eds, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden: Martinus Nijhoff, 2006) 393 at 394.

[108] *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission*, 8 June 2012, art 33 (entered into force 16 September 2012), online: <http://spcsrp.org/spcsrp/sites/default/files/csrp/documents/csrp2012/csrp-CMA_version_originale_juin_2012_fr.pdf>.

[109] Wolfrum, *supra* note 107; Jesus, *supra* note 107. See, however, Ndiaye, *supra* note 106 at 584.

[110] See e.g. Philippe Gautier, "Comments on Procedural Issues Relating to the Establishment of Rights over the Continental Shelf" in Zhiguo Gao et al, eds, *Technical and Legal Aspects of the Regimes of the Continental Shelf and the Area* (Beijing: China Ocean Press, 2011) 194 at 202; P Chandrasekhara Rao, "ITLOS: The First Six Years" (2002) 6 Max Planck YB UN L 183 at 211–12.

[111] *Rules of Procedure for Meetings of States Parties*, Doc SPLOS/2/Rev.4 (24 January 2005), Rule 52(1) [*SPLOS Rules of Procedure*].

[112] *Ibid*, Rule 53.

[113] *SRFC* (Advisory Opinion), *supra* note 70 at para 68.

[114] *Ibid*.

[115] *Ibid*, citing *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 66 at para 22 [*Nuclear Weapons* (Advisory Opinion)].

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that case, the ICJ declined to render an opinion because, after examining the functions of the World Health Organization (WHO) in light of its Constitution and subsequent practice, the ICJ concluded that the WHO was not authorized to deal with matters of legality, but only with the health effects, of the use of nuclear weapons. Accordingly, the ICJ held that the question asked by the WHO did not arise within the scope of its activities, as defined in its Constitution.[116] In this regard, it would seem difficult to hold the view that SPLOS's mandate, which is restricted to administrative, financial, and procedural issues as set out in its *Rules of Procedure*,[117] includes the possibility of seeking an advisory opinion from the tribunal.

Legal Question

A request for an advisory opinion must be based on a "legal question."[118] ITLOS has observed that questions "framed in terms of law and raising problems of international law … are by their very nature susceptible of a reply based on law."[119] As far as climate change is concerned, requesting an advisory opinion from ITLOS would be desirable in order to clarify, for instance, the legal environmental obligations of states under Part XII of *UNCLOS* in the context of climate change, and the legal consequences of sea-level rise for baselines, the outer limits of maritime zones, and coastal states' entitlements to maritime areas. These kinds of questions concern the interpretation of provisions of *UNCLOS* and raise issues of general international law.[120] The framing of the questions would be a crucial issue. Referring to the ICJ's case law, one can observe that, where questions have been unclear or vague, the ICJ has interpreted the scope and meaning of the

[116] *Nuclear Weapons* (Advisory Opinion), *supra* note 115 at paras 20–26.

[117] That the SPLOS should limit itself to consideration of financial and administrative matters relating to the bodies established by the Convention has been repeatedly noted by some delegations. See e.g. SPLOS, *Report of the Twenty-Ninth Meeting of States Parties*, Doc SPLOS/29/9 (8 July 2019) at 19, paras 107–08; SPLOS, *Report of the Twenty-Sixth Meeting of States Parties*, Doc SPLOS/303 (2 August 2016) at 16, para 92 [SPLOS, *Report of the Twenty-Sixth Meeting*]; see also SPLOS, *Report of the Twenty-Fifth Meeting of States Parties*, Doc SPLOS/287 (13 July 2015) at para 81; SPLOS, *Report of the Twenty-Fourth Meeting of States Parties*, Doc SPLOS/277 (14 July 2014) at 19, para 118. See also *SPLOS Rules of Procedure*, *supra* note 111, Rules 70–75; Ndiaye, *supra* note 106 at 584, 586.

[118] *Rules of the Tribunal*, *supra* note 41, art 138(1).

[119] *Responsibilities and Obligations of States* (Advisory Opinion), *supra* note 77 at 25, para 39.

[120] See *SRFC* (Advisory Opinion), *supra* note 70 at paras 65–66. The questions could potentially be framed as follows: "What are the legal obligations of states with respect to the preservation and protection of the marine environment in the case of climate change? What are the legal consequences arising from sea-level rise with respect to baselines, the outer limits of maritime zones, and coastal states' entitlements to maritime spaces?"

question,[121] and a great deal has depended on how it has proceeded to do so. It is interesting to note in this context that the ISA Council reformulated the questions initially posed by Nauru in Case no. 17.[122]

Discretion

In the event that ITLOS has jurisdiction, it would then have to decide whether it should exercise its discretion to decline a request for an advisory opinion. In Case no. 21, the tribunal decided by nineteen votes to one to exercise its jurisdiction. Yet, it emphasized that having jurisdiction does not mean that it is obliged to exercise it.[123] It also made clear that, while responding to a legal question, it cannot take a position on issues beyond the scope of its judicial functions or exercise a legislative role.[124] Referring to the ICJ's case law, it held that only "compelling reasons" should lead it to decline a request.[125] If the ICJ jurisprudence is to be followed by ITLOS in this respect, maintaining "the integrity of the Court's judicial function as the principal judicial organ of the United Nations" has so far been the reason for refusal given by the ICJ.[126] In particular, the ICJ has considered that it cannot regard the following factors, among others, as "compelling reasons" to decline to exercise its jurisdiction: the fact that the questions asked raise complex and disputed factual issues that are not suitable for determination in advisory proceedings;[127] the motives behind the request;[128] the lack of any useful purpose;[129] or the prospect that an advisory opinion could impede a political, negotiated solution to a particular conflict.[130] Nonetheless, the

[121] See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 at 423, para 50 [*Kosovo* (Advisory Opinion)].

[122] ISA Council, *Proposal to Seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters Regarding Sponsoring State Responsibility and Liability Submitted by the Delegation of Nauru*, Doc ISBA/16/C/6 (5 March 2010); ISA Council, *Decision of the Council of the International Seabed Authority Requesting an Advisory Opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea*, Doc ISBA/16/C/13 (6 May 2020).

[123] *SRFC* (Advisory Opinion), *supra* note 70 at para 71.

[124] *Ibid* at para 74.

[125] *Ibid* at paras 71, 78.

[126] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95 at 113, para 64 [*Chagos Archipelago* (Advisory Opinion)].

[127] *Ibid* at 114–15, paras 69–74.

[128] *Kosovo* (Advisory Opinion), *supra* note 121 at 416–17, paras 32–33.

[129] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at 162–63, paras 59–62 [*Construction of a Wall* (Advisory Opinion)].

[130] *Ibid* at 159–60, paras 51–53.

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question of discretion and propriety is arguably "very much harder."[131] This is particularly true when considering how close the ICJ came, in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* to actually declining to exercise its advisory jurisdiction for the first time.[132] The formulation of the question would be especially important to avoid this kind of problem. In any event, the ICJ has until now exercised its discretion to accede to all requests for an advisory opinion that came within its jurisdiction.[133]

On another note, several states had called upon ITLOS to exercise its discretionary authority to refuse to accede to the SRFC's request in Case no. 21 as it would otherwise be pronouncing on the rights and obligations assumed by third states that were not members of the SRFC without their consent.[134] However, the tribunal explained that in advisory proceedings the consent of non-requesting states is not relevant, adding that the opinion has no binding force.[135] It is of note here that, while both the SDC and ITLOS sensibly followed the jurisprudence of the ICJ in Cases no. 17 and 21, respectively, ITLOS did not rely on the ICJ's finding that,

> [i]n certain circumstances … the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.[136]

The lack of consent — regarded as a matter of discretion rather than jurisdiction — has been raised in numerous ICJ advisory opinions.[137] In

[131] *Ibid* at 136, Separate Opinion of Judge Higgins.

[132] See *ibid* at 454, Declaration of Vice-President Tomka; at 482, Separate Opinion of Judge Keith; at 500, Dissenting Opinion of Judge Bennouna; at 515, Dissenting Opinion of Judge Skotnikov.

[133] The ICJ in *Nuclear Weapons* (Advisory Opinion), *supra* note 115, refused to give an advisory opinion based upon the lack of jurisdiction rather than the question of its discretionary power.

[134] *SRFC* (Advisory Opinion), *supra* note 70 at 25–26, para 75.

[135] *Ibid* at 26, para 76; at 74, para 9, Declaration of Judge Cot.

[136] *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at para 33 [*Western Sahara* (Advisory Opinion)].

[137] See e.g. *Chagos Archipelago* (Advisory Opinion), *supra* note 126 at 22–23, paras 83–90; *Construction of a Wall* (Advisory Opinion), *supra* note 129 at 157–58, para 47; *Western Sahara* (Advisory Opinion), *supra* note 136 at 24–25, paras 31–33; *Interpretation of Peace Treaties*, Advisory Opinion [1950] ICJ Rep 65 at 71–72. See also *Status of Eastern Carelia*, Advisory Opinion, [1923] PCIJ (Ser B) No 5 at 27 (where the Permanent Court of International Justice (PCIJ) exercised its discretion to refuse a request due to lack of consent). See

any event, as stated above, there must be compelling reasons to decline a request, and, as a matter of principle, ITLOS will not refuse to accede to a request for an advisory opinion that is considered "desirable 'in order to obtain enlightenment as to the course of action [to be taken].'"[138] The scope of the compelling reasons sufficient to justify refusal remains, however, to be clarified.

Non-Binding Character

Advisory opinions are not legally binding,[139] but they offer authoritative guidance on the interpretation of a legal instrument. The purpose of an opinion is to assist the requesting organization in the performance of its activities and contribute to the implementation of *UNCLOS*.[140] As for the follow-up to a potential advisory opinion on climate change, some scholars have queried the likely "ineffectiveness" of such an opinion due to its non-binding character and have even questioned the legitimacy and/or legal effect of such an opinion requested by some states but having an impact upon others.[141] At the outset, one has to point out the restraint that states show in requesting advisory opinions.[142] This alone bears witness to the fact

generally Philip Burton, "Searching for the Eastern Carelia Principle," *ESIL Reflections* (2019), online: <https://esil-sedi.eu/fr/esil-reflection-searching-for-the-eastern-carelia-principle-copy/>.

[138] *SRFC* (Advisory Opinion), *supra* note 70 at para 76.

[139] *Ibid.*

[140] *Ibid* at para 77.

[141] See e.g. Seokwoo Lee & Lowell Bautista, "Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate against Climate Change: Making Out a Claim, Causation, and Related Issues" (2018) 45 Ecology L Quarterly 129 at 152, 154. See also SPLOS, *Report of the Twenty-Sixth Meeting*, *supra* note 117 at 5, para 25.

[142] Some advisory opinions have been proposed but not effectively requested. For instance, in 2011, Palau initiated a campaign for the UNGA to request an advisory opinion from the ICJ on whether countries have a legal responsibility to ensure that any activities on their territory that emit greenhouse gases do not harm other states. "Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases," *UN News* (2011), online: <https://news.un.org/en/story/2011/09/388202>. In 2016, it was proposed that clarification could be obtained by means of a request for an advisory opinion of the Seabed Disputes Chamber (SDC) under *UNCLOS* art 191 on the issues associated with the conduct of marine scientific research in exploration areas (ISA Council, *Issues Associated with the Conduct of Marine Scientific Research in Exploration Areas, Report of the Secretary-General*, Doc ISBA/22/C/3* (12 May 2016)). Yet many delegations indicated that it was premature to seek such an advisory opinion (ISA Council, *Summary Report of the President of the Council of the International Seabed Authority on the Work of the Council during Its Twenty-Second Session*, Doc ISBA/22/C/30 (29 July 2016) at 6–7, para 25).

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that requesting such an opinion is "no light matter."[143] In any event, it is worth considering how states and international organizations have put the two existing ITLOS advisory opinions into practice in order to shed some light on this issue.

With respect to Case no. 17, as stated by Michael Lodge, it is beyond doubt that it "solved a very real problem and has been of great value and assistance to States Parties, as well as potential investors in deep seabed mining."[144] First, the advisory opinion has paved the way for the submission of many applications for exploration by both developed and developing states, including Nauru. Since its deliverance, twenty-two plans of work for exploration have been approved by the ISA.[145] Second, as stated before, the SDC clarified the required content of national measures regulating activities in the Area. In this respect, the opinion has changed the behaviour of states parties[146] in that, after its issuance, a dozen states have adopted or amended their national legislation to control activities by entities with whom they had entered into contracts for exploration.[147] Third, a preambular paragraph taking note of the advisory opinion has been included in every decision of the Council formally approving a plan of work for exploration.[148] Fourth, this opinion has an impact on the current negotiations of the ISA's Mining Code. Many states have explicitly referred to it while commenting on drafts of the code.[149]

[143] Michael Wood, "Advisory Jurisdiction: Lessons from Recent Practice" in Holger P Hestermeyer et al, eds, *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Leiden: Martinus Nijhoff, 2012) 1833 at 1849. Furthermore, the fact that the exercise of advisory jurisdiction by the full tribunal in Case no. 21 was criticized by many states also demonstrates that requesting advisory opinions is "no light matter."

[144] Michael Lodge, "The Tribunal and the International Seabed Authority: The Future of the Advisory and Contentious Jurisdiction of the Seabed Disputes Chamber" (Paper delivered at ITLOS at 20: Looking into the Future — Symposium, 18 March 2017) 12 at 16. The relevance of this advisory opinion is recalled annually in the UNGA resolution on the oceans and the law of the sea. See e.g. GA Res 74/19, *supra* note 1 at 16, para 66.

[145] ISA, "Exploration Contracts," online: <www.isa.org.jm/deep-seabed-minerals-contractors>.

[146] Lodge, *supra* note 144 at 15.

[147] See ISA, "Comparative Study of the Existing National Legislation on Deep Seabed Mining," online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/compstudy-nld.pdf>.

[148] See e.g. ISA Council, *Decision of the Council of the International Seabed Authority Relating to an Application by the Government of Poland for Approval of a Plan of Work for Exploration for Polymetallic Sulphides*, Doc ISBA/23/C/14 (10 August 2017) at 1. The preambular paragraph typically reads as follows: "Taking note of the advisory opinion of 1 February 2011 of the [SDC] of the [ITLOS] on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area."

[149] E.g. France (12 December 2017); The Netherlands (15 December 2017); China (20 December 2017); United Kingdom (21 December 2017); Australia (28 September 2018); China (30 September 2018); Singapore (30 September 2018); Kingdom of Tonga

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As for Case no. 21, as Judge Tomas Heidar observed, the opinion "gives teeth to the relevant treaty provisions on flag State obligations and has already had an impact on State legislation and practice."[150] First, it has undoubtedly provided great assistance to the West African coastal states concerned (that is, Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, and Sierra Leone), having an impact upon their subsequent actions. States concerned have strengthened the national and sub-regional legal framework for fisheries.[151] They also have taken actions to improve fisheries governance, such as the organization of several training workshops to raise awareness of the advisory opinion as well as to validate national and sub-regional action plans for implementation of the opinion; actions to strengthen both the capacities of the SRFC's members and the framework for monitoring and control; and surveillance of fisheries and the launching of the sub-regional fisheries monitoring operation "TESSITO" supported by the European Union (EU).[152]

Second, setting apart the SRFC's members, the advisory opinion has also spurred changes in other parts of the world. For instance, it played a role in the EU's legislative process in assuring additional control by public authorities over fishing activities.[153] In 2015, the EU Commission made a proposal for an internal EU regulation concerning the management of external fishing fleets with a view to acquiring more effective control mechanisms for fishing activities under private licenses.[154] It is telling in this regard that the explanatory memorandum of the proposal for a regulation of the European Parliament and of the Council on the Sustainable Management of External Fishing Fleets explicitly cited Case no. 21 as one of the reasons for, and the objectives of, the proposal:

(30 September 2018); Jamaica (2 October 2018); Federated States of Micronesia (19 October 2018); Republic of Nauru (19 November 2018). See ISA, *Submissions to International Seabed Authority's Request for Comments. Draft Regulations on Exploitation of Mineral Resources in the Area* (19 November 2018), online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/2018/Comments/Comments.pdf>.

[150] Pacific Islands Forum Fisheries Agency, "International Judge Presents Keynote in Regional Judicial Symposium to Promote Responsibility in Fisheries" (2019), online: <www.ffa.int/node/2310?fbclid=IwAR2-dJT_gGQnKtXU90iK6J-2t40FZpd26NtFk2e86U9Nr81EK9yLzVh-JEw>. See also SPLOS, *Report of the Twenty-Sixth Meeting*, *supra* note 117 at 5, para 25.

[151] See e.g. *Loi n° 2015-18 du 13 juillet 2015 portant Code de la pêche maritime du Sénégal*, online: <http://spcsrp.org/sites/default/files/Leg-SN_2015-LOI-0018.pdf>.

[152] See generally Sub-Regional Fisheries Commission, "News," online: <http://spcsrp.org/fr/actualites>.

[153] Esa Paasivirta & André Bouquet, "Resolution of International Fisheries Disputes and Regional Experiences: The Case of European Union" (Paper delivered at ITLOS at 20: Looking into the Future — Symposium, 18 March 2017) 48 at 56.

[154] *Ibid.*

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> [I]n April 2015, [ITLOS] delivered its advisory opinion on [IUU] matters within the [EEZ] of the members of the Sub-Regional Fisheries Commission. ITLOS considers that a flag State's responsibility to prevent and/or repress IUU fishing activities within the EEZs of coastal states to be an obligation of "due diligence". ITLOS stresses the liability of the Union, and not its Member States, for any breach of the fisheries access agreements it has with coastal states.[155]

This led to the adoption of *Council Regulation (EU) 2017/2403 on the Sustainable Management of External Fishing Fleets, and repealing Council Regulation (EC) No 1006/2008*.[156] On another note, reference could also be made to the potential impact on the policy of the Pacific Islands Forum Fisheries Agency.[157]

Third, one could point to the negotiations on fisheries subsidies currently underway within the World Trade Organization (WTO).[158] Since certain forms of fisheries subsidies could be contributing to overfishing and the overcapacity of fleets around the world as well as enabling IUU fishing, the WTO's negotiations are driven by the goal of meeting the United Nations' (UN) Sustainable Development Goal no. 14.6 target of abolishing subsidies contributions to IUU fishing by 2020.[159] Against this backdrop, Case no. 21 constitutes one of the bases on which some states are explaining their proposals in order to assist WTO members in ultimately reaching an agreement.[160]

Gathering from the above, an advisory opinion relating to climate change could prove not only to be a valuable tool for the clarification of a legal situation but also a constructive tool potentially complementing the UN's climate negotiations by setting the terms of the debate, influencing domestic litigation, and/or helping to change social norms and values.[161]

[155] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Sustainable Management of External Fishing Fleets, repealing Council Regulation (EC) No 1006/2008* (2015) at 3, online: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-636-EN-F1-1.PDF>.

[156] *Council Regulation (EU) 2017/2403 on the Sustainable Management of External Fishing Fleets, and repealing Council Regulation (EC) No 1006/2008*, [2017] OJ L347.

[157] Pacific Islands Forum Fisheries Agency, *supra* note 150.

[158] These negotiations are in the framework of the 2001 World Trade Organization (WTO) Doha Round, as further elaborated by the 2005 negotiating mandate at the Hong Kong Ministerial Conference. WTO, "Introduction to Fisheries Subsidies in the WTO," online: <www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm>. See the Sustainable Development Goal indicators website at <https://unstats.un.org/sdgs/>.

[159] *Ibid.*

[160] WTO, "Negotiations on Fisheries Subsidies," online: <www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm>.

[161] Bodansky, *supra* note 101 at 18–19, 21; Sands, *supra* note 101 at 23–26.

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DEEP SEABED MINERAL MINING

Currently in the exploratory phase, it is foreseen that the deep seabed exploitation phase will begin soon. The ISA is currently developing a Mining Code, which refers to the whole of the comprehensive rules, regulations, and procedures issued by the ISA to regulate prospecting, exploration, and exploitation of marine minerals in the Area.[162] While taking into account stakeholders' interests, the Mining Code will play a critical role in minimizing the damage to the marine environment during the seabed mining process.[163] In July 2016, the first working draft of the Mining Code was issued by the ISA's Legal and Technical Commission. To date, three draft texts of regulations on exploitation of mineral resources in the Area have been issued. The following section considers the dispute settlement aspects of the ISA's Mining Code.

Settlement of Disputes in the Mining Code: SDC

Draft Regulation 106 of Part XII of the *Revised Draft Regulations on Exploitation of Mineral Resources in the Area*, entitled "Settlement of disputes," reads as follows:

> 1. Disputes concerning the interpretation or application of these regulations and an exploitation contract shall be settled in accordance with section 5 of Part XI of the Convention [Settlement of Disputes and Advisory Opinions].
>
> 2. In accordance with article 21 (2) of annex III to the Convention, any final decision rendered by a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the Authority and of the Contractor shall be enforceable in the territory of any State party to the Convention affected thereby.[164]

Along with its advisory jurisdiction, Section 5 of Part XI of *UNCLOS* confers a compulsory and quasi-exclusive jurisdiction upon the SDC over disputes arising from activities in the Area.[165] The categories of disputes include:

[162] To date, the Authority has issued: *Regulations on Prospecting and Exploration for Polymetallic Nodules* (adopted on 13 July 2000, updated on 25 July 2013); *Regulations on Prospecting and Exploration for Polymetallic Sulphides* (adopted on 7 May 2010); and *Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts* (adopted on 27 July 2012). ISA, "Draft Exploitation Regulations," online: <www.isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area>.

[163] Guifang Xue & Xu, *supra* note 5.

[164] ISA Council, *Draft Regulations on Exploitation of Mineral Resources in the Area: Prepared by the Legal and Technical Commission*, Doc ISBA/25/C/WP.1 (22 March 2019), online: <https://isa.org.jm/files/files/documents/isba_25_c_wp1-e_0.pdf>.

[165] See *UNCLOS*, *supra* note 3, arts 187–88.

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- disputes between states parties concerning the interpretation or application of Part XI of *UNCLOS* and its annexes relating thereto;[166]
- disputes between a state party and the ISA concerning their respective acts or omissions that are allegedly in violation of Part XI of *UNCLOS* or its annexes relating thereto or of rules, regulations, and procedures of the ISA;[167]
- disputes between a state party and the ISA concerning acts of the ISA alleged to be in excess of jurisdiction or a misuse of power;[168]
- disputes between parties to a contract concerning the interpretation or application of a relevant contract or a plan of work;[169]
- disputes between parties to a contract concerning acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;[170]
- disputes between the ISA and a prospective contractor concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;[171]
- disputes between the ISA and a state party, a state enterprise, or a natural or juridical person sponsored by a state party where it is alleged that the ISA has incurred liability as provided in Annex III, art 22;[172] and
- other disputes for which the jurisdiction of the SDC is specifically provided in *UNCLOS*.[173]

There seem to be potential loopholes in the SDC's jurisdiction as some disputes arising from deep seabed activities would fall outside its jurisdiction. Categories of disputes concerned are those that fall outside the jurisdiction of the SDC based on the language of Article 187 as well as those where one or more of the parties is or are outside its jurisdiction.[174] In this respect, it has been suggested

[166] *Ibid*, art 187(a). These disputes may be submitted, at the request of the parties to the dispute, to ITLOS's Special Chamber or, at the request of any party to the dispute, to an ad hoc chamber of the SDC (art 188(1)(a)(b); see also Annex VI, arts 15, 17, 36).

[167] *Ibid*, art 187(b)(i).

[168] *Ibid*, art 187(b)(ii); see also art 189.

[169] *Ibid*, art 187(c)(i). These disputes are to be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties agree otherwise (art 188(2)).

[170] *Ibid*, art 187(c)(ii).

[171] *Ibid*, art 187(d).

[172] *Ibid*, art 187(e).

[173] *Ibid*, art 187(f).

[174] ISA, "Discussion Paper No 1: Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations" (2016) at 3–5, online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Pubs/DPs/DP1.pdf> [ISA Discussion Paper No 1]; Michael Lodge, "The International Seabed Authority and Deep Seabed Disputes," *Max Planck Institute Luxembourg* (September 2017), online:

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that the jurisdiction of the SDC be enlarged to deal with the disputes concerned.[175] This proposal is not reflected in the various drafts to date.

Administrative Review Mechanism

ISA Discussion Paper no. 1, titled "Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations," suggests that the ISA "should give consideration as to whether the [SDC] is best suited for all disputes that are foreseeable, or whether there are some disputes that might be decided by other tribunals or decision makers."[176] First, it proposes the referral of "technical disputes" to an "appropriately qualified expert or expert panel for determination," as "it may not be efficient to have such disputes determined by a predominantly legally-trained and focused tribunal such as the [SDC]" and the proposed expert panel "is likely to be faster and cheaper than formal proceedings before the [SDC]."[177] It further recommends subjecting the proposed expert panel to the supervisory jurisdiction of the SDC.[178] Second, it notes that there may be circumstances in which, "in the interests of speed and cost and in the interests of ensuring that the [SDC] is not clogged with potentially expensive disputes concerning the ISA's administrative decisions," internal administrative appeals would be preferable before proceeding to dispute settlement under Part XI, section 5 of *UNCLOS* — in particular, for disputes between the ISA and a prospective contractor.[179]

The first drafts of Regulations 57 and 92, respectively, propose the establishment of an administrative review mechanism. In more detail, Draft Regulation 92 makes provisions for such a mechanism applicable in the event of any dispute concerning the interpretation or application of the exploitation contract, where the contractor seeks a review of any decision made or action taken by or on behalf of the ISA against the contractor.[180] Such a request might be the subject of an investigation by the secretary-general.[181] Once this investigation is concluded, if the secretary-general and

<https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/SG-Stats/mpi_sept2017.pdf>.

[175] ISA Discussion Paper No 1, *supra* note 174 at 5–8.

[176] *Ibid* at 8, para 5.1.

[177] *Ibid* at 8–9, paras 5.3–5.4.

[178] *Ibid* at 9, para 5.5.

[179] *Ibid* at paras 5.6–5.9.

[180] ISA, *Draft Regulations on Exploitation of Mineral Resources in the Area*, Doc ISBA/23/LTC/CRP.3* (8 August 2017), Draft Regulation 92(2), online: <www.isa.org.jm/files/documents/EN/Regs/DraftExpl/ISBA23-LTC-CRP3-Rev.pdf> [*Draft Regulations on Exploitation of Mineral Resources*].

[181] *Ibid*, Draft Regulation 92(3).

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the contractor fail to agree upon a single expert to determine the dispute, the dispute will be referred to a panel of experts constituted as follows:[182] the contractor and the secretary-general would seek to agree upon the composition of the panel within thirty days of the conclusion of the said investigation; if no agreement is reached, the contractor and the secretary-general would each nominate one member of the panel within a further thirty days; the two members so nominated would agree upon the third member of the panel, who would act as chairman; if the two members are unable to agree within thirty days of the second of them being appointed, the president of the SDC would nominate the third member of the panel.[183] A single expert, or a panel of experts, would seek to act in "the most expeditious and cost-effective manner."[184]

Some have expressed support for this "more cost-effective" route to the resolution of technical disputes, while pointing out that the drafting leaves a lot of questions unanswered, such as the question of appropriate technical expertise represented on such a panel, the question whether parties other than a contractor and the ISA would be able to use the review mechanism, the legal effect of the panel's decision, the question of whether there should be an appeal route to the SDC, and the interaction/consistency of such a mechanism with Part XI, section 5.[185] At the same time, others have commented that the proposed mechanism should not be set up as an alternative to the SDC and have emphasized the importance of preserving the integrity of *UNCLOS* and the jurisdiction of the SDC thereunder.[186] Ultimately, the proposed approach has not received broad support. The administrative review mechanism provided for in earlier drafts has been deleted in the last version of the revised draft regulations.

Apart from the administrative review mechanism, it is to be noted that some states have proposed alternative dispute settlement procedures. For instance, China has said that, if a dispute could not first be resolved

[182] *Ibid*, Draft Regulation 92(4).

[183] *Ibid*, Draft Regulation 92(5).

[184] *Ibid*, Draft Regulation 92(6).

[185] ISA, "Submissions to International Seabed Authority's Draft Regulations on Exploitation of Mineral Resources in the Area" (2018), online <www.isa.org.jm/files/files/documents/list-1.pdf> ["Submissions to ISA"]. See e.g. submissions of Belgium (20 December 2017) at 9; China (20 December 2017) at 16; Germany (20 December 2017) at 9; Singapore (20 December 2017); the United Kingdom (21 December 2017) at 10; Tonga Offshore Mining (24 November 2017) at 3; UK Seabed Resources (15 December 2017) at 3–4; Ocean Mineral Singapore (20 December 2017) at 5; Deep Sea Conservation Coalition (6 December 2017) at 8; and DeepSea Mining Alliance (15 December 2017) at 6.

[186] See e.g. *ibid*, submissions of France (12 December 2017) at 2; Tonga (19 December 2017) at para 17; Germany (20 December 2017) at 9; Japan (20 December 2017) at paras 39–40; Singapore (20 December 2017) at paras 9–13; and Algeria (on behalf of the African Group) at 10.

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through negotiation and consultation, the dispute settlement mechanism set out in the regulations might allow for disputes to be referred to a third-party dispute settlement procedure, with the express consent of the parties concerned.[187] The Federated States of Micronesia, for their part, have suggested that the ISA create a standing body of technical, legal, and scientific experts that the SDC could call on for an initial screening of a potential dispute to determine whether it is of a purely technical nature that does not require adjudication by the SDC or some other legal tribunal.[188] Another suggestion has been for the ISA to "explore the possibility of ITLOS establishing special rules of procedure that would accommodate expedited hearings on a subset of disputes that may arise under the exploitation regulations similar to those applicable to the prompt release of vessels and crews."[189]

The foregoing prompts some observations. First, the SDC may form an ad hoc chamber, composed of three of its members, to deal with a particular dispute submitted to it in accordance with Article 188(1)(b) of *UNCLOS*. Its composition is to be determined by the SDC with the approval of the parties.[190] Second, Article 49 of the *Rules of the Tribunal* expressly specifies that proceedings are conducted "without unnecessary delay or expense." Furthermore, numerous provisions dedicated to the SDC in the *Rules of the Tribunal* provide for the discharge of its functions speedily, efficiently, and cost-effectively.[191] Third, Article 289 of *UNCLOS* provides for the appointment of experts by the SDC in any dispute involving scientific or technical matters, at the request of a party or *proprio motu*.

In the discussion regarding the establishment of an administrative review mechanism, much has turned on the cost-effectiveness and formality of the procedure of the SDC or, in other words, the fact that seizing the SDC could be seen as using a "sledgehammer to crack a walnut."[192] Yet,

[187] See e.g. *ibid*, submission of China (20 December 2017) at 4–5.

[188] See e.g. Federated States of Micronesia, "Comments on the Draft Regulations of the International Seabed Authority on the Exploitation of Mineral Resources in the Area" (19 October 2018) at 8–9, online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/2018/Comments/FSM.pdf>.

[189] See e.g. "Submissions to ISA", supra note 185, submission of Jamaica (2 October 2018) at 32–33.

[190] *ITLOS Statute*, *supra* note 41, art 36.

[191] See generally Jin-Hyun Paik, "Special Commemorative Session of the Assembly of the International Seabed Authority, Convened to Celebrate the Twenty-fifth Anniversary of the Entry into Force of the United Nations Convention on the Law of the Sea and the Establishment of the International Seabed Authority," *ITLOS* (25 July 2019) at 3, paras 9–12, online: <www.itlos.org/fileadmin/itlos/documents/statements_of_president/paik/ISA_anniversary__Kingston-25_July_2019-Statement-Final.pdf>.

[192] Lodge, *supra* note 174 at 11–12 (explaining that "[i]t is more likely than not that most of the disputes that will arise in the Area will be of a technical or administrative nature. These

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alternatively, one can argue that such a mechanism would have real potential when it comes to limitations on the SDC's jurisdiction with regard to decisions of the ISA. Under Article 189 of *UNCLOS*, the SDC has no jurisdiction with regard to the exercise by the ISA of its discretionary powers in accordance with Part XI of *UNCLOS*. In particular, in no case shall the SDC substitute its discretion for that of the ISA. Without prejudice to its advisory jurisdiction under Article 191 of *UNCLOS*, the SDC shall not pronounce itself on the question of whether any rules, regulations, and procedures of the ISA are in conformity with *UNCLOS*, nor declare invalid any such rules, regulations, and procedures. Its jurisdiction in this regard is confined to deciding claims that the application of any rules, regulations, and procedures of the ISA in individual cases are in conflict with the contractual obligations of the parties to the dispute or their obligations under *UNCLOS*; claims concerning excess of jurisdiction or misuse of power; and claims for damages to be paid or other remedies to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under *UNCLOS*. These limitations on the SDC's jurisdiction are quite significant, but they afford the ISA the freedom, powers, and discretion it needs to discharge its responsibilities.[193] In such a setting, the establishment of an administrative review mechanism with respect to the ISA's exercise of its discretionary powers deserves further consideration.[194]

Needless to say, however, such a mechanism, if any, would incur costs, which would arguably be borne equally by the ISA and the party.[195] Besides, the limitations contained in Article 189 of *UNCLOS* do not apply to the advisory proceedings of the SDC. Therefore, this advisory jurisdiction can have implications for the procedures adopted by the ISA with regard to the exercise of its discretionary powers.[196]

might include, for example, appeals against the imposition of administrative sanctions for regulatory breaches, or requests for the review of decisions relating to operational matters. In such cases, it may not be efficient to have such disputes determined by a predominantly legally-trained tribunal such as the Chamber").

[193] Thomas A Mensah, "The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea" (1998) 2 Max Planck YB UN L 307 at 317; AO Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Leiden: Martinus Nijhoff, 1987) at 195.

[194] See Linlin Sun, "Dispute Settlement relating to Deep Seabed Mining: A Participant's Perspective" (2017) 73 Melbourne J Intl L 71 at 86–88.

[195] *Draft Regulations on Exploitation of Mineral Resources*, *supra* note 180, Draft Regulation 92(6).

[196] Mensah, *supra* note 193 at 318.

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MARINE BIOLOGICAL DIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION

In 2015, the UNGA decided to develop an internationally legally binding instrument under *UNCLOS* on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ).[197] Three substantive sessions of the ensuing intergovernmental conference have been held, and two draft texts have been issued by the president of the conference.[198] The following discussion succinctly considers the question of the dispute settlement mechanism under a potential BBNJ agreement. These comments are succinct as the issue has already been well documented elsewhere,[199] and, more fundamentally, it is not entirely clear at this stage what kind of dispute resolution mechanism might be included in such an instrument, not least because some general principles applicable to genetic resources beyond national jurisdiction remain contentious.[200]

In relation to the settlement of disputes, several delegations have suggested that provisions set out in Part XV of *UNCLOS* apply *mutatis mutandis* to any dispute between states parties, drawing on the provisions of *UNFSA*.

[197] *Development of an International Legally Binding Instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, GA Res 69/292, UN Doc A/RES/69/292 (6 July 2015).

[198] See *Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction: Note by the President*, UN Doc A/CONF.232/2019/6 (17 May 2019), online: <https://undocs.org/a/conf.232/2019/6>; *Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction: Note by the President* (advance, unedited version) (27 November 2019), online: <www.un.org/bbnj/sites/www.un.org.bbnj/files/revised_draft_text_a.conf_.232.2020.11_advance_unedited_version.pdf> *[Revised Draft Text of an Agreement under UNCLOS]*. See also *Article-by-Article Compilation of Textual Proposals for Consideration at the Fourth Session Dated 15 April 2020,* online: <www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf>.

[199] See Joanna Mossop, "Dispute Settlement in the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction," *NCLOS Blog* (2019), online: <https://site.uit.no/nclos/2019/12/23/dispute-settlement-in-the-new-treaty-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/>; Jin-Hyun Paik, "Some Thoughts on Dispute Settlement under a New Legal Instrument on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction at the Permanent Mission of Germany to the United Nations," *ITLOS* (2019), online: <www.itlos.org/fileadmin/itlos/documents/statements_of_president/paik/President_Paik_s_Statement_BBNJ_DS-German_House-NY-June_2019-Final_Corr170919.pdf>; Philippe Gautier, "Le règlement des différends" in A de Paiva Toledo & VJM Tassin, eds, *Guide to the Navigation of Marine Biodiversity beyond National Jurisdiction* (Rio de Janeiro: Editora D'Plácido, 2018) 665.

[200] See e.g. Efthymios Papastavridis, "The Negotiations for a New Implementing Agreement under the UN Convention on the Law of the Sea Concerning Marine Biodiversity" (2020) 69 ICLQ 585.

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Others have favoured an obligation to settle disputes by peaceful means, as provided under both *UNCLOS* and *UNFSA*. Others have refused to support any reference to *UNCLOS*. It has been proposed that parties could consider submitting disputes to a third-party procedure based on explicit mutual agreement. It has also been suggested that provision be made for the submission of disputes between states parties on the interpretation or application of the proposed BBNJ instrument to a special ITLOS chamber, whether or not they are also parties to *UNCLOS*. Still another proposal would provide the Conference of the Parties to the proposed BBNJ instrument with the power to request an advisory opinion from ITLOS.[201]

A few words may be said about the foregoing proposals. First, the availability of different dispute resolution options to states with disputes arising under both *UNCLOS* and the proposed BBNJ agreement might create difficulties.[202] Second, as for the proposal of creating an ITLOS special chamber to deal with issues related to BBNJ, ITLOS has the power to create such a chamber specifically tailored to resolve such disputes. Article 15(1) of the *ITLOS Statute* allows it to "form such chambers, composed of three or more of its elected members, as it considers necessary for dealing with particular categories of disputes."[203] Third, it has been highlighted above that the power to request an advisory opinion is a valuable tool, though it faces some hurdles, as noted previously, including issues surrounding the exercise by ITLOS of advisory jurisdiction. Finally, it should be noted that the latest version of the draft text tabled by the president of the BBNJ conference dedicated its Part IX to "Settlement of Disputes." Draft Article 54 sets out the general obligation to settle disputes by peaceful means. Draft Article 55 invokes the *mutatis mutandis* formula to apply the provisions

[201] *Chair's Non-paper on Elements of a Draft Text of an International Legally-binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (28 February 2017) at 110–11, online: <www.un.org/Depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf>; *Supplement to the Chair's Non-paper* (24 March 2017), online: <www.un.org/Depts/los/biodiversity/prepcom_files/Supplement.pdf>; *Chair's Streamlined Non-paper on Elements of a Draft Text of an International Legally-binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction* (21 July 2017) at 53–54, online: <www.un.org/Depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf>; see also "Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction," *Earth Negotiations Bulletin* (19–30 August 2019), online: <https://enb.iisd.org/vol25/enb25218e.html>; "Summary of the Second Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction," *Earth Negotiations Bulletin* (25 April 2019), online: <https://enb.iisd.org/vol25/enb25195e.html>.

[202] Mossop, *supra* note 199.

[203] *ITLOS Statute*, *supra* note 41.

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relating to the settlement of disputes set out in Part XV of *UNCLOS* "to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to *UNCLOS*," as modelled in Article 30 of *UNFSA*.[204]

Conclusion

State obligations on the protection and preservation of the marine environment have undergone significant development in ITLOS's jurisprudence through the prescription of provisional measures and the deliverance of advisory opinions. Furthermore, it has been shown that ITLOS constitutes an appropriate forum and is flexible enough to accommodate legal issues related to environmental challenges such as climate change, exploitation of the Area, or BBNJ. Furthermore, considering the above discussion, one has to recall that Part XV of *UNCLOS* was part of a delicately negotiated package deal. As President Hamilton Amerasinghe, the first president of the third UN Conference on the Law of the Sea explained, "[d]ispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced, otherwise the compromise will disintegrate rapidly and permanently."[205]

[204] *Revised Draft Text of an Agreement under UNCLOS*, *supra* note 198.

[205] "Memorandum by the President of the Conference on Document A/CONF.62/WP.9," UN Doc A/CONF.62/WP.9/ADD.1 (31 March 1976) at para 6.

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