
Centre for International
Governance Innovation



Liability Issues for Deep Seabed Mining Series | Paper No. 5 – February 2019

Responsibility and Liability for Damage Arising Out of Activities in the Area: Potential Claimants and Possible Fora

Tara Davenport



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CIGI Masthead

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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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About the Project

The Liability Issues for Deep Seabed Mining project was developed by the Centre for International Governance Innovation (CIGI), the Commonwealth Secretariat and the Secretariat of the International Seabed Authority (ISA) to assist in clarifying legal issues of responsibility and liability underpinning the development of exploitation regulations for the deep seabed. CIGI, in collaboration with the ISA Secretariat and the Commonwealth Secretariat, in 2017, invited leading legal experts to form the Legal Working Group on Liability for Environmental Harm from Activities in the Area (LWG) to discuss liability related to environmental damage, with the goal of providing the Legal and Technical Commission, as well as members of the ISA with an in-depth examination of potential legal issues and avenues.

Papers in the series cover the following topics: the current legal architecture for liability/responsibility under the United Nations Convention on the Law of the Sea; the scope of activities covered under a liability regime; the responsible parties; the potential claimants; the range of recoverable damages; and the appropriateness of using insurance and compensation funds to ensure adequate resources for compensation. CIGI Senior Fellow Neil Craik coordinated the development of the paper series.

About the LWG

The LWG was co-convened by CIGI, the Commonwealth Secretariat and the Secretariat of the ISA, under the joint direction of Neil Craik (CIGI), Hannah Lily (Commonwealth Secretariat) and Alfonso Ascencio-Herrera (ISA Secretariat). Other members of the LWG were invited based on their expertise in areas related to international law of state responsibility and liability, international environmental law and law of the sea. While working under the auspices of the ISA, the LWG is an independent group of legal experts.

The members of the LWG are:

- Alfonso Ascencio-Herrera, Deputy Secretary-General, ISA
- Christopher Brown, Legal Officer, ISA
- Eden Charles, Independent Consultant on International Law, and Former Deputy Permanent Representative of Trinidad and Tobago to the United Nations*
- Neil Craik, Senior Fellow, CIGI, and Professor of Law, University of Waterloo*
- Tara Davenport, Research Fellow, Centre for International Law, National University of Singapore*
- Elie Jarmache, Special Adviser on the Law of the Sea, Member, Legal and Technical Commission, ISA
- Hannah Lily, Legal Adviser, Commonwealth Secretariat*
- Ruth Mackenzie, Reader in International Law, University of Westminster*
- Stephen E. Roady, Professor of the Practice of Law, Duke University School of Law
- Andres Rojas, Diplomat, Ministry of Foreign Affairs and Worship, Argentina*
- Dire Tladi, Professor, University of Pretoria, and Member, International Law Commission
- Guifang (Julia) Xue, Professor, KoGuan Law School, Shanghai Jiao Tong University*

*Contributing authors to the paper series.

About the Author

Tara Davenport is currently an instructor at the Faculty of Law, National University of Singapore (NUS) and a research fellow at the Centre for International Law at NUS. She has an LLB from the London School of Economics, an LLM in maritime law from NUS, and an LLM and JSD from Yale Law School. She received the NUS Overseas Graduate Scholarship in 2014 and a Fulbright Scholarship in 2013. She is a qualified advocate and solicitor in Singapore. Her current research areas are public international law, law of the sea and international dispute settlement.

Acronyms and Abbreviations

ABNJ	area beyond national jurisdiction
ASR	Articles on the Responsibility of States for Internationally Wrongful Acts
CHM	common heritage of mankind
GLE	group of legal experts
ICJ	International Court of Justice
ILC	International Law Commission
IOs	intergovernmental organizations
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LOSC	United Nations Convention on the Law of the Sea
LTC	Legal and Technical Commission
LWG	Legal Working Group on Liability for Environmental Harm from Activities in the Area
NGOs	non-governmental organizations
SDC	Seabed Disputes Chamber
UNCC	United Nations Compensation Commission

Executive Summary

This paper explores the various issues related to identifying claimants that have a sufficient legal interest to bring a claim for damage arising out of activities in the area beyond national jurisdiction (“the Area” or the ABNJ) (standing) and whether such claimants have access to a dispute settlement forum to adjudicate such claims, be it an international court, tribunal or national courts (access). The paper argues that the major challenge in the context of deep seabed mining is that damage can impact both individual and collective interests of the international community, making the determination of which actor has standing a complex task. While concepts such as *erga omnes* and *erga omnes partes* recognize that there are some obligations owed to the international community, in which all states have a legal interest in their protection, the parameters of this concept and its application to damage arising out of deep seabed mining is mired in some uncertainty. As a result, there may be a variety of actors that could potentially sustain damage as a result of deep seabed mining and, hence, have sufficient legal interest to bring claims, but do not have access to the primary dispute settlement forum under the 1982 United Nations Convention on the Law of the Sea (LOS),¹ namely the Seabed Disputes Chamber (SDC). Bringing claims in national courts may be their only option, but this has its own unique set of challenges. Accordingly, this paper suggests that more clarity is needed on which actors have sufficient legal interest to bring a claim for damage arising out of activities in the Area. Further, in terms of potential fora, policy makers will have to decide whether to maintain the status quo (the SDC and national courts); channel the majority of claims to the SDC and exclude claims to national courts; maintain the SDC’s jurisdiction and harmonize national legislation; and establish a new mechanism altogether.

1 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 396, 21 ILM 1261 Part XI, s 5 (entered into force 16 November 1994) [LOS].

Introduction

There is no uniform concept of standing in international law.² For example, standing is traditionally understood as requiring a potential claimant to show that the actions of the wrongdoer have affected his or her legally protected positions, usually referred to as “rights” or “legal interests” as opposed to mere interests.³ Other definitions of standing describe it as whether a particular claimant has access to a particular court, or in other words, who has the right to appear before a court as a party.⁴

For present purposes, this paper defines standing as encompassing whether a particular claimant has sufficient legal interest to make a claim.⁵ Access, on the other hand, refers to whether a particular claimant has access to initiate proceedings before the SDC under section 5 of Part XI of the LOS.⁶ The major challenge in the context of deep seabed mining is that damage can impact both individual and collective interests, making the determination of which actor has standing a complex task. This is compounded by the fact that there are a variety of actors that could potentially sustain damage as a result of deep seabed mining and, hence, have standing to bring a claim, but do not have access to the SDC and will have to initiate claims in domestic courts. Policy makers devising potential new rules on liability and compensation for deep seabed mining will have to balance competing imperatives to compensate parties that have suffered damage, but at the same time ensure that the costs of carrying out an activity are not so prohibitive so as to act as a disincentive for contractors and insurers.

2 Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, UK: Cambridge University Press, 2005) at 26; Angela Del Vecchio, “International Courts and Tribunals, Standing” in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* [Wolfrum, *Max Planck Encyclopedia*], online: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e799?prd=EPIL>>.

3 Tams, *supra* note 2 at 29, 32–36; Malgosia Fitzmaurice, “Liability for Environmental Damage Caused to the Global Commons” (1996) 5:4 RECIEL 305, 306–07.

4 Del Vecchio, *supra* note 2.

5 In the *South West Africa* case, the court stated that in order for a state to bring a claim based on *actio popularis*, the specific right of protection “must be clearly vested in those who claim them, by some text or instrument or rule of law.” See *Case Concerning South West Africa, Second Phase (Ethiopia v South Africa and Liberia v South Africa)* [1966] ICJ Rep 6, 32 at para 44 [South West Africa].

6 LOS, *supra* note 1.

This paper will first examine the various fora in which claims for compensable damage may be brought. It will then discuss the potential claimants for claims for damage against the primary actors that are attributed liability under the current LOSC framework, namely, contractors, the International Seabed Authority (ISA) and sponsoring states.⁷ For discussion purposes, this paper will assume the claims for compensable damage consist of damage to “common heritage of mankind” (CHM)⁸ resources in the ABNJ; damage to the marine environment in the ABNJ; damage to living resources in the ABNJ; damage to persons and property in the ABNJ; and damage in areas under the jurisdiction of the coastal state.⁹ Under each heading of damage, the paper will examine the possible claimants that may have standing (a legal interest) to bring a claim as well as whether it has access to the SDC to initiate proceedings.

Potential Fora

Section 5 of Part XI provides for several different fora for disputes relating to deep seabed mining, consisting of the SDC (composed of 11 members selected by a majority of the elected members of the International Tribunal for the Law of the Sea [ITLOS]);¹⁰ an ad hoc chamber of the SDC (composed of three members of the SDC);¹¹ a special chamber of ITLOS (consisting of five members of

ITLOS selected by the parties);¹² and a commercial arbitral tribunal.¹³ Apart from these fora, national courts may also play a role in deciding deep seabed mining disputes. The discussion below focuses on the SDC (as the primary international forum to decide claims related to damage arising out of activities in the Area) and national courts.

The SDC

The centrality of the SDC as the primary forum to decide disputes related to seabed mining is borne out by the legislative history of Part XI¹⁴ and the terms of the LOSC itself. The SDC is the forum that has jurisdiction over the greatest number of disputes, but gives states parties the option of choosing alternative fora, such as a special chamber of ITLOS or an ad hoc chamber of the SDC, for disputes between states parties on the interpretation or application of the LOSC. Further, parties to a contract related to seabed mining activities are given the option of choosing binding commercial arbitration,¹⁵ but the SDC retains essential jurisdiction over disputes that involve a question of interpretation of Part XI and the Annexes thereto, and disputes in which a party to the dispute or which the commercial arbitral tribunal decides is dependent upon a ruling of the SDC.¹⁶

The SDC has personal jurisdiction to adjudicate claims by the primary actors involved in deep seabed mining, namely, states parties, the ISA, the Enterprise and the contractors (states, state enterprises, privately owned entities and natural persons).¹⁷

7 For a discussion on other actors that could potentially be responsible for damage, see Tara Davenport, “Responsibility and Liability for Damage Arising Out of Activities in the Area: Attribution of Liability” CIGI, Liability Issues for Deep Seabed Mining Series Paper No 4, 10 January 2019.

8 Unless directly quoting the “common heritage of mankind” in the LOSC, this paper uses the term “humankind” to indicate that the deep seabed belongs to everyone.

9 Neither the convention nor the Exploration Regulations specify what constitutes compensable damage, although the Exploration Regulations and Draft Exploitation Regulations currently under discussion include damage to the marine environment, including the costs of reasonable measures to prevent, limit and ameliorate damage to the marine environment. While a more comprehensive discussion on compensable damage can be found in a paper by Ruth Mackenzie, “Liability for Environmental Harm from Deep Seabed Mining Activities: Definition of Compensable Damages” CIGI, Liability Issues for Deep Seabed Mining Series [forthcoming in 2019], this paper takes a broad view of the potential categories of compensable damage (without taking any position on the merits of including such categories of compensable damage).

10 LOSC, *supra* note 1, art 187 read with art 35, Annex VI.

11 *Ibid*, art 188(1)(b), read with art 36, Annex VI.

12 *Ibid*, art 188(1)(a), read with arts 15, 17.

13 *Ibid*, art 188(2).

14 Some delegates felt that only one forum should have jurisdiction over all seabed mining disputes so as to ensure the unity of jurisprudence and consequently maintain public order. Others preferred to be able to select between several different fora, including arbitral tribunals, so as to influence the composition of the bench. A compromise was reached whereby primary jurisdiction was conferred upon the SDC, but states parties had the option of referring disputes on the interpretation of the LOSC to a special chamber of ITLOS or an ad hoc chamber of the SDC, and parties to contractual disputes had the option of commercial arbitration: *Report of the Chairman of the Group of Legal Experts [GLE] on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text*, Doc A/CONF.62/C.1/L.25; *Official Records of the Third United Nations Conference on the Law of the Sea*, vol XI, Add.1 at 117 [GLE Report].

15 LOSC, *supra* note 1, art 188(1).

16 *Ibid*, art 188(2).

17 *Ibid*, art 37, Annex VI.

With regard to subject matter jurisdiction, with the exception of article 187(e) of the LOSC, which expressly deals with the liability of the ISA under article 22 of Annex III, there is no other mention of the liability of other actors for claims for compensable damage.¹⁸ Notwithstanding this, article 187 could be interpreted broadly to cover most claims for compensable damage. For example, damage resulting from the “wrongful acts” of the contractor and the ISA will necessarily require an interpretation of Part XI; the Annexes; the regulations, rules and procedures of the ISA; as well as any contractual arrangements, all of which are *prima facie* covered by articles 187(a) to (e). The SDC determines its own jurisdiction¹⁹ and may be inclined to take a broad approach to the jurisdictional provisions of section 5. This is especially important, considering the fact that the subject matter jurisdiction of a court or tribunal generally depends on how an issue is formulated²⁰ and that the objective of section 5 of Part XI is to confer primary jurisdiction on the SDC so as to promote uniformity in jurisprudence.²¹ Accordingly, this paper takes the position that most of the claims for compensable damage can fall within the SDC’s jurisdiction listed in articles 187(a) to (e), with the caveat that this assumption is necessarily speculative.

National Courts

Generally, proceedings for damage claims may be initiated in the courts of the place where damage is suffered or, in other words, the injured party’s state; the place where the harmful activity is located; or the place where the defendant is domiciled.²² For deep seabed mining, the relevant national court would be the court in the injured

party’s state or where the defendant is domiciled, which *prima facie* is the sponsoring state.

Under general international environmental law, states have an obligation to ensure that there are adequate mechanisms available to respond to claims for compensation for damage to the environment,²³ reflected in article 235(2) of the LOSC. Based on this provision, the SDC found that it was a direct obligation on the sponsoring state to adopt laws and regulations on compensation within the framework of its legal system.²⁴ The SDC did not confine the obligation to the establishment of procedures and substantive rules governing claims for damages to environmental damage. According to the SDC, the sponsoring state has a certain measure of discretion with regard to the adoption of laws and regulations and taking administrative measures, but it is not absolute — “it must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.”²⁵ Further, legislation should include provisions to ensure that any final decision rendered by a court or tribunal under the LOSC relating to the rights and obligations of the ISA and contractor shall be enforceable in the territory of each state party.²⁶ Accordingly, the extent to which a claimant has access to national courts will depend on the applicable legal framework within that state.

18 Indeed, the GLE constituted to consider the dispute settlement procedures in Part XI noted that they did not deeply consider issues of liability in relation to the dispute settlement mechanisms in Part XI as they felt it was outside their mandate: see *GLE Report*, *supra* note 14 at 118.

19 LOSC, *supra* note 1, art 188(4).

20 As observed by Alan Boyle, “[E]verything turns in practice not on what each involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside.” See Alan Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction” (1997) 46:1 ICLQ 37 at 38.

21 One of the primary concerns of the GLE, as well as negotiators of the LOSC, was to ensure uniformity of jurisdiction and jurisprudence. See in general, *GLE Report*, *supra* note 14.

22 Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (Oxford, UK: Oxford University Press, 2009) at 312.

23 See 1972 Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc A/CONF.48/14/Rev.1(1973), 11 ILM 1416 (1972), Principle 22; Rio Declaration on Environment and Development, UN Doc A/CONF 151/26 (vol I), 31 ILM 874 (1992), Principle 13; Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries (2006) 2:2 YB ILC, Principle 4.

24 SDC of the ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011), Advisory Opinion, No 17 [SDC Advisory Opinion 2011] at para 139, online: <www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>.

25 *Ibid* at paras 227, 230.

26 LOSC, *supra* note 1, art 21(2), Annex III.

Claims against Contractors

Damage to the CHM

Meaning and Status of the CHM

The LOSC defines the “Area and its resources” as the CHM.²⁷ Resources are defined as “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed including polymetallic nodules,” and consist of polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts.²⁸ The Area is defined as the “seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”²⁹ While there may be legal and practical difficulties in separating damage to CHM resources and damage to the marine environment,³⁰ this paper assumes that damage to CHM resources and damage to the marine environment are separate heads of damage.³¹

From its inception, the CHM has been a “controversial legal concept,”³² and there existed no agreement on a workable definition.³³ In the troubled attempts to implement the CHM principle in various treaty regimes from the law of the sea, to outer space, to Antarctica, the atmosphere and biological diversity either met with failure (atmosphere, Antarctica, biological diversity), inchoate implementation (outer space) or a significant modification from what it started out to be (as exemplified in the LOSC and the

1994 Implementation Agreement).³⁴ Much ink has been spent on defining what the CHM means³⁵ and constraints of space prohibit an in-depth discussion on this. That said, the most robust implementation of the CHM principle can be found in the LOSC, despite the modification of Part XI by the 1994 Implementation Agreement. The CHM principle as implemented in the LOSC has a definite legal meaning. As articulated by Ambassador Arvid Pardo,³⁶ it consists of non-appropriation;³⁷ shared management of the resources on behalf of the international community;³⁸ sharing of benefits for the whole of mankind;³⁹ peaceful purposes;⁴⁰ and preservation for future generations.⁴¹ While the extent to which each of these has been implemented under the LOSC is an on-going process (and also subject to debate),⁴² these five elements are generally accepted as giving legal flesh to the CHM principle.

Given this meaning, the question arises as to which actor has a sufficient legal interest to bring a claim in the event of damage to CHM resources. This does not have a straightforward answer, emblematic of the questions on liability that usually arise in the context of the global

27 *Ibid*, art 136.

28 *Ibid*, art 133.

29 *Ibid*, art 1(1).

30 See discussion in Mackenzie, *supra* note 9.

31 SDC Advisory Opinion 2011, *supra* note 24 at para 179.

32 Prue Taylor, “The Concept of the Common Heritage of Mankind” in Douglas Fisher, ed, *Research Handbook on Fundamental Concepts of Environmental Law* (Cheltenham, UK: Edward Elgar, 2016) 306 at 306.

33 Jeffrey Loan, “The Common Heritage of Mankind in Antarctica: An Analysis in Light of the Threats Posed by Climate Change” (2004) 1 NZ YB Intl L 149 at 157.

34 *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994*, UNTS 1836, UN Doc A/Res.48/263 [entered into force 28 July 1996] [1994 *Implementation Agreement*]. For a discussion on the way in which the CHM has been implemented in various regimes, see Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Dordrecht, the Netherlands: Martinus Nijhoff, 1998). For a discussion on how the CHM implemented in the LOSC was modified, see, for example, Alfredo C Robles Jr, “The 1994 Agreement on Deep Seabed Mining: Universality vs. the Common Heritage of Humanity” (1996) 12 *World Bulletin* 20 at 61.

35 The voluminous literature on the CHM has been compiled in a bibliography: Prue Taylor & Lucy Stroud, *Common Heritage of Mankind: A Bibliography of Legal Writing* (Valletta, Malta: Fondation de Malte, 2013).

36 Arvid Pardo, “Law of the Sea Conference: What Went Wrong” in Robert L Friedheim, ed, *Managing Ocean Resources: A Primer* (Boulder, Colorado: Westview Press, 1979) 137 at 141. See also, for example, Christopher Joyner, “Legal Implications of the Concept of the Common Heritage of Mankind” (1986) 35:1 *ICLQ* 190 at 191, which states that “five principal elements appear to characterize the ‘common heritage of mankind’ notion when applied to common space areas.” See also Taylor, *supra* note 32 at 319–20.

37 LOSC, *supra* note 1, art 137(1).

38 *Ibid*, arts 137(2), 153(1), 157.

39 *Ibid*, arts 137(2), 140.

40 *Ibid*, art 141.

41 *Ibid*, art 145, 150(b).

42 See, for example, Michael Lodge, “The Common Heritage of Mankind” (2012) 27 *Intl J Mar & Coast L* 733 at 734; Aline Jaeckel, Jeff A Ardrón & Kristina M Gjerde, “Sharing benefits of the common heritage of mankind – Is the deep seabed mining regime ready?” (2016) 70 *Mar Pol’y* 198 at 200.

commons.⁴³ This is further complicated by what interests are denoted by the term humankind, and who is entitled to represent humankind. While it has been argued that humankind has emerged as a subject of international law, given its frequent invocation in various fields,⁴⁴ there is still considerable debate on its parameters.⁴⁵ The LOSC does not elaborate on what is meant by “mankind as a whole” although under article 140, it extends to states parties and non-states parties, including peoples of non-self-governing territories or peoples who have not attained full independence. During the negotiations, there were some attempts to confine the beneficiaries of humankind to just states parties, but this did not get strong support and was considered to be contrary to the 1970 Declaration of Principles.⁴⁶ It has also been held by the International Court of Justice (ICJ) that “mankind” necessarily entails both present and future generations.⁴⁷ Indeed, it has been recognized that any future mechanism for the distribution of revenue by the ISA must have an intra- and inter-temporal component.⁴⁸ The very least that can be said about “mankind” is that it extends beyond states and consists of “present and future generations.” What is not clear is which actor is entitled to represent such interests, in particular in an international system dominated by states.

A related issue is whether damage to CHM resources is a breach of an *erga omnes* or *erga omnes partes* obligation and the implications of such a designation. At the outset, it bears noting that the concept of *erga omnes* obligations is one that is characterized by uncertainty. The ICJ, having rejected Liberia and Ethiopia’s application to invoke the responsibility of South Africa for

breaching its mandatory obligations on the basis of *actio popularis* in the 1966 *South West Africa Cases (Second Phase)*,⁴⁹ proceeded to elaborate on the concept of obligations *erga omnes*, or the obligations of a state toward the international community as a whole, in *Barcelona Traction*.⁵⁰

When a State admits into its territory foreign investments or foreign nationals, whether national or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports

43 See e.g. Kathy Leigh, “Liability for Damage to the Global Commons” (1992) 14 *Austl YB Intl L* 129, 149–51.

44 Antonio Augusto Cancado Trindade, *International Law for Humankind: Toward a new jus gentium* (Leiden, the Netherlands: Nijhoff, 2005) at 287.

45 See Baslar, *supra* note 34 at 70–76.

46 ED Brown, *The Area Beyond the Limits of National Jurisdiction: Sea Bed Energy and Mineral Resources and the Law of the Sea*, vol 2 (Dordrecht, the Netherlands: Nijhoff, 1986) at 3.29. Although note that article 82, which obliges the coastal state to make payments or contributions for exploitation of the outer continental shelf, which are to be distributed by the Authority on the basis of equitable sharing criteria, only specifies that the Authority shall distribute them to states parties (rather than humankind as a whole).

47 See e.g. *Gabcikovo-Nagymoros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at para 140.

48 Michael W Lodge, Kathleen Segerson & Dale Squires, “Sharing and Preserving the Resources in the Deep Sea: Challenges for the International Seabed Authority” (2017) 32 *Intl J Mar & Coast L* 427 at 429.

49 In the 1966 *South West Africa Cases (Second Phase)* involving South Africa’s mandatory powers over South West Africa, the ICJ held that in order to bring a claim based on *actio popularis*, the specific right of protection must be clearly vested in those who claim them by some text or instrument or rule of law. The principle of sacred trust “has no residual juridical content which could, so far as any particular mandate is concerned, operate per se to give rise to legal rights and obligations outside the system as a whole; and within the system equally, such rights and obligations exist only in so far as there is actual provision for them.” *South West Africa*, *supra* note 5 at paras 44, 54.

50 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain); Second Phase*, (1970) ICJ Rep 3. 32 [*Barcelona Traction*]. Arguably, the recognition of *erga omnes* obligations in *Barcelona Traction* was prompted by the criticism that the ICJ faced for the *South West Africa* cases: see James Crawford, “Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 on Responsibility of States for Internationally Wrongful Acts” in Ulrich Fastenrath et al, eds, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford, UK: Oxford University Press, 2011) [Crawford, “Responsibility for Breaches”] 224 at 230.

1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.⁵¹

The International Law Commission's (ILC's) Articles on the Responsibility of States for Internationally Wrongful Acts (ASR),⁵² adopted in 2001, also recognizes *erga omnes* obligations in article 48(1): "Any State other than an injured State is entitled to invoke the responsibility of another State... if (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole."

Article 48(1)(a) refers to obligations *erga omnes partes*, which can either be derived from multilateral treaties or customary international law.⁵³ Article 48(1)(b) gives effect to the statement in *Barcelona Traction* that "in cases of breaches of specific obligations protecting the collective interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42."⁵⁴ While not an international convention, the ASR provides important guidance on the responsibilities of states and is increasingly relied upon by states and international courts/tribunals.⁵⁵

Although *Barcelona Traction* was a milestone in international law, the concept of *erga omnes* remains shrouded in uncertainty. First, the implications of a characterization of an obligation as *erga omnes* are not immediately clear. *Barcelona Traction* merely said that every state had a legal interest in its protection — it did not expressly convey rights of standing on the claimant state. The ASR clarified that in the event of a breach of an *erga omnes* obligation, every state may claim from the responsible state cessation of the internationally wrongful act and, if necessary,

assurances and guarantees of non-repetition and performance of the obligation or reparation in the interest of the injured state or of the beneficiaries of the obligation breached.⁵⁶ However, it is clear that the characterization of an obligation as *erga omnes* is not sufficient to overcome jurisdictional rules of an international court or tribunal.⁵⁷

Second, how do various norms enter into the "magic *erga omnes* circle?"⁵⁸ With regard to obligations falling within article 48(b) (i.e., obligations owed to the international community as a whole), the ICJ's jurisprudence has not been particularly clarifying. For example, *erga omnes* arguments were invoked by Australia and New Zealand in the 1974 *Nuclear Tests Case*, but were not expressly addressed by the court, which was "unsympathetic to the notion of an *actio popularis* allowing high-seas freedoms to be enforced by any state."⁵⁹ However, in other cases, the court has explicitly recognized a number of examples such as prohibitions against aggression, slavery, racial discrimination, genocide,⁶⁰ the right to self-determination⁶¹ and the rules of international humanitarian law embodying "elementary considerations of humanity,"⁶² as consisting of *erga omnes* obligations. At the same time, the ICJ has not elucidated why these obligations should be

51 *Barcelona Traction*, *supra* note 50 at paras 33–34.

52 ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53rd Sess, UN Doc A/56/10 (2001) [ILC, ASR].

53 For obligations *erga omnes partes*, two conditions must be met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the state invoking responsibility belongs; and, second, the obligation must have been established for the protection of a collective interest established by a treaty or customary international law (*ibid* at 126).

54 *Ibid*.

55 James Crawford, "State Responsibility" in Wolfrum, *Max Planck Encyclopedia*, *supra* note 2.

56 ILC, ASR, *supra* note 52, art 48(2).

57 In the *East Timor* case between Portugal and Australia, the ICJ recognized that the right to self-determination had *erga omnes* status, but that it could not rule on the lawfulness of the conduct of a state when its judgment would necessitate an evaluation of the lawfulness of the conduct of another state that is not a party to the case: *Case concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 102 at para 29 [*East Timor*]. Also see *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6 at 31, 52 at paras 64, 125 [*Armed Activities*], where the ICJ acknowledged that the principles underlying the Genocide Convention have the status of *jus cogens* or to create rights and obligations *erga omnes*, but this cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.

58 Michael Reisman, "Comment" in Jost Delbrück, ed, *The Future of International Law Enforcement: New Scenarios – New Law?* (Berlin: Duncker & Humboldt, 1993) 168 at 170.

59 Birnie, Boyle & Redgwell, *supra* note 22 at 233. Although in the separate or dissenting opinions of other judges, the issue of *actio popularis* in international law was not found to exist in customary international law, the joint and dissenting opinion recognized that while it was a controversial concept, the question of its existence was one that may be considered as "capable of rational legal argument." See *Nuclear Tests Case (Australia & New Zealand v France)* ICJ Rep 1974 at 253, 370.

60 *Barcelona Traction*, *supra* note 50 at para 34; *Armed Activities*, *supra* note 57 at para 71.

61 *East Timor*, *supra* note 57 at para 29.

62 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at paras 155, 157.

considered *erga omnes*.⁶³ Consequently, there are a wide range of disparate views on what are the *erga omnes* obligations that are owed to the international community as a whole.⁶⁴ In this regard, it bears noting that in the ILC's *Third Report on Peremptory Norms of General International Law (Jus Cogens)*, the special rapporteur suggests that peremptory norms of international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all states.⁶⁵ Thus, *jus cogens* refers to the legal status of the norms, while *erga omnes* obligations concern the legal implications that result from the characterization of a particular norm as *jus cogens*.⁶⁶

Similarly, it is also not clear when an obligation under a treaty regime or owed to a group of states under general international law is *erga omnes partes*.⁶⁷ The ASR in its commentary suggests that such obligations *erga omnes partes* may concern, for example, the environment or security of a region and are not limited to arrangements established only in the interests of member states, but would extend to agreements established by a group of states in some wider common interest and must transcend the sphere of bilateral relations of states parties.⁶⁸ The commentary did not elaborate on what was meant by collective interest except to say that the principal purpose would be to foster a "common interest, over and above any interests of the States concerned individually."⁶⁹ Scholars have suggested that *erga omnes partes* arise under human rights treaties, such as the European Convention on Human Rights, the Convention on Civil and Political Rights, the 1949 Geneva Conventions and the 1977 Protocols or international humanitarian law, in its entirety, international environmental law (including obligations to protect the marine

environment) and the World Trade Organization Agreements.⁷⁰ The 2012 dispute between Belgium and Senegal was the first time that the ICJ explicitly recognized *erga omnes partes*. Belgium brought a case against Senegal regarding the latter's failure to prosecute a former Chadian dictator on the basis that this was a breach of the obligation to prosecute or extradite under the Convention against Torture as well as the customary duty to do so for crimes against humanity. After recognizing that all states parties have a legal interest in the compliance with the Convention against Torture, and that these obligations were *erga omnes partes*, the court found that any state party to the convention may invoke the responsibility of another state party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under article 7, paragraph 1 of the convention, and to bring that failure to an end.⁷¹

Does the CHM regime established in Part XI of the LOSC create obligations *erga omnes* or *erga omnes partes* so as to give all states or states parties sufficient legal interest to bring a claim against the contractor for damage to CHM resources? It has been consistently recognized by scholars that the CHM regime has been established in the common interest of the international community.⁷² Further, in the early discussions of the ILC on state responsibility, it was accepted that "the States parties to a multilateral treaty may agree to consider a breach of an obligation, imposed by such treaty, as infringing a collective interest of all the States parties to that multilateral treaty.

63 Tams, *supra* note 2 at 118–19. Arguably, the *Barcelona Traction* case provides some guidance. The court emphasized that in order to be *erga omnes*, it had to protect important values, suggested by the statement "in view of the importance of the rights involved, all States can be held to have a legal interest of obligations...*erga omnes*."

64 Tams, *supra* note 2 at 119.

65 ILC, *Report of the International Law Commission*, 68th Sess, UN Doc A/71/10 (2016) [ILC, *Report*] at paras 103–11, online: <<http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp9.pdf&lang=EFSRAC>>.

66 *Ibid* at para 109.

67 It has been argued that *Barcelona Traction* did not address *erga omnes partes* and the reference to "international instruments of a universal or quasi-universal character" should be interpreted as an indication that obligations *erga omnes* are often also protected by international treaties. See Tams, *supra* note 2 at 122–23.

68 ILC, ASR, *supra* note 52 at 126.

69 *Ibid*.

70 Tams, *supra* note 2 at 120.

71 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 422 at paras 69–70. It should be borne in mind that although the decision referred to *Barcelona Traction*, which referred to obligations owed to the international community as a whole, *Belgium v Senegal* referred to obligations *erga omnes partes*, which are owed to a group of states under a treaty regime.

72 Crawford, "Responsibility for Breaches", *supra* note 50 at 238. See also Rüdiger Wolfrum, who states that the "community interest orientation is most clearly reflected in the common heritage principle and in the establishment of the International Seabed Authority 'through which States Parties shall... organize and control activities in the Area.'" Rüdiger Wolfrum, "Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia" in Fastenrath, *supra* note 50 at 1136. Yoshifumi Tanaka, "Protection of Community Interests in International Law: The Case of the Law of the Sea" (2011) 15 Max Planck YB UN L 329 at 339–49; Alexandre Kiss, "The Common Heritage of Mankind: Utopia or Reality?" (1985) 40:3 Intl J 423 at 428. Kiss goes on to say that the materialization of the common interest of mankind means that "states suspend or do not assert rights or claims, or in some cases exercise such jurisdiction only within set limits, for the benefit of the whole human community, without any immediate return, and conserve and if necessary manage areas in conformity with the common interest for the benefit of all mankind."

Actually, and by way of example, the concept of ‘common heritage of mankind,’ as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction, expresses such collective interest.”⁷³

Scholars have also argued that the CHM may constitute the basis for enforcement by states that have suffered no particular injury in the global commons.⁷⁴ The SDC recognized that the *erga omnes* character of the obligations on the preservation of the marine environment of the high seas and the Area entitles each state party of the LOSC to claim compensation for damage to the marine environment.⁷⁵ It did not distinguish between *erga omnes* and *erga omnes partes*,⁷⁶ nor did it mention *erga omnes* in the context of damage to CHM resources, but instead stated that the ISA implicitly would be entitled to bring such a claim on behalf of humankind.⁷⁷ This does not necessarily mean that CHM resources were not subject to *erga omnes* obligations, only that there was no need for the ISA to rely on such justifications to mount a claim for damage to CHM resources.

Another pertinent issue is whether responsibility for breaches for *erga omnes* or *erga omnes partes* obligations can be invoked against non-state actors. *Prima facie*, the ASR only applies to the responsibility of states. In the present scenario, the invocation of responsibility is against state contractors and non-state contractors, and the question arises as to whether non-state contractors can be held responsible for breaches of *erga omnes* obligations. In this regard, it bears noting that contractors have international obligations under

the contract with the ISA⁷⁸ and, hence, it has been argued that “if they breach their obligations, the rules on responsibility as elaborated by the ILC in the [ASR] would, by analogy, be applicable to these entities.”⁷⁹ Accordingly, it is possible to argue that contractors, regardless of their status, have *erga omnes partes* obligations.

In summary, there is some legal opinion that obligations in relation to CHM resources under the LOSC are obligations *erga omnes partes* (see discussion above), subject to the caveat that certainty on this issue will only occur after determination by a court or tribunal.

Whether such obligations are *erga omnes*, owed to the international community as a whole, is more uncertain. For example, if one accepts the argument of the special rapporteur on peremptory norms that it is only norms of *jus cogens* that have *erga omnes* effects, then an argument that the CHM regime creates obligations *erga omnes* in general may be difficult to mount. During the drafting of the LOSC, attempts to have the *jus cogens* nature of the CHM concept recognized in

73 ILC, *Report of the Commission to the General Assembly on the work of its thirty-seventh session*, YB ILC, vol 2, Part 2 (1985), A/CN.4/SER.A/1985/Add.1 (Part 2) at 27.

74 Jonathan Charney, “Third State Remedies for Environmental Damage to World’s Common Spaces” in Francesco Francioni & Tullio Scovazzi, eds, *International Responsibility for Environmental Harm* (London, UK: Graham & Trotman, 1991) 165 at 175.

75 SDC Advisory Opinion 2011, *supra* note 24 at para 180.

76 The fact that the SDC observed that it was only *states parties* that could claim compensation for damage to the marine environment suggests that the obligation to protect the marine environment is an obligation *erga omnes partes*.

77 On the basis of the LOSC, *supra* note 1, art 137(2).

78 The contract between the ISA and the contractor incorporates the standard terms annexed to the Exploration Regulations. The standard terms expressly state that Part XI of the LOSC, the Implementation Agreement, are to be interpreted and applied together as a single instrument, and the contract and reference in the contract to the convention are to be interpreted and applied accordingly (see, for example, ISA, *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA/16/A/12/Rev.1 (2010), Annex 3 (Sulphides Regulations; Section 1.3, Standard Clauses for Exploration Contract, Annex 4, Sulphides Regulations). Further, the contract “shall be governed by the terms of this contract, the rules, regulations and procedures of the Authority, Part XI of the Convention, the Agreement and other rules of international law not incompatible with the Convention” (see LOSC, *supra* note 1, art 21, Annex III; Standard Clause 27.1, Annex 4, Sulphides Regulations) [emphasis added].

79 Ilias Plakokefalos, “Environmental Protection of the Deep Seabed” in André Nollkaemper & Ilias Plakokefalos, eds, *The Practice of Shared Responsibility in International Law* (Cambridge, UK: Cambridge University Press, 2017) 380 at 391.

Part XI were ultimately rejected.⁸⁰ It therefore may be difficult to argue that the CHM has attained *jus cogens* status⁸¹ and is an obligation *erga omnes*.

Potential Claimants

The ISA

In the event that damage is sustained to CHM resources, whether subject to a contract for exploration or exploitation or neither allocated as yet nor part of a reserved area, the ISA would certainly have sufficient legal interest to bring a claim on behalf of humankind against the contractors, as recognized by the SDC.⁸² The *erga omnes partes* nature of CHM resources may also justify the ISA's standing in this respect.

The SDC has jurisdiction over claims for damage to CHM resources by the ISA against the contractor under article 187(c)(i) covering disputes relating to the "interpretation or application of a relevant contract or a plan of work" or article 187(c)(ii) covering "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."⁸³

The ISA as claimant raises several issues. First, it is conceivable that the Legal and Technical Commission (LTC) and the Council could veto a decision to institute proceedings for a claim for damage to CHM resources before the SDC,⁸⁴ leading to a situation where damage is uncompensated. The decision to initiate proceedings requires a consensus at first, failing which a decision shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any of the voting chambers.⁸⁵ It is possible that the chamber consisting of investor states could veto the decision to initiate proceedings against a contractor. This particular possibility may be ameliorated by the ability of states parties to either initiate proceedings on behalf of humankind against the ISA (discussed below). Further, while the Assembly does not have the authority to initiate proceedings, it can reject the recommendation of the Council on any matter and return the matter to the Council for further consideration, and the Council is obliged to reconsider the matter in light of the views expressed by the Assembly.⁸⁶

Second, in the event that the ISA does receive compensation for damage to CHM resources, the question arises as to how it should distribute such compensation. This will, of course, depend on the nature of compensable damage claimed, for example, whether costs are incurred in assessment and/or prevention of damage and need to be offset by the compensation received and/or whether it is based on the market value of the resources. In the case of the latter, humankind is the ultimate beneficiary and, in principle, may be entitled to a share of the compensation received for damage to CHM resources. This may be addressed by current discussions on how the ISA should fulfill its obligation under article 140(2) to provide for "the equitable sharing of financial and other economic benefits from activities in the Area."⁸⁷

80 During the negotiations of the LOSC, it was proposed by Chile that the CHM, as set out in article 136, be declared a "peremptory norm of general international law from which no derogation is permitted and, which consequently, can be modified only by a subsequent norm of general international law having the same character." See the Chilean Proposal of 20 August 1979, quoted in Renate Platzöder, ed, *The Law of the Sea: Documents 1983-1989* (New York: Oceana, 1990) vol XII at 390. In order to have these proposals become acceptable, it was necessary to delete the reference to *jus cogens* and the language found in article 53 of the Vienna Convention on the Law of Treaties. The final result was article 311(6) of the LOSC, which states that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof." See *Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions*, 22 August 1980, UN Doc A/CONF.62/L.58, reprinted in the *Third United Nations Conference on the Law of the Sea*, Official Records (New York: United Nations, 1982) vol 14 at 128-29. See discussion in Erik Franckx, "The International Seabed Authority and the Common Heritage of Mankind: The Need for States to Establish the Outer Limits of their Continental Shelf" (2010) 25:4 *Intl J Mar & Coast L* 543 at 547.

81 E. D. Brown has described article 311(6) as the "butchered remains" of the failed drive to give the CHM principle the status of *jus cogens*. See ED Brown, *Sea-Bed Energy and Minerals: The International Legal Regime* (Dordrecht, the Netherlands: Nijhoff, 2001) vol 2 at 58. Also see Joyner, *supra* note 36 at 199.

82 See SDC Advisory Opinion 2011, *supra* note 24 at para 180.

83 The dispute settlement clause in the standard terms of contract between the ISA and the contractor states that "any disputes between the parties concerning the interpretation or application of this contract shall be settled in accordance with Part XI, section 5 of the Convention." See e.g. ISA, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, Doc No ISBA/6/A/18 (2000) [Nodules Regulations], s 25, Annex 3.

84 The LTC recommends to the Council that proceedings be instituted on behalf of the ISA before the SDC: see LOSC, *supra* note 1, art 163(i). The Council has the power to institute proceedings on behalf of the ISA before the SDC for cases of non-compliance (*ibid*, art 162[2][u]).

85 1994 Implementation Agreement, *supra* note 34, s 3(5), Annex.

86 *Ibid*, s 3(4), Annex.

87 For a discussion on the difficulties faced by the ISA in ensuring the equitable sharing of financial and other benefits, see Lodge, Segerson & Squires, *supra* note 48.

Contractors

Contractors are granted exclusive 15-year licences to explore⁸⁸ (and eventually to exploit, in which case, the current Draft Exploitation Regulations envisage 30-year contracts)⁸⁹ the resources contained in concession blocks. The LOSC and related instruments grant the contractor “the exclusive right to explore and exploit the area covered by the plan of work” and “shall ensure that no other entity operates in the same area for a different category of resources in a manner which might interfere with the operations of the operator,” and that there is security of tenure.⁹⁰ The contractors are also given exclusive and permanent title to the resources mined in that area, and under the Draft Exploitation Regulations, the revenue received by the contractor will be subject to the obligation to surrender part of the profits received from the resources to the ISA as a royalty.⁹¹ To the extent that contractors have suffered damage to CHM resources that fall within their contract area, they have suffered damage to their private interests and should have sufficient legal interest to mount a claim for damage to such resources against another contractor.

There is presently no provision giving jurisdiction to the SDC over disputes between one contractor and another contractor, except in the event that both contractors are states parties, in which case they may be able to rely on article 187(a) of the LOSC, which covers disputes between states parties. However, the SDC could well find that disputes between states parties do not apply to disputes between one state party and the other state party in its capacity as contractor.

Sponsoring States

A sponsoring state may also have standing to bring a claim against its sponsored contractor for damage to CHM resources suffered within its contract area, on the basis that it has lost potential revenue (assuming that the contract between the sponsored contractor and the sponsoring state provides for some form of royalty or fees).

Such claims would be governed by the relevant contract between the sponsoring state and the contractor, which will presumably contain its own dispute settlement provisions.⁹² While sponsoring states and contractors may subject their contractual arrangements to the national law and courts of the sponsoring state or to commercial arbitration, it is open to these parties to agree to confer jurisdiction on the SDC. It is not clear whether such conferral is sufficient for the SDC to have jurisdiction over such disputes. Article 21 (read with article 40)⁹³ of the ITLOS statute provides that the jurisdiction of ITLOS “comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*” (emphasis added). Notably, the provision refers to “any other agreement” and not to “international agreements” and, arguably, it could cover both international agreements between states, as well as agreements between states and a private entity, although this has not been tested before the SDC or ITLOS.⁹⁴

Apart from an express conferral in the contract between the sponsoring state and the sponsored contractor, does the SDC have jurisdiction over such disputes under section 5, Part XI? Article 187(c) in its entirety states: “(c) disputes between parties *to a contract*, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: (i) the interpretation or application of *a relevant contract* or a plan of work; or (ii) 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” (emphasis added).

It has been argued that an expansive interpretation should be given to the term “contract” in article 187(c)(i) to include any contract related to deep seabed mining activities (including, for example, contracts between sponsoring states and contractors or between the Enterprise and

88 See e.g. *Nodules Regulations*, *supra* note 83, s 3, Standard Clauses for Exploration Contract, Annex 4.

89 ISA, *Draft Regulations on Exploitation of Mineral Resources in the Area*, Doc No ISBA/24/LTC/WP.1 (2018), Reg 21 [*Draft Exploitation Regulations*].

90 LOSC, *supra* note 1, art 153(6). See also, for example, *Nodules Regulations*, *supra* note 83, s 2, Standard Clauses for Exploration Contract, Annex 4.

91 *Draft Exploitation Regulations*, *supra* note 89, Reg 62.

92 The SDC has observed that a sponsorship agreement is not required under the ISA Regulations: SDC Advisory Opinion 2011, *supra* note 24 at para 225.

93 Article 40 of the ITLOS Statute provides that the other sections of the statute, which are not incompatible with this section, apply to the SDC.

94 Philippe Gautier, “Two Aspects of ITLOS Proceedings: Non-State Parties and Costs of Bringing Claims” in Harry N Scheiber & Jin-Hyun Paik, eds, *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (Leiden, the Netherlands: Martinus Nijhoff, 2011) 73 at 77.

contractors that governs their joint venture).⁹⁵ This is reinforced by the use of the indefinite article “a” before the relevant contract in article 187(c)(i), as opposed to the use of the definite article “the” in article 187(c)(ii).⁹⁶ Further, this interpretation is supported by the drafting history of this provision.⁹⁷ Earlier drafts of article 187 envisaged that the SDC would have jurisdiction over: “any dispute between States Parties to the Convention, or between such State Party and a national of another State Party, or between nationals of different States Parties or between a State Party or the national of a State party and the Authority or the Enterprise concerning the conclusion of any contract, its interpretation or application or other activity in the Area which has arisen.”⁹⁸

Some members of the GLE felt that earlier drafts of article 187 were too broad as it provided for comprehensive jurisdiction in all cases involving *any contract* as well as *any dispute* relating to activities in the Area.⁹⁹ Accordingly, this appears to have led article 187(c) to be confined to disputes arising out of *any contract*, which strengthens the argument that article 187(c) can be interpreted broadly to cover contracts between the sponsoring state and the entity that it has sponsored. Disputes falling within article 187(c)(i) can also be submitted to binding commercial arbitration at the request of any party to the dispute, although the SDC retains jurisdiction over disputes on the interpretation of the LOSC and disputes where the decision of the arbitral tribunal depends on a ruling by the SDC.¹⁰⁰

In the event that a sponsored contractor (either a state enterprise or privately owned entity) has suffered direct damage to CHM resources within their contract area through the acts or omissions of another contractor, the sponsoring state for that contract may also have sufficient legal interest to bring a claim on the basis that it

has lost potential revenue. There is no contractual arrangement between the sponsoring state and the liable contractor. Accordingly, there is no ground of jurisdiction in section 5 of Part XI unless it is a state contractor, in which case article 187(a) may form the basis for the SDC’s jurisdiction.¹⁰¹

States Parties to the LOSC

As discussed in the first section above, states parties may have sufficient legal interest to bring claims against contractors for damage suffered to CHM resources on the basis that such damage is destructive to their collective interests and, consequently, a breach of the *erga omnes partes* obligations under the LOSC. This is subject to several uncertainties discussed above, including whether damage to CHM resources is deemed a breach of obligations *erga omnes partes* and whether non-state contractors owe such *erga omnes* obligations to LOSC states parties, although it could be argued that the non-state contractors have international obligations under their contracts with the ISA. Further, like the ISA as claimant, there may also be issues related to the distribution of any compensation received by states parties.

As explained above, the designation of an obligation as *erga omnes partes* is not sufficient to overcome jurisdictional procedures. The SDC does not have jurisdiction over disputes between states parties and non-state contractors under section 5 of Part XI, given that there is no contractual relationship between these actors. The SDC has jurisdiction over “disputes between States Parties concerning the interpretation or application of UNCLOS,” which may allow states parties to bring a claim against a state contractor.¹⁰²

Non-party States

Even though activities in the Area are supposed to be carried out for the benefit of humankind as a whole, irrespective of the geographical location of *states* (i.e., not confined to states parties),¹⁰³ it is uncertain whether the financial and other economic benefits will be eventually distributed

95 Niels-Jurgen Seeberg-Elverfeldt, *The Settlement of Disputes in Deep Seabed Mining: Access, Jurisdiction and Procedure before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea* (Baden-Baden, Germany: 1998) at 125–26.

96 *Ibid.*

97 *Ibid.*

98 Art 33(1)(b), Revised Single Negotiation Text, RSNT/Rev.1/Part I (1976); art 189(1)(ii), Informal Composite Negotiating Text, ICNT (1978).

99 GLE Report, *supra* note 14 at 117.

100 LOSC, *supra* note 1, art 188(2). Arguably, claims for damage to CHM resources should be an issue over which the SDC has jurisdiction rather than a commercial arbitration tribunal, i.e., it is not a strictly commercial dispute.

101 In addition, the sponsoring state may be able to bring a claim for damages to CHM resources against another sponsoring state who sponsored the contractor that caused the damage under article 187(a) of the LOSC (this will be discussed below).

102 LOSC, *supra* note 1, art 187(a).

103 *Ibid.*, art 140(1).

to non-party states,¹⁰⁴ such that it could be said they have been granted a legal interest or right. Further, if the CHM regime in the Area is only *erga omnes partes* and not *erga omnes*, non-party states would not have the legal right to enforce breaches of this obligation. It is also not clear whether the CHM principle is customary international law that confers rights and obligations on non-party states, given the divergence of views on the issue.¹⁰⁵ In any event, non-party states do not have access to the SDC and thus cannot initiate proceedings even if they have sufficient legal interest.

Non-state Actors

An important issue that should be addressed is whether non-state actors such as intergovernmental organizations (IOs), non-governmental organizations (NGOs) and individuals have sufficient legal interest to claim for damage to CHM resources against the contractors even if they have not suffered direct damage. Arguably, standing of these non-state actors could be based on the idea that they represent humankind, including present and future generations, and their interests have been impacted by damage to CHM resources, although this argument has not been tested in international law. With particular regard to NGOs, while it is true that they are increasingly playing roles before a multitude of international courts and tribunals, direct NGO participation as parties before international courts and tribunals

has been relatively limited.¹⁰⁶ In most cases in which access is granted to NGOs, the NGO needs to be a direct victim of a violation of the law rather than representing some form of public interest.¹⁰⁷ In contrast, there appears to be greater recognition that NGOs can initiate proceedings for damage that does not directly impact them (i.e., on behalf of some form of public interest) in domestic courts, although national legislation usually expressly provides that they have standing and access to national courts and also carefully circumscribes the rules governing such standing and access.¹⁰⁸

In the context of deep seabed mining, IOs, NGOs and individuals fall within the definition of “stakeholders” in the Draft Exploitation Regulations, i.e., “a natural or juristic person or an association of persons with an interest of any kind in, or who may be affected by, the proposed or existing Exploitation Activities under a Plan of Work in the Area, or who has relevant information or expertise.”¹⁰⁹ The ISA recognizes that these “stakeholders” have an interest in the administration of the CHM and are, at the very least, entitled to participate in the policy making of the ISA.¹¹⁰ At present, NGOs and other individuals do not have access to the SDC

104 *Ibid*, art 140(2) only states that the ISA “shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area.” Article 82(4) of the LOSC on the distribution of revenues for the exploitation of the continental shelf beyond 200 nautical miles provides that “payments shall be made through the Authority which shall distribute them to States Parties to the Convention” [emphasis added].

105 Some scholars have argued that it is not a principle of customary international law as it is too indeterminate and lacking in accompanying state practice and *opinio juris* to have gained acceptance in customary international law. See e.g. Joyner, *supra* note 36 at 198, although this was written in 1986 before the 1994 Implementation Agreement and near-universal acceptance of the LOSC that followed; Jennifer Frakes, “The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing States Reach a Compromise?” (2003) 21 *Wis Intl LJ* 409 at 411. On the other hand, others have argued that “the common heritage principle, as far as the use of common spaces is concerned, is part of customary international law” and “constitutes a distinct basic principle providing general but not specific, legal obligations with respect to the utilization of areas beyond national jurisdiction.” See Rüdiger Wolfrum, “Common Heritage of Mankind” in Wolfrum, *Max Planck Encyclopedia*, *supra* note 2 at para 25. See also International Law Association, *Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order*, Report of the 62nd Conference 8 (1987) at para 7.1; John Noyes, “The Common Heritage of Mankind: Past, Present, and Future” (2011–2012) 40 *Denv J Intl L & Pol’y* 447 at 456.

106 Luisa Vierucci, “NGOs before international courts and tribunals” in Pierre-Marie Dupuy & Luisa Vierucci, eds, *NGOs in International Law: Efficiency in Flexibility?* (Cheltenham, UK: Edward Elgar, 2008) 155 at 160. Vierucci notes in this 2008 study that only the European Court of Human Rights, the Inter-American Commission of Human Rights, the African Commission for Human and Peoples’ Rights, the African Court and the European Court of Justice grant legal standing to NGOs to varying degrees (*ibid* at 158).

107 See discussion in Vierucci, *ibid* at 157–63. See also Eric De Brabandere, “NGOs and the ‘Public Interest’: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes” (2011) 12:1 *Chi J Intl L* 85 at 90.

108 See discussion in Edward HP Brans, *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment* (New York: Kluwer Law, 2001) at 35–62, 358–60.

109 *Draft Exploitation Regulations*, *supra* note 89, Schedule 1.

110 For example, in the context of developing the Exploitation Regulations, the ISA has recognized the need to develop an effective “communications and engagement strategy” for the ISA to ensure active stakeholder participation in the development of a minerals code (see Kristian Telicki, “Developing a Communications and Engagement Strategy for the International Seabed Authority to Ensure Active Stakeholder Participation in the Development of a Minerals Exploitation Code” [2016] ISA Discussion Paper No 3). The ISA conducted a series of “stakeholder surveys” in 2014, 2015, 2016 and 2017, in which it received submissions from various actors, including IOs, NGOs and individuals.

under section 5 of Part XI, although IOs may, in certain circumstances, have access to the SDC.¹¹¹

If damage to CHM resources by a contractor is a breach of *erga omnes partes* obligations, can non-state actors invoke such obligations? The ASR acknowledges that state responsibility extends to breaches of international law where the primary beneficiary of the obligation breached is an individual or an entity other than a state.¹¹² Article 48 of the ASR *prima facie* only entitles states to represent the interests of the international community, as suggested by article 48(2), which allows every state to claim from the responsible state “reparation in the interest of the injured State or of the *beneficiaries of the obligation breached*.”¹¹³ However, the ILC’s deliberations on the ASR suggest that members were aware of the possibility that entities other than states may wish to invoke state responsibility. Article 33(2) of the ASR states that “this Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity *other than a State*” (emphasis added). The accompanying commentary suggests that in cases where the primary obligation is owed to a non-state actor, some procedure may be available whereby that entity can invoke the responsibility on its own account and without the intermediation of any state. This would imply that it is possible to give non-state actors the right to invoke the responsibility on their own initiative without the necessity of the state espousing such a claim, provided this procedure is provided for in the relevant framework.

It is not immediately clear that the protection of CHM resources is an obligation owed by the contractor or states to non-state actors, although an argument could obviously be made. As mentioned above, they do not, however, have access to the SDC under section 5 of Part XI. That said, *prima facie*, it could be decided that these non-state actors (i.e., IOs, NGOs and other individuals) should be given access to dispute settlement fora in a prospective deep seabed liability regime. The modalities of this

option will have to be explored further as well as the costs and benefits of giving these actors access. For example, the prospect of non-state actors, such as NGOs, being able to initiate claims may be an effective alternative in the event the ISA, for various reasons, decides not to initiate claims on behalf of humankind for damage to CHM resources. It could serve as an effective mechanism to enhance the accountability of the ISA, the sponsoring state as well as the contractor. At the same time, granting non-state actors liberal rights of access may prove too burdensome from an efficiency standpoint by exposing the contractor to a slew of claims and would, *prima facie*, be inconsistent with the dispute settlement regime envisaged under the LOSC. This underscores the need for careful consideration of the advantages and disadvantages of giving NGOs or individuals access to the SDC for damage claims arising out of activities in the Area.

Claims for Damage to Marine Environment in the ABNJ

Status of Marine Environment in the ABNJ

One of the major obstacles in seeking compensation for environmental damage in the ABNJ has been the difficulty in identifying the party that has sufficient legal interest to bring a claim. This will depend on the type of environmental damage claim being mounted as well as the status of the marine environment in the ABNJ.

With regard to the type of environmental damage claim that may be compensable, as explored in a paper in this series by Ruth Mackenzie entitled “Liability for Environmental Harm from Deep Seabed Mining Activities: Definition of Compensable Environmental Damage,” it will be assumed that claims for environmental damage will include loss or damage by impairment of the marine environment (“loss of profit” claims); the costs of reasonable preventive or response measures; reasonable costs of assessing and monitoring impairment of the marine environment; the costs of reasonable measures of restoration or reinstatement of the marine environment, including natural resources; and reasonable measures to introduce the equivalent of destroyed or damaged components of the marine environment.¹¹⁴ Where

111 Although an IO does not have explicit access to the SDC, an IO will have access to Part XV dispute settlement if it becomes a party to the LOSC (see LOSC, *supra* note 1, arts 305, 307, Annex IX, read with arts 20, 40). Since states participating through an IO are entitled to participate in activities in the Area under article 139, it could also be argued that a purposive interpretation of article 187 may give them rights of access to the SDC.

112 ILC, ASR, *supra* note 52 at 32, 87–88.

113 *Ibid.*, art 48(2) [emphasis added].

114 See ISA, Council, “Addressing serious harm to the marine environment in the regulations for the exploitation of mineral resources in the Area,” Submitted by the delegation of the Netherlands, ISBA/21/C/13 (2015).

adequate measures of reinstatement or restoration or introduction of equivalent components cannot be put into place, it may be necessary to incorporate *pure environmental damage* into a prospective liability regime, i.e., non-economic loss associated with environmental damage.

With regard to the status of the marine environment, first, it is *not* considered the CHM. Although the definition of the CHM under the LOSC includes *the Area* and its resources, the SDC differentiated between damage to resources constituting the CHM and damage to the marine environment.¹¹⁵ Nonetheless, an essential element of the CHM principle is intergenerational equity, which implies “the need to manage natural resources in a rational way so that they could be transmitted to future generations.”¹¹⁶ Consequently, to fail in the protection and preservation of the marine environment would be to contravene intergenerational equity requirements.¹¹⁷ Analogously, allowing damage to the marine environment to go uncompensated would be contrary to principles of equity that are inherent in the CHM.

Second, the marine environment beyond national jurisdiction is also *not* “the common concern of mankind,”¹¹⁸ despite attempts by scholars and states to have it declared as such.¹¹⁹ The “common concern of mankind” concept has been reflected in regimes such as the 1992 United Nations Framework Convention on Climate

Change and the 1992 Convention on Biological Diversity. While diverse interpretations of the legal implications of a “common concern of mankind” designation have been put forth by scholars,¹²⁰ the ILC has observed that “the legal consequences of the concept of the common concern of humankind remain unclear at the present stage of development of international law relating to the atmosphere.”¹²¹ Even if the marine environment were designated the common concern of humankind, it would not help identify the actor that has sufficient legal interest to bring a claim.

Third, as is the case with CHM resources, damage to the marine environment in the ABNJ can implicate both private interests (to the extent that an actor has sustained direct loss from, for example, loss of profit; reasonable costs of assessing and monitoring impairment of the marine environment; and the costs of reasonable preventive or response measures) as well as collective interests of the international community in terms of pure environmental loss.¹²² In this regard, the SDC stated that “[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area.”¹²³ It did not distinguish between *erga omnes partes* and *erga omnes*, although they specified that states parties were the only actors that could bring a claim on the basis of *erga omnes*. The Chamber did not

115 SDC Advisory Opinion 2011, *supra* note 24 at para 179.

116 Kiss, *supra* note 72 at 424.

117 See generally Dire Tladi, “The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability” (2015) 25 YB Intl Envtl L 113 at 129.

118 The principle of “common concern” grew out of an attempt by the Maltese government to declare the climate as part of the CHM, which was met with the traditional opposition from the developed states, and General Assembly Resolution 43/53 ultimately dropped the term “common heritage of mankind” and instead recognized climate change as “a common concern of mankind,” a political compromise: Alan Boyle, “International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles” in Robin Churchill & David Freestone, eds, *International Law and Global Climate Change* (London, UK: Graham & Trotman, 1991) 7 at 9.

119 It has been argued that the marine environment should be designated a common concern of humankind due to the interconnectedness of the oceans and the transboundary nature of pollution, which impacts the collective interests of all states as well as requires the collective action of all states, but it has not yet been officially declared a “common concern of humankind” by states. See James Harrison, *Saving the Oceans Through Law* (Oxford, UK: Oxford University Press, 2017) at 2–3. It has most recently arisen in the context of the negotiations for a new international legally binding instrument on biodiversity beyond national jurisdiction.

120 For example, Jutta Brunnée argues that while it does not indicate a specific rule of conduct for states, it “signals that states’ freedom of action may be subject to limits even where other states’ sovereign rights are not affected in the direct transboundary sense envisaged by the no harm principle” and that it entitles and, perhaps, requires all states to cooperate internationally to address the concern (see Jutta Brunnée, “Common Areas, Common Heritage and Common Concern” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* [Oxford, UK: Oxford University Press, 2008] 551 at 567). Harrison asserts it means that states cannot seek refuge in sovereignty or exclusive domestic jurisdiction as a means to avoid the scrutiny of other states, and that states should seek to cooperate with a view to agreeing on common rules and principles to guide their actions to address challenges of common concern (*ibid* at 2–3). It has also been argued that the “common concern of humankind” gives rise to *erga omnes* obligations that may be pursued as a whole, although this is a controversial notion. See Dinah Shelton, “Common Concern of Humanity” (2009) 39:2 Envtl L & Pol’y 83.

121 See ILC Drafting Committee, “Chapter V: Protection of the atmosphere”, A/70/10 at 27.

122 See, for example, Julian Barboza who argues that “harm to the environment per se would injure a collective subject, such as a community, which in any case would be represented by the State.” See ILC, *Eleventh Report of the Special Rapporteur, Julian Barboza*, 47th Sess, UN Doc A/CN.4/468 (1995) 56.

123 SDC Advisory Opinion 2011, *supra* note 24 at para 180.

elaborate as to how it came to the conclusion that the preservation of the environment of the high seas and the Area are *erga omnes*.¹²⁴ Environmental obligations have not been recognized as non-derogable peremptory norms by the international community, militating against the argument that the protection of the marine environment is an *erga omnes* obligation owed to the international community in general.¹²⁵ Bearing this in mind, the discussion will now move to potential claimants.

Potential Claimants

The ISA

The ISA would seem the most logical actor to bring a claim for damage to the marine environment, including the various claims described above. While the SDC noted that there was no provision in the LOSC that explicitly entitles the ISA to make a claim for marine environmental damage or damage to CHM resources, “such entitlement is implicit in Article 137 (2)” of the LOSC, which provides that “all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act.” The Chamber did not specify whether this entitles the ISA to claim for damage to CHM resources, damage to the marine environment or both. Arguably, article 137(2) would only be the basis for the ISA claiming for damage to CHM resources.

A stronger basis for the ISA to claim for marine environmental damage is the ISA’s broad mandate to protect the marine environment under article 145, reflecting the “inter-generational equity” component of the CHM (see discussion above). This provision “assigns the primary responsibility for preventing environmental harm resulting from mining activities in the Area to the ISA” and affords the ISA “a general and far-reaching environmental mandate.”¹²⁶ Accordingly, as part of this mandate and the overall purpose of a liability regime to deter wrongful activities, there is a strong basis for the ISA to be able to make

all types of environmental damage claims. The ISA clearly has access to the SDC under section 5 of Part XI to bring claims against the contractor who is responsible for environmental damage under article 187(c)(i) or (ii) of the LOSC.¹²⁷

Contractors

In the event that one contractor causes damage to the marine environment, it is conceivable that another contractor may incur direct costs in the form of loss of profit (for example, because the damage interfered with the operations within the contract area); reasonable costs of assessing and monitoring impairment of the marine environment to assess the damage; and the costs of reasonable preventive or response measures. However, there is presently no provision giving jurisdiction to the SDC over disputes between one contractor and another contractor, except in the event that both contractors are states parties, in which case they *may* be able to rely on article 187(a).

States Parties

To the extent that states parties operating in the Area have incurred direct costs through loss of profits; reasonable costs of assessing and monitoring impairment of the marine environment; and the costs of reasonable preventive or response measures, they *prima facie* have sufficient legal interest in mounting a claim against a responsible contractor. As discussed above, and as recognized by the SDC Advisory Opinion 2011, states parties to the LOSC may be able to bring a claim for damage to the marine environment against the contractor on the basis of *erga omnes partes*.¹²⁸ The SDC does not have jurisdiction over disputes between states parties and contractors, unless it is a dispute between a state party and a state contractor over the interpretation or application of Part XI (article 187[a]).

Non-party States

Non-party states operating in the Area may also suffer direct losses arising from damage to the marine environment (for example, loss of profits;

124 Other scholars have also opined that the marine environmental protection obligations in the ABNJ are *erga omnes* (without specifying whether they are *erga omnes* or *erga omnes partes*). See e.g. Rüdiger Wolfrum, “Purposes and Principles of International Environmental Law” (1990) 33 German YB Intl L 308 at 325–26; Birnie, Boyle & Redgwell, *supra* note 22 at 234; Leigh, *supra* note 43 at 147–48.

125 Birnie, Boyle & Redgwell, *supra* note 22 at 235.

126 Aline Jaekel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mining and Environmental Protection* (Leiden, the Netherlands: Brill, 2017) at 123–24.

127 The concerns relating to the Council vetoing a decision on whether to initiate proceedings against a contractor before the SDC in relation to damage to CHM resources apply also to claims for damage to the marine environment (see discussion above).

128 See discussion above on whether non-state actors such as the non-state contractors can owe *erga omnes* obligations.

reasonable costs of assessing and monitoring impairment of the marine environment; and the costs of reasonable preventive or response measures). Whether non-party states have sufficient legal interest to claim for damage to the marine environment on the basis that they have suffered damage to their collective interests is not clear. As discussed above, there is a degree of uncertainty as to whether obligations to protect the marine environment are obligations *erga omnes partes* based on the LOSC or are *erga omnes* obligations owed to the international community as a whole. If proceeding on the argument that only *jus cogens* norms are capable of having *erga omnes* effects and that the protection of the marine environment is not a *jus cogens* norm, then non-party states would not have sufficient legal interest to bring a claim. Of course, the issue is arguably moot since non-party states do not have access to the SDC under section 5 of Part XI.¹²⁹

Non-state Actors

Non-state actors operating in the Area may suffer direct losses arising from damage to the marine environment (for example, loss of profits and the costs of reasonable preventive or response measures). Other non-state actors such as IOs, NGOs and individuals *may* also have standing to bring claims for pure environmental damage on the basis of *erga omnes* obligations, as explained above, and, arguably, actors such as NGOs may have more incentive to bring such claims. However, as explained in relation to damage to CHM resources, non-state actors, possibly with the exception of IOs, do not have access to the SDC and could not bring claims against contractors.¹³⁰ As explained above, whether such non-state actors should (and are able to) have access to the SDC is a question that warrants further research and discussion.

Claims for Damages to Living Resources in the ABNJ

¹²⁹ Arguably, a non-state party may be able to rely on the customary law obligation to protect the marine environment. In this regard, it should be noted that it is not clear whether the obligations on the protection of the marine environment in Part XII of the LOSC in its entirety are customary international law. Some clearly have been found to be part of customary international law by international courts and tribunals or scholars, such as article 192 on the obligation to protect the marine environment; article 194(2) on the obligation on states to ensure that activities under their jurisdiction or control respect the environment or areas beyond national control; and article 206 on the need to conduct environmental impact assessments, but others are not so clear-cut.

¹³⁰ See discussion under the section on claims for damage to CHM resources.

It is conceivable that activities in the Area can result in damage to the living resources in the ABNJ, i.e., fisheries, as well as marine genetic resources found in both the water column and seabed. With regard to fisheries that are subject to high seas freedoms, there are several issues which, given constraints of space in this paper, are only possible to explore in the most general way. Which actor has sufficient legal interest to claim for damage to such resources? Nobody owns the fish in the high seas before they are caught, although there are potentially several actors or groups of actors that may be impacted by damage to fisheries, including fishermen and fishing companies, those who buy fish and regional fishing management organizations — how would one determine sufficient legal interest? In any event, it should be borne in mind that there is nothing in section 5 that would give the SDC jurisdiction over such claims, unless the claimant claiming damage to fisheries resources is a state party and is claiming against a state contractor under article 187(a) of the LOSC.

The applicable regime governing marine genetic resources may be the subject of a new implementing agreement. Developing states support the CHM principle being applicable to such resources, whereas developed states propose that it should be subject to freedom of the seas. The practical approach espoused by the European Union is for the regime to be neither, so as to avoid the usual political debates but to incorporate some form of access and benefit sharing.¹³¹ At the present moment, it is not possible to say with certainty which actor would have sufficient legal interest to bring a claim, and this will depend on the regime ultimately adopted in the new implementing agreement. This is another issue that will benefit from further in-depth research.

Damage to Persons and Property in the ABNJ

Activities in the Area could result in direct damage to persons and property operating in the high seas. The SDC Advisory Opinion 2011 acknowledged that “other users of the sea” would be subjects entitled to claim compensation.¹³²

¹³¹ Ronan Long & Mariamalia Rodríguez Chaves, “Anatomy of a New International Instrument for Marine Biodiversity Beyond National Jurisdiction: First Impressions of the Preparatory Process” (2015) 23:5 Environmental Liability: Law, Policy & Practice 213–23.

¹³² SDC Advisory Opinion 2011, *supra* note 24 at para 179.

While an exhaustive list of actors that could claim as a result of such damage is outside the scope of this paper, the Area and the high seas above it are the stage for a variety of competing activities carried out by states, companies and individual persons. The possible entities that could potentially suffer direct damage to property or persons who are operating in the ABNJ include:

- contractors;
- shipowners;
- marine scientific researchers or research institutions;
- fishing companies;
- genetic resource exploiters;
- cable owners;
- vessel crews;
- owners or operators of installations and artificial islands;
- states parties, including flag states; and
- non-state parties.

Many of the claimants above are non-state actors that do not have access to the SDC and will not be able to claim against the contractor in the event they have suffered damage. The only entities that have access to the SDC would be states parties (including state contractors) who may be able to bring claims for damage to persons and property against state contractors under article 187(a). There is no recourse under section 5 of Part XI for states parties to bring claims against contractors who are state enterprises or privately owned entities. To remedy the lack of recourse, some non-state actors, such as cable companies, have suggested that the requirement of a performance guarantee from the contractor under the Draft Exploitation Regulations be revised so that the release of the performance guarantee could be withheld in the event the contractor has damaged a submarine cable or pipeline.¹³³ The feasibility of developing mechanisms to ensure that these actors have some form of recourse to compensation for damage should be subject to further study.

¹³³ See letter from OPT French Polynesia to ISA (19 December 2017) at 10, online: <www.isa.org.jm/files/documents/EN/Regs/2017/Other/OPT.pdf>.

Damage to Resources, Marine Environment, Persons and Property in Areas under Coastal State Jurisdiction

Activities in the Area could also result in damage to living and non-living resources, the marine environment, persons and property (for ease of reference, referred to as coastal state “interests”) in areas under coastal state jurisdiction (the territorial sea, the exclusive economic zone and continental shelf). In this case, the coastal state would *prima facie* be considered the injured state with sufficient legal interest to bring claims, a point acknowledged by the SDC¹³⁴ and bolstered by article 142(3) of the LOSC.¹³⁵ Currently, there is no explicit provision in section 5 of Part XI that would entitle the coastal state or other non-state actors operating within areas under national jurisdiction to bring claims for damage to its interests against the contractor, although article 187(a) may allow it to bring claims against a state contractor.

Claims against the ISA

The ISA is the primary regulator of deep seabed mining activities, and their acts or omissions may result in damage to various actors. Much of the discussion on the claimants that have standing (sufficient legal interest) to bring claims against the contractor will apply equally to claims against the ISA. Accordingly, the analysis below will only briefly address whether a particular claimant has sufficient legal interest to bring a claim against the ISA and will focus on whether that claimant has access to the SDC.

Before analyzing potential claimants, several points on the liability of the ISA warrant note. First, the 2011 Draft Articles on the Responsibilities

¹³⁴ The SDC stated that coastal states would also be a subject entitled to compensation. See SDC Advisory Opinion 2011, *supra* note 24 at para 179.

¹³⁵ Article 143(2) states: “Neither this Part nor any rights granted or exercised pursuant thereto shall affect the rights of coastal States to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area.”

of International Organizations¹³⁶ recognize that international organizations can also owe *erga omnes* obligations to a group of states or international organizations for the protection of the collective interest of the group¹³⁷ or if the obligation breached is owed to the international community as a whole.¹³⁸ The ISA, in principle, can be held liable for breaches of *erga omnes* obligations. Second, as demonstrated above in the section entitled “Claims against Contractors,” the ISA is usually the most logical and appropriate actor to initiate proceedings against the contractor for damage, in particular when damage implicates collective interests. For obvious reasons, the ISA would be precluded (both practically and legally) from mounting a claim against itself. This underscores the importance of establishing clear and adequate rules on standing and access to ensure that if there is damage caused by the ISA, other actors are able to hold the ISA accountable.

The Contractor

A contractor may have sufficient legal interest to initiate claims against the ISA for damage to CHM resources within its contract area; damage to the marine environment, provided that it led to direct loss sustained by the contractor; as well as damage to its property or persons employed by them. Contractors can bring claims against the ISA before the SDC under article 187(c)(ii) (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) or article 187(e), where it is alleged the ISA has incurred liability as provided for in Annex III, article 22.¹³⁹

Sponsoring States

Sponsoring states may have sufficient legal interest to bring claims against the ISA for damage to CHM resources or the marine environment

¹³⁶ ILC, *Draft articles on the responsibility of international organizations, with commentaries*, (2011) 2 YB ILC 46 at 46. Note that the Draft Articles have not received the same level of acceptance as the ASR.

¹³⁷ *Ibid*, art 49(1). The Draft Articles state that “should an international organization breach an obligation under a multilateral treaty for the protection of the common environment, the other parties to the treaty may invoke responsibility because they are affected by the breach even if they are not ‘specially affected’ within the meaning of article 43 (b) (i)” of the Draft Articles (*ibid* at 90).

¹³⁸ *Ibid*, art 49(2).

¹³⁹ See Davenport, *supra* note 7. This paper addresses the situation where both the ISA and the contractor may be responsible for damage.

sustained by their sponsored contractor, provided they can establish they have suffered direct losses. The SDC would have jurisdiction over such disputes under articles 187(b)(i) (disputes between a state party and the Authority concerning acts or omissions of the Authority alleged to be in violation of Part XI, the Annexes, rules, regulations and procedures of the Authority).¹⁴⁰

States Parties

States parties may also have standing to bring a claim against the ISA even if that state has not suffered direct losses, for example, on the basis of damage to CHM resources and damage to the marine environment, on the grounds that such damage constitutes a breach of the *erga omnes partes* obligations owed under the LOSC. States parties may have standing to bring a claim against the ISA for direct losses they have sustained either to coastal state interests or to their persons and property while operating in the Area, including damage sustained as a flag state. In principle, states parties would have access to the SDC under article 187(b)(i) (disputes between a state party and the Authority concerning acts or omissions of the Authority alleged to be in violation of Part XI, the Annexes or rules, regulations and procedures of the Authority).

Non-party States

As explained above, non-party states may suffer direct damage (and have standing) either because they are operating in the Area and damage has been sustained by their property or nationals or because it is a coastal state that has sustained damage. In contrast, it may be difficult for non-party states to argue that they have standing to bring claims against the ISA for damage that they have not suffered directly, such as damage to CHM resources and damage to the marine environment. In any event, non-party states do not have access to the SDC.

Non-state Actors

With regard to claims for damage to collective interests, such as damage to CHM resources or the marine environment, while *erga omnes* or *erga omnes partes* obligations can, in principle, be owed

¹⁴⁰ Although article 187(e) refers to disputes between the ISA and states parties, it may be interpreted as being confined to states parties who are also contractors.

to non-state actors such as NGOs and IOs, it has to be provided for in the relevant framework. There is a range of non-state actors that may sustain direct damage as a result of the ISA's acts or omissions, by virtue of the fact that they are operating in the Area or in areas under national jurisdiction, including IOs, shipowners, cable owners, owner/operators of installations, fishing companies, genetic resource exploiters or scientific research institutes. Presently, there is nothing in section 5 of Part XI that would give non-state actors access to the SDC to bring claims against the ISA.

Claims against Sponsoring States

As with the ISA, the discussion on potential claims against sponsoring states will only summarily address whether a particular claimant has sufficient legal interest to bring a claim against the sponsoring state and will focus on whether that claimant has access to the SDC. It should be borne in mind that the sponsoring state's liability is only triggered when it has failed to carry out its own responsibilities under the LOSC, and that has led to damage caused by the sponsored contractor and the contractor has not compensated for the damage.¹⁴¹

The ISA

As explained above, the ISA has standing to bring claims against sponsoring states for damage to collective interests, such as CHM resources and the marine environment in the ABNJ, as well as direct damage arising from injury to persons working for them or damage to their property. The ISA could bring a claim against the sponsoring state under article 187(b), which provides the SDC with jurisdiction over "disputes between a State Party and the Authority concerning...(i) acts or omissions of the State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith."

141 See Hannah Lily, "Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining" CIGI, Liability Issues for Deep Seabed Mining Series Paper No 3, 5 December 2018.

The Contractor

A contractor who is not in a contractual relationship with the sponsoring state may wish to bring a claim against that sponsoring state for direct losses arising out of damage to CHM resources in its own contract area, damage to the marine environment or personal injury or property damage due to the actions of that sponsoring state's contractor. However, the SDC does not appear to have jurisdiction over such non-contractual disputes between the contractor and sponsoring state, unless it was a state contractor bringing a claim against a sponsoring state under article 187(a), i.e., disputes between states parties. That said, article 190(2) on the appearance of sponsoring states provides: "If an action is brought against a State Party by a natural or juridical person *sponsored by another State Party* in a dispute referred to in article 187, subparagraph (c), the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person. Failing such appearance, the respondent State may arrange to be represented by a juridical person of its nationality." This was motivated by the concern that some states may prefer to have an interstate dispute, and if the other state does not take part, the respondent state may arrange to be represented by a juridical person of its nationality.¹⁴² Article 187(c) is confined to disputes between parties to a contract. Article 190(2) suggests that article 187(c) envisages a scenario where a contractual dispute could arise between a sponsored contractor and another state party that is not a sponsoring state, although it is difficult to imagine how this could arise.

A contractor may also have standing to bring a claim for damages against its own sponsoring state, which would *prima facie* be governed by the contract between them, which may confer jurisdiction on the SDC. As explained above, it is not clear that such conferral would be sufficient to give the SDC jurisdiction. Apart from an express conferral, article 187(c)(i) may be broad enough to cover contractual disputes between the sponsoring state and its sponsored contractor.

States Parties

142 Satya N Nandan, Michael W Lodge & Shabtai Rosenne, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 4 (Leiden, the Netherlands: Brill, 2002) at 638–39.

States parties may have standing to bring a claim against the sponsoring state for direct losses it has sustained either as a coastal state or while operating in the Area, including losses sustained as a flag state. States parties may also have standing to bring a claim against the sponsoring state when it has not suffered direct losses, for example, on the basis of damage to CHM resources and damage to the marine environment, on the grounds that such damage constitutes a breach of the *erga omnes partes* obligations owed under the LOSC. The SDC has jurisdiction over such disputes under article 187(a) of the LOSC.

Non-party States

As explained above, non-party states may suffer direct damage (and have standing) either because they are operating in the Area and damage has been sustained by their property or nationals or because it is a coastal state that has sustained damage. In contrast, it may be difficult for non-party states to argue that they have standing to bring claims against the sponsoring state for damage that they have not suffered directly such as damage to CHM resources and damage to the marine environment. In any event, non-party states do not have access to the SDC.

Non-state Actors

With regard to claims for damage to collective interests, such as damage to CHM resources or the marine environment, while *erga omnes* or *erga omnes partes* obligations can, in principle, be owed to non-state actors such as NGOs and IOs, it has to be provided for in the relevant framework. There are a range of non-state actors that may sustain direct damage as a result of the sponsoring state's acts or omissions, by virtue of the fact that they are operating in the Area or in areas under national jurisdiction, including IOs, shipowners, cable owners, owners or operators of installations, fishing companies, genetic resource exploiters or scientific research institutes. Presently, there is nothing in section 5 of Part XI that would give non-state actors access to the SDC to bring claims against the sponsoring state.

Options on Fora in a Prospective Liability and Compensation Regime

The choices on fora in a prospective liability and compensation regime are to maintain the status quo; channel the majority of claims to one forum; maintain the SDC's jurisdiction and harmonize national legislation; and establish a new administrative mechanism.

Maintain the Status Quo: The SDC and National Courts

Maintaining the status quo means having two tiers of fora. First, the SDC has jurisdiction to hear primary disputes on liability between the ISA and the contractor; between the ISA and the sponsoring state; between the contractor and the sponsoring state; and between states parties and the ISA, states parties and the state contractor, and states parties and the sponsoring state. The second tier would be national courts of sponsoring states, where other actors who have suffered damage arising out of activities in the Area (such as non-state contractors, vessel owners, cable owners, fishing companies and non-party states to the LOSC) may be able to bring claims against the contractor, the ISA and the sponsoring state, and other third parties who may be responsible.

In terms of advantages, this latter point is the easiest option. It also reflects the intention of the drafters of the LOSC in that the actors that have direct responsibility for deep seabed mining (the contractor, the ISA and the sponsoring state) would be held liable by a certain defined class of actors in an international forum and the remaining claims, if any, would be decided by national courts. This gives the ISA, the contractors, other investors and insurers some certainty and predictability and ensures that their liability is not open-ended.

On the other hand, there are also disadvantages. First, there are several difficulties with the present ad hoc approach of national courts of sponsoring states deciding claims for damage arising out of deep seabed activities. Not all sponsoring states have adopted legislation on deep seabed mining; not all sponsoring states that have adopted legislation on deep seabed mining have provisions

on liability. Those sponsoring states that do have legislation containing express provisions on liability still may leave considerable gaps in liability, including a lack of operational detail as to how claims can be made in the national courts of sponsoring states. Other issues include whether foreign claimants have the knowledge and financial resources to mount such claims before the national courts of sponsoring states; the possible immunity of the ISA¹⁴³ as well as state or state-owned contractors¹⁴⁴ before national courts; whether national legislation confers jurisdiction on national courts over acts that occurred in the ABNJ; and enforcing judgments against contractors, in particular those privately owned contractors that may have their assets elsewhere.¹⁴⁵

Second, the focus thus far has been on the national legislation of sponsoring states with the assumption that sponsoring states have control over the contractors and that national courts have jurisdiction over the contractor and its assets. However, other national courts may be the more appropriate forum, such as the national courts of the victims that have suffered damage or the national courts where the assets of the contractor are located, neither of which may be the sponsoring state. The lack of uniformity and consistency in the adoption and implementation of national laws on liability results in a considerable amount of uncertainty as to whether claims will be compensated. These deficiencies in national legislation may result in an inequitable situation whereby a victim is unable to claim for such damage and where the party responsible for such damage is not held accountable, thereby undermining the deterrent effect of a liability regime.

Third, having two fora may lead to inconsistent decisions relating to deep seabed mining

and a fragmentation of interpretation of “the constitution” of the oceans. The drafters felt it important enough to reserve the jurisdiction of the SDC to decide issues of interpretation or application of the LOSC even in the context of commercial arbitration. There is no such review by the SDC when it comes to decisions of national courts even if they may decide matters that address the LOSC and/or activities in the Area that are carried out for the benefit of humankind. Indeed, it has been argued, “it should be recognized that if jurisdiction over ‘activities in the Area’ is fragmented, the importance of the Chamber and the authority of its decisions risks being diluted.”¹⁴⁶

Fourth, having two fora may result in actors, such as the contractor, being potentially exposed to liability in two different fora for the same wrongful acts. For example, it is conceivable that the ISA could bring a claim against the contractor for damage to CHM resources before the SDC and the contractor could be faced with national proceedings by another contractor also for damage to CHM resources within its own contract area.

Channel the Majority of Claims to the SDC and Exclude Claims to National Courts

Another option that could potentially be adopted in a prospective liability and compensation regime for deep seabed mining is to channel most permutations of claims to the SDC. This could be done by expanding the jurisdiction of the SDC or channelling all claims of actors who do not have access to the SDC toward the ISA to make claims on their behalf. With regard to expanding the jurisdiction of the SDC, it could possibly involve making clearer which claims are subject to the SDC’s jurisdiction and increasing the number of actors that have access (including giving other non-state actors access to the SDC). It is not immediately clear how this could be done. This issue of extension of the jurisdiction of the SDC was addressed in a discussion paper on “Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations.”¹⁴⁷ The paper suggested that it would be advisable to extend the jurisdiction of the SDC so as to avoid

143 International organizations are generally entitled to immunity from legal proceedings: see articles 177, 178 and 179 of the LOSC, reflecting the general principle in international law that international organizations have immunity from the jurisdiction of national courts.

144 The law in different jurisdictions varies on whether states or state-owned enterprises are entitled to immunity and whether this immunity only applies to acts of state as opposed to commercial activities: see discussion in Clifford Chance, *State Immunity and State-Owned Enterprises: Report Prepared for the Special Representative of the UN Secretary-General on Business and Human Rights* (2008), online: <<https://business-humanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF>>.

145 See discussion in Andres Rojas, “Effective Control: Toward a Definition” CIGI, *Liability Issues for Deep Seabed Mining Series* (forthcoming in 2019).

146 Herbert Smith Freehills, “Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations” (2016) Discussion Papers to Support the Development of an Exploitation Code, Discussion Paper No 1 at para 4.7.

147 *Ibid.*

multiplicity of proceedings as well as inconsistent judgments and awards. The discussion paper suggested, *inter alia*, that a widely drafted dispute resolution provision should be inserted in the Exploitation Regulations and/or contracts requiring any party involved in activities in the Area to submit to the jurisdiction of the SDC. It was also recommended that the SDC be consulted to determine whether it would accept such disputes.¹⁴⁸

In principle, this expansion of the SDC's jurisdiction in this manner is permitted under the LOSC. Article 21 of the ITLOS Statute provides that the jurisdiction of ITLOS "comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*" (emphasis added). Article 40 provides that the other sections of this Annex, which are not incompatible with this section, apply to the Chamber. However, using article 21 as a basis for the expansion of the SDC's personal jurisdiction has not been tested, and it is not clear that the SDC would agree to such expanded jurisdiction, especially involving non-state actors and considering that it would be a significant modification to the idea behind section 5, which was already quite exceptional in traditional state-to-state dispute settlement.

Another way in which claims could be channelled to the SDC is by creating a mechanism whereby claims by actors that presently may not be able to initiate proceedings in the SDC are channelled through the ISA as the primary regulator for deep seabed activities and trustee for the CHM resources and the Area. A useful analogy may be the doctrine of *parens patriae* where states are considered the trustees of certain natural resources.¹⁴⁹

For example, under the doctrine of *parens patriae*, a state has standing to bring a suit on behalf of its citizens to protect its quasi-sovereign interests, provided that it has an interest of its own, separate and distinct from the interests of particular private parties, and that a significant number of the state's inhabitants are threatened or will be adversely impacted by the acts of the defendants.¹⁵⁰ While the majority of *parens patriae* suits seek injunctive relief, it has been recognized that such suits could

also cover a claim for damages.¹⁵¹ Such mechanisms would, of course, have to be the subject of greater study, including whether the ISA is the right body to bring such claims, how such claims should be lodged (for example, should non-state actors make claims in their respective states and should their states then be obliged to lodge such claims, or should non-state actors have direct access to the ISA), whether the ISA has the capacity and willingness to take on what is essentially a claims verification role and other similar issues.

Another difficulty in attempting to make the SDC the only forum in which damage claims are adjudicated is the issue of whether it is possible to effectively exclude claims being brought in national courts.¹⁵² Apart from these challenges, channelling to one international forum has distinct advantages. It will contribute to the development of a uniform jurisprudence that will, in turn, create more certainty and predictability and will facilitate the ease of claiming compensation for victims as there is only one forum.

Maintain the SDC's Jurisdiction and Harmonize National Legislation

Another option is to maintain the SDC's jurisdiction and, at the same time, pursue approaches that ensure some form of harmonization of national legislation. Harmonization, among other things, can provide a common minimum standard for all legal systems, mitigate conflicts of laws problems, and create certainty and predictability in the adjudication of claims for damage, thus fulfilling the obligation of states to ensure that victims get adequate compensation.¹⁵³ Harmonization would address issues such as standards of liability, basis of jurisdiction, choice of law, standing to bring claims, attribution of liability, remedies, recognition and enforcement of judgments, double recovery and

¹⁵¹ *Ibid* at 56–57.

¹⁵² For example, under the Algiers Declaration on the Establishment of the Iran-United States Claims Tribunal, there was a provision that stated that the United States agreed to terminate all legal proceedings in US courts involving claims of US citizens and institutions against Iran and its state enterprises. Then US President Ronald Reagan issued an executive order that required courts in the United States to suspend prosecution of all claims over which the tribunal had jurisdiction, which was challenged in several courts, although the US Supreme Court finally found that the president had the authority to dissolve pre-judgment attachments and suspend claims pending in US courts. See Christopher Pinto & Bridie McAsey, "Iran-United States Claims Tribunal" in Wolfrum, *Max Planck Encyclopedia*, *supra* note 2.

¹⁵³ Birnie, Boyle & Redgwell, *supra* note 22 at 316.

¹⁴⁸ *Ibid* at paras 4.13, 4.14.

¹⁴⁹ See discussion in Brans, *supra* note 108 at 55–60.

¹⁵⁰ *Ibid* at 55.

the interaction of national courts with the SDC. This is the approach taken by liability conventions dealing with claims for oil pollution damage.

The question is how to achieve such harmonization. The easiest option, as suggested by Hannah Lily in her paper on sponsoring state liability, is to develop model legislation, which has been requested by several states.¹⁵⁴ This would be the so-called “lowest-hanging fruit” although it would require significant work by the Secretariat of the ISA. It should be borne in mind that while such model legislation would provide invaluable guidance to states, it is not binding on such states to implement the model legislation in their national laws and the problem of lack of uniformity inherent in the current ad hoc approach may not be solved. Another option is to negotiate an international convention such as a protocol to the LOSC and the 1994 Agreement that could contain obligations on states to adopt national laws on a liability regime and provisions on what such national laws should entail. While this option has a certain appeal in that it would place a greater obligation on states parties to ensure that such laws are in place, it is still not clear this would result in the harmonization required as there is little one can do, from a practical perspective, if a state does not have such national legislation in place. Such an international treaty may also take several years to negotiate and it is not clear that the relevant stakeholders have the will or capacity to do so, given the present emphasis on the Exploitation Regulations.

Establish a New Administrative Mechanism for Determining Liability

Both the SDC and national courts are based on adversarial approaches where litigation is required. Another option that warrants further research is the possibility of establishing an administrative mechanism for the determination of claims of liability for damage arising from activities in the Area. A pertinent example is the United Nations Compensation Commission (UNCC), which was established as a subsidiary organ of the Security Council to process claims and pay compensation for losses and damages suffered by corporations, governments and individuals as a direct result of Iraq’s unlawful invasion

and occupation of Kuwait.¹⁵⁵ The UNCC was not entrusted with determining the liability of Iraq, as that determination had been made by the Security Council, and was more of an administrative body than an arbitral tribunal: “The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.”¹⁵⁶

Consequently, the UNCC did not depend on elaborate adversarial processes and operated “as a claims resolution facility with the capacity to make determinations on a large number of claims within a reasonably short period of time.”¹⁵⁷ The UNCC was, for the most part, administrative and fact-finding, although, in the latter stages, in particular when Iraq challenged specific claims, and in response was given a greater role in participating in the process, making it similar to normal arbitral proceedings.¹⁵⁸

The sheer volume of its work and the fact that it was completed in such a relatively short time made the UNCC a “unique success story of post-conflict claims resolution mechanism.”¹⁵⁹ It should be borne in mind that the UNCC benefited greatly from the involvement of the Security Council and the backing of the world community, the fact that it did not have the difficult task of deciding liability, that it was not reciprocal and that Iraq had sufficient resources to fund both the operations of the UNCC and a large number of claims.¹⁶⁰ The disadvantages of such an approach is that the creation of such a complex claims process can be expensive, require a high level of technology and large expenditure of time, and will greatly depend on the resources available.¹⁶¹

155 UNCC, “Home”, online: <www.uncc.ch/>.

156 *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687*, UN Doc S/22559 (1991) at para 20.

157 Thomas A Mensah, “United Nations Compensation Commission (UNCC)” in Wolfrum, *Max Planck Encyclopedia*, supra note 2 at para 21.

158 *Ibid* at para 22.

159 Timothy J Feighery, “The United Nations Compensation Commission” in Chiara Georgetti, *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Leiden, the Netherlands: Brill, 2012) 517 at 517.

160 Sean Murphy, Won Kidane & Thomas R Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commissions* (Oxford, UK: Oxford University Press, 2013) at 49.

161 *Ibid*.

154 See discussion in Lily, supra note 141.

Depending on the liability and compensation regime ultimately adopted, more administrative mechanisms may be appropriate, in particular in cases where liability has already been established (for example, where the contractor is strictly liable). An administrative tribunal deciding on the extent of compensation and who it should be paid to may be useful. For example, one could envisage a situation where the SDC makes a primary determination as to which actor is liable and an administrative body assesses the damage, determines the appropriate compensation and distributes it to the relevant claimants, which could include state actors, the ISA or non-state actors. Establishing a completely new court or tribunal to carry out these administrative functions may not be politically or practically feasible, but adapting existing dispute settlement mechanisms in the LOSC could be an alternative avenue to explore. For example, the Part VIII Special Arbitration Tribunals established for disputes on the LOSC related to fisheries, the protection of the marine environment, marine scientific research and navigation with its tribunals consisting of experts in these areas could be one model. An ad hoc chamber of the SDC consisting of three members could also be utilized for this purpose, provided they were assisted by relevant experts.¹⁶²

Conclusion

Devising effective rules on standing and access to fora in a deep seabed mining liability regime is a complex process, in particular because damage arising out of activities in the area potentially impacts individual and collective interests. There is presently a large degree of uncertainty on which actors have standing to initiate claims. Thus, there may be actors that do have a sufficient legal interest to bring a damage claim, but do not have access to the SDC. This, coupled with the lack of uniformity and uncertainty in national legislation, could result in a situation of uncompensated damage, which is *prima facie* contrary to the intra-

generational and intergenerational component of the CHM principle. As demonstrated above, the following issues need to be addressed:

- Consideration must be given as to whether more clarity is needed on the implications of the designation of the obligation to protect CHM resources and the marine environment in the ABNJ as *erga omnes* or *erga omnes partes* obligations; and which actors have sufficient legal interest to bring claims, in particular in relation to claims for damage to collective interests (including the interests of future generations), such as CHM resources and the marine environment in the ABNJ, and how to get such clarity (for example, through an advisory opinion or letting the issue be decided by the SDC as, and when, it arises).
- Given the centrality of the ISA in bringing claims, in particular on behalf of collective interests, consideration is needed as to whether independent mechanisms need to be established to mitigate against the possibility of the Council deciding not to initiate proceedings.
- In terms of fora, further consideration needs to occur as to whether the existing two-tier system of the SDC and national courts should continue; whether the two-tier system of the SDC and national courts should continue, but accompanied by some form of harmonization of national legislation; whether claims should be exclusively channelled to the SDC; and whether administrative mechanisms should be established (which will also depend on the standard of liability that is imposed on the contractors, the ISA and the sponsoring state).

¹⁶² Under article 289 of the LOSC, it is provided that in any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal, but without the right to vote.

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**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

