

that making UNEP a specialised agency would heighten its role and influence in sustainable development while others believed that member States must draw on already-existing expertise.

At the conclusion of the meeting, the co-chairs proposed a draft negotiating document to be transmitted to CSD-19, outlining the process for reaching a final document in 2012. The draft was adopted by consensus<sup>7</sup> and the delegates appeared satisfied that, although much work remains to be done, both for Rio+20 and for implementing sustainable development, PrepCom 2 had made progress.

## ITLOS / Case No. 17

### Seabed Mining

#### – Advisory Opinion on Responsibility and Liability –

by Donald K. Anton, Robert A. Makgill and Cymie R. Payne

On 1 February 2011, the Seabed Disputes Chamber (“the Chamber”) delivered its first Advisory Opinion. The Council of the International Seabed Authority (ISA) requested the advice of the Chamber – the body within the International Tribunal for the Law of the Sea (ITLOS) with the relevant jurisdiction<sup>1</sup> – on the limits of State liability when a contractor that a State is sponsoring to explore or exploit the seabed in areas beyond national jurisdiction causes damage or harm. In providing this advice, the Chamber was also requested to opine on the primary international obligations of a sponsoring State under the United Nations Convention on the Law of the Sea (UNCLOS or Convention), the breach of which would give rise to responsibility.

The case involved at least four historic firsts. It is the first time that the advisory jurisdiction of ITLOS has been invoked. It is the first time that the Tribunal has been unanimous in a ruling without separate opinions or declarations containing varying rationale – a testament to the President of the Chamber, Tullio Treves. It is the first time that non-governmental organisations – Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature submitting together – have had a written submission linked on the ITLOS website (although it was not made part of the case file), despite the fact that no treaty rule or internal ruling of the Tribunal provides for such a procedure. It is also the first time that oral proceedings in ITLOS have been webcast live.

By way of background, the case naturally originates with the Convention, which declares the seabed and its resources that lie beyond national jurisdiction (a geographical component known as “The Area” in ITLOS

#### Notes

1 Member States will decide on the structure and content of the 10YFP on SCP at CSD-19 in May 2011. For more information, see [http://www.un.org/esa/dsd/csd/csd\\_multyearprogwork.shtml](http://www.un.org/esa/dsd/csd/csd_multyearprogwork.shtml).

2 See [http://www.un.org/esa/dsd/csd/csd\\_pdfs/csd-19/IPM-Organization-of-Work.pdf](http://www.un.org/esa/dsd/csd/csd_pdfs/csd-19/IPM-Organization-of-Work.pdf).

3 Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States. For more information, see [http://www.sidsnet.org/msi\\_5/](http://www.sidsnet.org/msi_5/).

4 See [http://ec.europa.eu/environment/chemicals/reach/reach\\_intro.htm](http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm).

5 See <http://esa.un.org/marrakechprocess/tenyearframework.shtml>.

6 For more information on the draft and on IPM, see [http://www.un.org/esa/dsd/csd/csd\\_csd19\\_ipm.shtml](http://www.un.org/esa/dsd/csd/csd_csd19_ipm.shtml).

7 See [http://www.un.org/esa/dsd/csd/csd\\_pdfs/csd-19/Advanced%20unedited%20copy%20-%20Chair's%20draft%20negotiating%20document.pdf](http://www.un.org/esa/dsd/csd/csd_pdfs/csd-19/Advanced%20unedited%20copy%20-%20Chair's%20draft%20negotiating%20document.pdf).



circles) to be “the common heritage of mankind”.<sup>2</sup> This was one of the most significant achievements of international law during the twentieth century. The doctrine of common heritage establishes norms preserving a large part of ocean space as a commons accessible and shared by all States.

An important concomitant of common heritage in UNCLOS is the explicit promotion of effective participation and special consideration of developing States in the exploration and exploitation of minerals in the Area. This, in turn, is implemented by what is known as a “parallel system” of exploration and exploitation (as modified by the 1994 Implementation Agreement).<sup>3</sup> The parallel system places exploration and exploitation



Courtesy: ISA

of the Area under the control of the International Seabed Authority. All prospective exploration and exploitation activities (either carried out by a State entity or a private entity) are required to be sponsored by a party to UNCLOS and sponsoring States must apply to the ISA for approval of a plan of work for exploration and licences for exploitation. In the case of developing States, under the parallel system established under UNCLOS, one section of the Area

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subject to a plan of work is reserved for activities by the ISA “in association with developing States”.<sup>4</sup> These sections are referred to as “reserved areas”.

In 2008, two applications for approval of plans of work for exploration in a reserved area were received by the ISA. They were lodged by Nauru Ocean Resources, Inc. (a Nauruan corporation sponsored by Nauru) and Tonga Offshore Mining Ltd (a Tongan corporation sponsored by Tonga). However, in 2009, because of a concern about liability for damage caused by exploration, a request was made to the ISA that both applications be postponed. Before proceeding, Nauru proposed that the ISA seek an Advisory Opinion from the Chamber on several specific questions to clarify the liability of sponsoring States. In support of its proposal, Nauru submitted the following:

*...Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector .... Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate ...the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru .... [Ultimately], if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area.<sup>5</sup>*

Ultimately, the Council of the ISA decided to request an Advisory Opinion from the Chamber on three questions:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?<sup>6</sup>

The Advisory Opinion provides further illumination of a number of concepts, principles and norms that underpin environmental protection of areas beyond national jurisdiction. It also advances ITLOS jurisprudence in significant ways.

## Preliminary Matters

Before turning to the substantive questions, the Chamber first dealt with a number of preliminary matters. In particular, the Chamber took up the issue of its jurisdiction, the admissibility of the case, the law to be applied, and questions of treaty interpretation.<sup>7</sup> For reasons of space, we address the three most interesting aspects of these preliminaries.

First, in considering the admissibility of the case, the Chamber declined to decide whether it has discretion to decline to issue an Advisory Opinion when it has clear jurisdiction. The Chamber noted the difference between Article 191 of the Convention, stating that the Chamber “shall give” an Advisory Opinion,<sup>8</sup> and the Statute of the International Court of Justice (ICJ) which states that the Court “may give” an Advisory Opinion.<sup>9</sup> Some participants<sup>10</sup> were of the view that provided that there is 1) a request from the Council, 2) it concerns a legal question, and 3) the question arises within the scope of the Council’s activities, then the Chamber cannot consider whether judicial propriety might otherwise lead the Chamber to decline to hear a case. In other words, under the Convention, the Chamber might not be able to proceed in the manner in which the Permanent Court of International Justice did in *Eastern Carelia*, declining to issue an Advisory Opinion because it would be tantamount to deciding a contentious case without consent.<sup>11</sup>

Second, unsurprisingly, the Chamber invoked the Vienna Convention on the Law of Treaties (VCLT)<sup>12</sup> as reflective of the customary rules that it is bound to apply in the interpretation of the Convention. However, this is the first time that the Tribunal has been explicit in stating that Articles 31–33 of the VCLT reflect customary international law. It is also the first time it has used the VCLT to interpret relevant instruments that are not treaties – specifically the Regulations on Polymetallic Nodules and Polymetallic Sulfides. This is an interpretive posture the ICJ recently adopted in connection with Security Council Resolution 1244 authorising an international presence in Kosovo.<sup>13</sup>

Third, the Chamber resolved problems with the use of the terms “obligation”, “responsibility” and “liability” in the English text by reference to the equally authoritative Arabic, Chinese, French, Spanish and Russian texts of UNCLOS. Observing that use of these terms is consistent in all other texts and that usage is consistent with the International Law Commission (ILC) Articles on State Responsibility, it concludes that the phrase “legal responsibilities” and “responsibility” mentioned in Questions 1 and 3 relate to the primary international legal obligations placed on sponsoring States by the Convention, the 1994 Agreement, and related instruments. In Question 2, the term “liability” refers, counterintuitively but entirely correctly, to the secondary rules governing the consequences of a breach of a sponsoring State’s obligations – in other words, State responsibility.

## Question 1

Question 1 is perhaps the most significant part of the Advisory Opinion. This aspect of the Chamber’s

decision added clear momentum to the development of international environmental law, especially as it relates to the obligations of States with respect to the common heritage of humankind.

In preliminary analysis, however, Chamber found it necessary to determine the ambit of activities included under Question 1 because the question concerned sponsoring State obligations in connection with “activities in the Area”. Interpreting the Convention, the Chamber found that, for this purpose, the concepts of exploration and exploitation include recovery of minerals from the seabed, lifting them to the water surface and other directly related activities. It does not include processing on land or transportation from the high seas superjacent to the part of the Area in which exploration or exploitation occurs.<sup>14</sup>

David Freestone has observed that this distinction limits the applicability of the ruling and the liability of States because the obligations of sponsoring States under the Convention do not extend to activities outside of the Area.<sup>15</sup> Although the Chamber did not address this, Article 192 creates a general obligation for States to protect and preserve the entire marine environment. This obligation extends to activities undertaken outside of the Area. Furthermore, Article 235 makes clear that States are responsible for the fulfilment of their obligations to protect and preserve the marine environment and can be held liable in accordance with general international law.

### The Primary Obligations

The Chamber commenced this part of the Advisory Opinion by identifying the key provisions concerning the obligations of sponsoring States as follows:<sup>16</sup>

#### Article 139(1)

*States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.*

#### Article 153(4)

*The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with Article 139.*

#### Annex III, Article 4(4)

*The sponsoring State or States shall, pursuant to Article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations*

*under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.*

The Chamber determined that the basic obligation of a sponsoring State is to ensure that the activities in the Area conducted by the sponsored entity or contractor are “in conformity” or “in compliance” with:<sup>17</sup>

- Part XI of the Convention (governing The Area);
- Relevant Annexes to the Convention;
- Rules, Regulations and Procedures of the Authority;
- The terms of its exploration contract with the Authority; and
- Any other obligations under the Convention.



Macro of native copper



Pure (99.9 %) cobalt chips, electrolytically refined

Courtesy: Wikipedia

All of this is relatively straightforward, but it was the need to analyse the “duty to ensure” that required the Chamber to discuss the general international due diligence obligation not to cause harm to the environment beyond national jurisdiction. This concept of the rule of law has a long history, from early mention in Moore’s Digest in 1906, through the *Trail Smelter* case, Principle 21 of the Stockholm Declaration, the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities and, most recently, the ICJ’s decision in the *Pulp Mills* case.<sup>18</sup>

### Due Diligence

Due diligence is an obligation of conduct and not of result. Accordingly, the sponsoring State's obligation to ensure is not to achieve the result that a contractor complies with the requirements of the Convention. Rather, the Chamber described it as an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost to achieve this result".<sup>19</sup> Considering the content of the due diligence obligation, the Chamber described it as a "variable concept" that "may change over time as measures considered sufficiently diligent at a certain moment, for instance, may not be diligent enough in light of new scientific or technological knowledge". Further, the Chamber recognised that "the standard of due diligence has to be more severe for ... riskier activities".<sup>20</sup>

The Chamber goes on to point out that the Convention gives some guidance as to the content of the "due diligence" obligation to ensure. "Necessary measures [to ensure compliance] are required and these must be adopted within the legal system of the sponsoring State".<sup>21</sup> In particular, the Convention requires the sponsoring State to adopt "laws and regulations" and to take "administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".<sup>22</sup> The Chamber gives more specific indications concerning the content of these measures, including their enforcement, under its reply to Question 3.

Following its discussion of due diligence, the Chamber proceeded to put "meat on the bones" by considering the "direct obligations" of sponsoring States under the Convention and general international law. Three particularly important direct obligations are:

- The Precautionary Approach;
- Best Environmental Practices; and
- Environmental Impact Assessment.

Turning to the precautionary approach, the Chamber stated that the link between an obligation of due diligence and the precautionary approach is implicit in the *Southern Bluefin Tuna* Cases.<sup>23</sup> It then observed "that the precautionary approach has been incorporated into a growing number of international treaties and instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration". In the Chamber's view "this has initiated a trend towards making this approach part of customary international law".

The Chamber cited the Convention's regulations and the ICJ's invocation of the precautionary approach in the *Pulp Mills* case as support for its applicability here.<sup>24</sup> The mining regulations, governing prospecting and exploration for polymetallic nodules and sulphides, explicitly require States and the ISA to apply Rio Declaration Principle 15. That formulation requires that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". The Chamber noted that under Principle 15, States are to apply precaution "according to their capabilities", which might indicate a less strict standard for developing States.<sup>25</sup>

In light of the Chamber's findings, it concluded that States must apply a precautionary approach as an integral part of their due diligence obligations "in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks". Disregarding such risks would constitute a failure to comply with the precautionary approach, and accordingly a failure to meet the State's due diligence obligation.

As mentioned, another direct obligation includes "best environmental practices". The Chamber observed that "best environmental practices" are required by the ISA regulations and the standard clauses for exploration contracts. The Chamber appears to be of the view that the express requirement for "best environmental practices" under the regulations and standard clauses heralds a raise in standard from use of "best technology available". "Best environmental practices" certainly appears to be a much broader concept than best available technology. Whereas the latter appears to be limited by what is technologically achievable, a survey of the former in a variety of international instruments shows that it requires the application of the most appropriate combination of environmental control measures and strategies.<sup>26</sup> Moreover, this obligation is the same for developed and developing States.

The third significant direct obligation is the requirement for the preparation of an Environmental Impact Assessment (EIA). Referring to the ICJ's *Pulp Mills* judgment, the Chamber stressed that EIA is both "a direct obligation under the Convention and a general obligation under customary international law".<sup>27</sup> The Chamber acknowledged that the ICJ decision had been limited to consideration of impacts on the environment in a transboundary context. It went on to state, however, that the ICJ's reasoning may also apply to activities in an area beyond the limits of national jurisdiction, and the Court's references to "shared resources" may apply to resources that are the common heritage of mankind.<sup>28</sup> The Court concluded by stating that the EIA requirement extended beyond the scope of the application of the specific provisions of the regulations.

### Developing States

In light of the background to the request for the Advisory Opinion, the Chamber went to some length to consider whether the Convention applied different standards of due diligence to developing and developed States. It found that there is specific provision under Part XI of the Convention for the promotion of developing State participation in activities in the Area. However, none of the general provisions of the Convention concerning responsibilities or liability accord preferential treatment to sponsoring States.

Accordingly, the general provisions concerning responsibility and liability apply equally to all sponsoring States. The standard of due diligence owed by sponsoring States is not to be differentiated based on levels of economic development, with the exception of the precautionary approach; which as discussed above may import reference to different capabilities under Principle

15 of the Rio Declaration. The Chamber reasoned that equality of treatment is necessary to avert the spread of sponsoring States “of convenience” with little or no regulatory requirements, which “would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind”.<sup>29</sup>

## Question 2

Question 2 comprised the crux of Nauru’s concern about expansive State liability that would pose a barrier to developing State sponsorship of activities in the Area. On the other hand, the question raised the prospect of situations in which damage may be occasioned, but for which no remedy is available. UNCLOS Article 139(2) sets out the limits of State responsibility for sponsoring States. It does, however, leave a “liability gap” in at least three instances:

- where a State takes all necessary and/or appropriate measures required by international law and the blameless actions of the contractor nevertheless cause environmental harm;
- where a State takes the requisite necessary and/or appropriate measures and the private operator is blameworthy, but insolvent or its assets are beyond the reach of the sponsoring State; and
- where the sponsoring State has failed to take the required measures but there is no causal link with the environmental harm.

The question in such cases is what entity, if any, must bear the loss in this circumstance? The Chamber’s answer to this question under UNCLOS Article 139(2) and related instruments is that the State does not bear residual liability. This is reflected in the maxim *damnum absque injuria* – damage without wrong (in the sense that an action will not lie).<sup>30</sup>

The emerging trend in international law is reflected in the ILC’s Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The point of departure for the principles on allocation is the establishment by Principle 4(2) of principal liability for a private operator(s) in the first instance. However, the Principles recognise a situation may arise in which prompt and adequate compensation for harm by a private operator, like a sponsored entity, fails. In such a situation, a residual liability remains with the State under Principle 4(5) “to ensure that additional financial resources are made available”.

The Chamber was unwilling to read this much into applicable international law. It did, however, emphasise that under Article 304 of the Convention, the “regime of international law on responsibility and liability is not ... static [and] opens the liability regime for deep seabed mining to new developments [customary or

conventional] in international law”.<sup>31</sup> It also indicated a strict liability regime could be introduced via the ISA Mining Regulations. Thus, the principle of residual liability may one day find its place. For now, though, the Chamber suggests that a possible solution could be the establishment of a trust fund, although how it would be established and funded raises further problems.<sup>32</sup>

In connection with Question 2, the Chamber indicated, citing the ILC Articles on State Responsibility, Article 48, that obligations to preserve the environment of the high seas and in the Area may be *erga omnes*, that is, owed to the international community as a whole, or *erga omnes partes*, “to a group of States [if the obligation] is established for the protection of a collective interest of the group”. The Chamber noted that the ISA acts “on behalf of” humankind and so might be able to claim compensation, as might “entities engaged in deep seabed mining, other users of the sea, and coastal States”.<sup>33</sup> It further observed that “[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character” of these obligations.<sup>34</sup> While the Chamber’s language can be read as hypothesising (“may”), it tends to equate the principle of “common heritage” and environmental protection with the classic examples of *erga omnes* obligations identified by the *Barcelona Traction* and *East Timor* cases – genocide, aggression, slavery, racial discrimination and self-determination.<sup>35</sup>

## Question 3

As expected, the Chamber gave a general response in specifying the measures that a sponsoring State must take to ensure that it has acted with all requisite due diligence. The Chamber had really answered this in replying to the first question. In particular, a State must have effective laws and supporting administrative regulations in place; simple contractual arrangements are not sufficient. Those laws and regulations must be regularly enforced by monitoring and inspection. Moreover, they must be “no less effective than international rules, regulations and procedures”,<sup>36</sup> primarily those adopted by the Authority.

The Chamber’s emphasis, that laws and regulations by themselves may not be sufficient, reiterates the ICJ’s observation in the *Pulp Mills* case that a State must both enact and enforce legislation designed to ensure the compliance of its nationals.<sup>37</sup> In particular the Chamber observed that “[a]dministrative measures aimed at securing compliance with them may also be needed. Laws, regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor.”<sup>38</sup>

These requirements (along with the non-differentiated high standard of due diligence) will challenge developing States to put adequate legal rules and structures in place to ensure they meet the obligations outlined by the Chamber. It may mean that developing States will look to sponsored



Courtesy: ISA

entities to finance the implementation and administration of domestic legislation governing mining activities in the Area. In these circumstances it is likely that measures will focus on environmental management of activity-specific proposals in defined locations rather than comprehensive governance of seabed mining in the Area. Equally, it may prompt sponsorship partnerships with developed States with well-developed legal, monitoring and enforcement capabilities.

## Conclusion

The advisory opinion has provided useful guidance to the international community concerned with the deep seabed. First and foremost, the Chamber has accomplished its task to assist the ISA with independent and impartial judicial interpretation of the Convention and related instruments. States that intend to extract valuable resources now know that they must evaluate their legal codes, administrative capacity, and their judicial enforcement mechanisms to determine where they fall short of the standards that the Chamber has identified. For most States it will be necessary to introduce new laws to provide the requisite rules, regulations and procedures. Entities seeking sponsorship will likely wish to work with these governments to develop a workable regime. Other entities, such as those interested in scientific research, other economic uses, and protection of the ocean and seabed resources, will want to assist with this process to ensure that their interests are respected and that developing States are given assistance to develop appropriate laws and enforcement capacity. Finally, the limitations and gaps in the Convention's liability scheme have now been identified and await the international legal community's attention.

## Notes

- 1 The Chamber has jurisdiction to give advisory opinions when requested by the Assembly or Council of the International Seabed Authority, United Nations Convention on the Law of the Sea (UNCLOS), Article 191. All references to the Convention are taken from United Nations. (1983). *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference*. U.N. Pub. Sales No. E.83.V.5.
- 2 UNCLOS, Article 136. For detailed treatment of the concept of common heritage see Baslar, K. (1998). *The Concept of the Common Heritage of Mankind in International Law*. The Hague: Martinus Nijhoff.
- 3 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. U.N.Doc. A/RES/48/263 (28 July 1994).
- 4 UNCLOS, Annex III Article 8. Under UNCLOS Annex III Article 9, paragraph 4 (to the extent it has not been modified by the 1994 Agreement on Part XI, Annex, Section 2) it is also possible for any party to notify the Authority of its intent to submit a plan of work in a reserved area.
- 5 ISBA/16/C/6 (5 March 2010), para. 1, at: <http://www.isa.org.jm/files/documents/EN/16Sess/Council/ISBA-16C-6.pdf>.
- 6 ISBA/16/C/13 (6 May 2010), at: <http://www.itlos.org/case-17/Dossier%20No%207.pdf>.
- 7 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, (Feb. 1, 2011)(hereafter "Advisory Opinion"), paras 31–71.
- 8 UNCLOS, Article 191: "The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency" (emphasis added).
- 9 Statute of the International Court of Justice, Article 65(1): "The Court may

give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request" (emphasis added).

- 10 See, e.g., Written Statement of the United Kingdom of Great Britain and Northern Ireland, para. 2.7, at: [http://www.itlos.org/case\\_documents/2010/document\\_en\\_329.pdf](http://www.itlos.org/case_documents/2010/document_en_329.pdf); Written Statement of International Seabed Authority, para. 2.6, at: [http://www.itlos.org/case\\_documents/2010/document\\_en\\_342.pdf](http://www.itlos.org/case_documents/2010/document_en_342.pdf). See also Nordquist, M., Nandan, S., Rosenne, S. and Lodge, M.W. (Eds) *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI. Martinus Nijhoff.
- 11 *Status of Eastern Carelia*, [1923] P.C.I.J. (ser. B) No. 5 (July 23). See also *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories*, [2004] ICJ Rep (Advisory Opinion) (9 July 2004) at para. 44.
- 12 Vienna Convention on the Law of Treaties (VCLT), 1155 U.N.T.S. 331.
- 13 *Accordance with International Law of the Declaration of Independence in respect of Kosovo*, [2010] ICJ Rep (Advisory Opinion) (22 July 2010), at para. 94.
- 14 Advisory Opinion, paras 94–96.
- 15 Freestone, D. (2011). "Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on 'Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area'". *ASIL Insights* Vol. 15, Issue 7 (Mar. 9, 2011).
- 16 Advisory Opinion, para. 100.
- 17 *Ibid.*, paras 103 to 104.
- 18 Note from the Secretary of State of the US in the Negrete Affair, In: Moore, VI Digest of International Law, 1906, at 962; *Trail Smelter Case* (U.S. v. Canada), III UNRIAA 1905, 1938-1981 (1949); The United Nations Conference on the Human Environment, Stockholm, 1972; Prevention of Transboundary Harm from Hazardous Activities, G.A. Res. 62/68, Annex, U.N. Doc. A/RES/62/68 (6 December 2007); *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) Merits, Judgment, ICJ Reports 2010.
- 19 Advisory Opinion, para. 110.
- 20 *Ibid.*, para. 117.
- 21 *Ibid.*, para. 119.
- 22 *Ibid.*, para. 119.
- 23 *Ibid.*, para. 132; *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (2000) 1 (1) MJIL 153.
- 24 Advisory Opinion, para. 135.
- 25 *Ibid.*, para. 161. See Payne, C. (2011). "Chamber advises caution in seabed mining". *IntLawGrrls* March 8 2011, at: <http://intlawgrrls.blogspot.com>.
- 26 UNEP Expert Group on best available techniques and best environmental practices. (2003). "Use of the terms *best available techniques*, *best environmental practices* and related concepts in international environmental instruments". UNEP/POPS/EGB.1/INF/3 (29 January 2003).
- 27 Advisory Opinion, para. 145.
- 28 *Ibid.*, para. 148.
- 29 *Ibid.*, para. 159.
- 30 Written Statement of the International Union for Conservation of Nature, para. 111, at: [http://www.itlos.org/case\\_documents/2010/document\\_en\\_336.pdf](http://www.itlos.org/case_documents/2010/document_en_336.pdf). See also Oral Statement of Ambassador Joel Hernandez G., Legal Adviser of the Mexican Ministry of Foreign Affairs of Mexico, ITLOS/PV.10/2/Rev.1 (15 September 2010), pp. 46–47, at: [http://www.itlos.org/case\\_documents/2010/document\\_en\\_345.pdf](http://www.itlos.org/case_documents/2010/document_en_345.pdf).
- 31 Advisory Opinion, paras 209–211.
- 32 *Ibid.*, para. 205.
- 33 *Ibid.*, para. 180.
- 34 The Area has been described as "formally subject to an international (treaty-based) public trust regime". Sand, P.H. (2007). "Public Trusteeship for the Oceans". In: Ndiaye, T.M. and Wolfrum, R. (Eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, at 536. Martinus Nijhoff Publishers.
- 35 *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain); Second Phase, [1970] ICJ Reports 3; *Case Concerning East Timor* (Portugal v. Australia) [1995] ICJ Reports 90. See Treves, T. (2010). "Principles and Objectives of the Legal Regime Governing Areas beyond National Jurisdiction". In: Molenaar, E.J. and Oude Elferink, A.G. (Eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments*, at 16–17. Leiden Boston: Martinus Nijhoff. See also Brunneé, J. (2007). "Common Areas, Common Heritage and Common Concerns". In: Bodansky, D., Brunneé, J. and Hey, E. (Eds), *Oxford Handbook of International Environmental Law*. Oxford: OUP.
- 36 Advisory Opinion, para. 241; UNCLOS, Article 209(2).
- 37 *Pulp Mills*, p.58, para. 197. The Court held that the obligation to prescribe "appropriate rules and measures ... is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of rules and measures, but also a certain high level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as monitoring of activities undertaken by such operators, to safeguard the rights of other [parties]."
- 38 Advisory Opinion, para. 218.

