



THE SPECIFICITIES OF SEABED DISPUTES IN LIGHT OF THE LAW OF THE SEA

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ABSTRACT

Certainly, the proclamation by the United Nations Convention on the Law of the Sea (UNCLOS) of a new maritime area, which is the Seabed Area, applying the principle of the common heritage of mankind to its resources, and the establishment of an International Tribunal for the Law of the Sea (ITLOS) have had an important impact on the international law of the sea. In fact, the establishment of ITLOS, which includes a permanent chamber with competence to settle seabed disputes, was driven by this development and the specificity of these disputes compared with other disputes under the law of the Sea. This specificity emerges through granting persons of domestic law the right of litigation before the ITLOS, and specifically before the Seabed Disputes Chamber (SDC), but also through the Compulsory procedures, as the jurisdiction is not linked to the consent of the parties to the dispute. So, this study will attempt to shed light on the controls that allow subjects of domestic law to sue before the ITLOS, in particular those relating to obtaining a sponsorship from one of the State parties to carry out activities in the Seabed Area, as well as it will focus on cases where procedures of the SDC are Compulsory.

INTRODUCTION

By the end of the initial half of the twentieth century, international law had made significant progress; interstate litigation, once traditionally understood within a bilateral framework, became increasingly regarded as serving broader community interests.¹ This shift is reflected not only in procedural devices – such as intervention – which serve to guarantee the rights of non-party states to the dispute, but also in the wider role of adjudication in affirming and advancing international law beyond the mere resolution of individual disputes.

In fact, the evolution of international law is particularly reflected in the human rights field, by granting individuals the entitlement to prosecute States before international Courts if their rights enshrined in human rights Pacts were violated. That progress has cast a pall over the standing of the individual within the framework of the law of the sea, which has also undergone an important development, reversed in the Convention on the Law of the Sea (UNCLOS), that provided inter alia the proclamation of a new maritime area named ‘Seabed area’, in which resources represent a shared heritage of humanity. Also, it established an International Tribunal for the Law of the Sea (ITLOS) to resolve disputes relating to the application or interpretation of UNCLOS.

Some writers did not see the need to create an additional standing Tribunal, since the International Court of Justice (ICJ) and arbitral Courts still exist. Some ones like ‘Shigeru’, even considered its creation a great mistake.² In fact, some writers believed that the establishment

of this court increases the risk of conflicting judicial interpretations, as the parties in dispute could freely choose between different bodies for dispute resolution. The divergent interpretations of international law rules could erode the assumption of the unity of international law and its global nature and put it at risk. They also believed that any divergent interpretations could weaken the important benefits of the mandatory litigation mechanism and its function in promoting the stability of international norms enshrined in the Convention on the Law of the Sea.³

However, the above argument may be countered by the fact that the international Legal framework of the seas has evolved in this manner as to allow subjects of domestic law to conduct operations on the seabed Area,⁴ and, normally, conflicts could occur involving one of the persons mentioned. There is therefore a need to set up a judicial instrument to ensure the solving of these differences, whose jurisdiction is unconditional on the agreement of the litigants.

It is worth noting that the negotiating parties at the Conference of the United Nations on the Law of the Sea initially considered establishing a completely independent court to address disputes related to the exploitation of the seabed under Part Eleven, but they ultimately settled on the creation of a chamber with specific jurisdiction within the ITLOS, known as the Seabed Disputes Chamber (SDC), which consists of eleven members.⁵

Indeed, there have been many previous studies that have discussed the topics of the international law of the sea, but most of them have either focused on the importance of the establishment of a new international tribunal for the law of the sea, or on the subject of the protection of the marine environment, or on the topic of the common heritage of mankind.

1 Benzing M. (2006). Community Interests in the Procedure of International Courts and Tribunals, *The Law & Practice of International Courts and Tribunals*, 5(3), 369. <https://doi.org/10.1163/157180306778938719>; Longobardo, M. (2021). The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ, *International Community Law Review*, 23(5), 6.

2 Seymour, J. (2006). The International Tribunal for the Law of the Sea: A great mistake? *Indiana Journal of Global Legal Studies*, 13(1), 2. <https://doi.org/10.2979/gls.2006.13.1.1>.

3 Noyes, J. E. (1999). The International Tribunal for the Law of the Sea. *Cornell International Law Journal*, 32(1), 173.

4 United Nations Convention on the Law of the Sea. (December 10, 1982). 1833 U.N.T.S. 397.

5 Noyes, J. E. *Ibid.*, 138, 139.

This study will focus on the specificities of seabed disputes, compared to other disputes concerning the law of the sea. So, what are these specificities?

Below, we will try to answer this problem by addressing the conditions that must be met by the person of domestic law to be able to sue before the ITLOS, and the application of the compulsory procedures concerning the seabed disputes.

METHODOLOGY

The legal nature of the topic leads the study to rely on some relevant sources, which allow the problem to be answered with legal arguments and grounds. As the study will be based on the UNCLOS, in particular its eleventh part concerning the Seabed, and its fifteenth part concerning dispute settlement, not to mention Annex III to the Convention concerning the basic conditions of prospecting, exploration and exploitation, and Annex VI concerning the Statute of the ITLOS.

The study will also draw on some decisions of the International Seabed Authority, and some national acts issued by some States to regulate exploration and exploitation activities in the Seabed area. In addition, it will draw on numerous decisions and advisory opinions issued by competent international tribunals, including those of the ITLOS.

To achieve the objectives of the study and address its core problem, a combination of the inductive approach and the analytical approach has been adopted. The inductive approach is employed to systematically gather and to extract the related provisions from the provisions of UNCLOS and its annexes, national acts, authority decisions, as well as from some international judicial decisions. Complementing this, the analytical approach is utilized to deconstruct and critically analyze the aforementioned provisions and identifying its significance. This allows for the evaluation of their legal implications, enabling the study to construct sound

legal arguments and provide comprehensive, grounded answers to the research problem.

FINDINGS AND DISCUSSION

1. PERSONS OF DOMESTIC LAW AS LITIGANTS TO THE SEABED DISPUTES

Besides sovereign and semi-sovereign states, international organizations that accomplish the requirements of Annex IX of the UNCLOS, we can say that the UNCLOS and especially its 6th Annex hint that natural persons could be litigants before the ITLOS.

Actually, that allusion is concluded from article 190 paragraph 1 of the UNCLOS that stipulates: "If a natural or juridical person is a party to a dispute referred to in article 187, the sponsoring State shall be given notice thereof and shall have the right to participate in the proceedings by submitting written or oral statements". It's also concluded from the second paragraph of article 291 of the same Convention that provides: "... The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention".

In confirmation of the provisions previously mentioned, the first paragraph of Article 20 of the Annex VI concerning the Statute of the Tribunal provides: "The Tribunal shall be open to entities other than States parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case".

Then, Article 20 of the Statute of the Tribunal alludes to the existence of non-State Party entities referred to in Article 305 of the UNCLOS. Those entities also have the right to litigate before the ITLOS in specific cases mentioned in the 11th Part of the UNCLOS, or in accordance with a special agreement. Article 291 paragraph 2 of the UNCLOS also alludes to specific cases in which non-State Party entities have to be charged before the ITLOS.

Within the same framework, if we refer to Article 187 contained in the 11th part of the UNCLOS, we will find that it has identified some disputes that, as a general rule, fall within the competence of the SDC, which is one of the chambers of the ITLOS. And among these disputes, we note those in which one of the parties is the ISA, or its enterprise, government enterprises, and individual or corporate entities benefiting from State sponsorship.⁶

So, we can say that recourse to the ITLOS by persons of domestic law is a legally recognized right, which distinguishes seabed disputes. However, it should be noted that the appearance of natural and legal persons before the ITLOS in disputes arising under Part Eleven is restricted by Article 190 of the UNCLOS. Under this article, it is allowed for the State that sponsors the individual or legal entity to present statements in writing or orally if that person is a party to the proceedings. It also allows the respondent states to require the State providing sponsorship to be “represented in the proceedings on their behalf”. If the sponsoring state does not appear, the State called upon to respond may appoint a legal person holding its nationality as its representative.

In fact, the inclusion of Article 190 within the provisions of the UNCLOS reflects, as noted by an official engaged in the negotiation of the dispute settlement provisions at the Third United Nations Conference on the Law of the Sea, the continued reluctance of States to recognize the Internal persons’ right to institute proceedings against them before an international judicial forum.⁷

In any case, litigation before the ITLOS falls under the general rules of litigation, the most important of which is the requirement of legal interest, in application of the legal fundamental principle “no legal interest infringed there is no

right of action”,⁸ bearing in mind that the legal interest notion in international law has expanded and is no longer confined to bilateral relations, particularly after the development of the principle of the common heritage of humanity, where the concept of collective interest has appeared.⁹

Accordingly, by reading the stipulations of Article 187 of the UNCLOS, we can say that persons of domestic law cannot litigate before the ITLOS as parties to Seabed disputes without having an interest in litigation. Even more so, the litigant shall be the party with a direct interest and have the capacity to sue. As for the issue in dispute, it should be one of the disputes mentioned in Article 187.

But, like any lawsuit brought before Courts, the applicant must also have the legal capacity to sue. In cases related to the seabed, this clause supposes that the entitled person possesses the standing of a contractor with the ISA, or at least possesses the status of a prospective contractor. In other words, that means that the person concerned must have obtained a sponsorship and then applied to the ISA for endorsement of an implementation plan covering the Area, since obtaining a sponsorship and filing a formal request before the ISA is mandatory to get the aforesaid status.¹⁰

In this regard, we note that each formal request for the endorsement of an exploration work plan must be submitted by the authority entrusted with that function by the State providing sponsorship, and must include adequate information to ascertain the applicant’s nationality or to identify the State or States exercising effective control over the applicant or over its nationals. Also, it shall contain the applicant’s main place of business or residence and, if applicable, its registration address. And if it comes

6 United Nations Convention on the Law of the Sea. (December 10, 1982). 1833 U.N.T.S. 397.

7 Seeberg-Elverfeldt, N. J. (1998). 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. Nomos Verlagsgesellschaft, Baden-Baden, 143, 147.

8 Dupuy, P.-M. (2012). Back to the future of a multilateral dimension of the law of State responsibility for breaches of obligations owed to the international community as a whole. *The European Journal of International Law*, 23(4), 1061.

9 Longobardo, M. *Ibid.*, 5, 6.

10 United Nations Convention on the Law of the Sea. (December 10, 1982). 1833 U.N.T.S. 397.

to an entity or group of entities' partnership, the application shall provide the requisite information for each entity forming the partnership or consortium.¹¹

If his application is rejected, the applicant will enjoy the right to lodge an appeal against the decision of refusal before the ITLOS. On the other hand, if it is accepted, he will acquire the status of a contractor,¹² and will have the right to appeal to the ITLOS about the contract's application or even its interpretation, or about acts or failings related to activities carried out in the Area, aimed at the other party or having a direct impact on its legitimate interests.

As a prerequisite for submitting a plan of action to the ISA, and thus obtaining the status of a contractor or potential contractor to engage in activities on the seabed area,¹³ the sponsorship raises some questions to which we will try to come up with answers below.

1.1. Who can grant the sponsorship to persons under domestic law?

As the ITLOS said in its Advisory Opinion dated February 1st, 2011, the sponsorship is a fundamental component of the system for the exploration and exploitation of the Area's resources established in the Convention.¹⁴ And, if we refer to the fourth article of the third Annex to the UNCLOS concerning the "Basic Conditions Of Prospecting, Exploration And Exploitation", it can be observed that the sponsorship shall be granted to the person of domestic law by the State of its nationality, otherwise by State Parties involved if this person holds multiple nationalities, as in the instance of a partnership or consortium of entities representing multiple States, unless this person was under the effective control of another State Party or via one of their citizens, so in such case each of the two States Parties shall sponsor this person.

Accordingly, nothing prevents an individual who wishes to conduct exploitation or even exploration of the resources found in the seabed Area from obtaining sponsorship from several States, especially when this person has dual or multiple nationality or when he possesses the nationality of one State and is effectively controlled by another State.

But, as noted above, only States Parties can grant a sponsorship to their nationals or those who are subject to their effective control or to the control of their nationals. Therefore, States that are not parties to the UNCLOS cannot grant such a sponsorship. Thus, persons of their nationality who wish to conduct exploitation or exploration activities in the Seabed Area should obtain a sponsorship from one of the States adhering to the UNCLOS, as is the situation, for example, of the American company Lockheed, which obtained sponsorship from the United

11 International Seabed Authority Council. (July 22, 2013). Decision relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters (Decision ISBA/19/C/17). https://isa.org.jm/wp-content/uploads/2022/06/isa-19c-wp1_0.pdf; International Seabed Authority Assembly. (May 7, 2010). Decision relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area (Decision ISBA/16/A/12/Rev.1). <https://www.isa.org.jm/>; International Seabed Authority Assembly. (July 27, 2012). Decision relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (Decision ISBA/18/A/11). https://www.isa.org.jm/wp-content/uploads/2022/04/isa-18a-11_0.pdf.

12 United Nations Convention on the Law of the Sea. (December 10, 1982). 1833 U.N.T.S. 397.

13 Dingwall, J. (2020). Commercial mining activities in the deep seabed beyond national jurisdiction: The international legal framework. In C. Banet (Ed.), *The law of the seabed: Access, uses, and protection of seabed resources*, 148. Brill. https://doi.org/10.1163/9789004391567_009; Freestone, D. (2011). Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. *American Journal of International Law*, 105(4), 755. <https://doi.org/10.5305/amerjin-telaw.105.4.0755>.

14 ITLOS. (2011). Case of Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion). Case No. 17. Hamburg. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-17/>.

Kingdom, the party to the UNCLOS, through the “Company UK Seabed Resources Ltd” which is under the full ownership of Lockheed Martin,¹⁵ since the United States of America is not a contracting Party to the UNCLOS.¹⁶

Assuming the requirement of effective control is fulfilled, the deep seabed regime imposes no limitations preventing a subsidiary formed within the territory of a State Party and having the sponsorship of that State Party from participating in activities in the Seabed Area.¹⁷ Certainly, through its Advisory Opinion of February 1st, 2011, by implication, the ITLOS acknowledged the liberty of commercial entities to establish firms abroad, thereby obtaining foreign nationality and sponsorship. Nevertheless, according to the court, achieving parity in treatment between developed and developing sponsoring States, commercial firms from the former must be actively barred from establishing subsidiaries in the latter, with the aim of acquiring their nationality and securing their sponsorship, seeking to avoid tougher environmental standards and closer scrutiny. The proliferation of sponsoring states ‘of convenience’ could jeopardize the uniform enforcement of the most stringent marine environmental protection standards, the safety of operations within the area, and the safeguarding of the heritage common of all humanity.¹⁸

15 Dingwall, J. Ibid., 154.

16 It should be noted that the Reagan administration in The United States objected to provisions dealing with deep seabed mining and declined to sign the final text. But later in 1994, after the Agreement Relating to the Implementation of Part XI of the UNCLOS was adopted, President Clinton signed UNCLOS and the Part XI Agreement and submitted the treaty to the Senate. No further action was taken by the United States at that time. For details see: Borgerson, S. G. (2009). The national interest and the law of the sea (Council Special Report No. 46). Council on Foreign Relations, 41, 42. <http://www.jstor.com/stable/resrep00295.11>; Tomlinson, M. L., Becker, M.-A. (2008). International law of the sea. The International Lawyer, 42(2), 797-809. <https://www.jstor.org/stable/40708115>.

17 Dingwall, J. Ibid., 155.

18 ITLOS. (2011) Case of Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion). Case No. 17. Hamburg. <https://www.itlos.org/en/main/>

In this same context, we note that the Competent Authority and procedures for granting the sponsorship are fixed by the internal law of each State Party. For example, article 17 of Order No. 2016-1687 concerning the Maritime zones falling within sovereign authority or jurisdiction in France provides that natural or legal persons wishing to undertake activities in the seabed zone beyond the jurisdiction of the national judiciary must request a sponsorship from both the Ministry of Foreign Affairs and the Ministry of Mines, indicating areas and sectors with its site coordinates, the category of mineral resources concerned and the nature of the operations to be carried out. It should also be accompanied by supporting documents concerning the claimant’s financial ability during the planned operations, as well as the technological capacity that allows him to undertake exploitation or even exploration operations. After the examination of the request, the sponsorship will be granted in the form of a certificate, and must be attached to the application addressed to the ISA.¹⁹

In this context, we note that State Parties do not have absolute discretion over granting their sponsorship. In fact, no State Party may impose requirements for a contractor that are not in conformity with the Eleventh Part of the UNCLOS. However, the implementation of environmental law or any other legal provisions by a State Party against the contractors enjoying its sponsorship, or to vessels sailing under its flag, stricter than those set out by the ISA shall not be considered as conflicting with the Eleventh Part of the UNCLOS.

Accordingly, if the State party refuses to grant its sponsorship to a customer without a compelling reason consistent with requirements prescribed in the UNCLOS, especially in its Annex III, he will have the right to appeal against this decision, but in this case, the com-

[cases/list-of-cases/case-no-17/](https://www.isa.org.jm/national-legislation-database/cases/list-of-cases/case-no-17/).

19 French Ordinance Concerning the Maritime Zones Falling Within Sovereign Authority or Jurisdiction. Official Journal No. 0286. (December 9, 2016). <https://www.isa.org.jm/national-legislation-database/>.

petence to hear that appeal is governed by the relevant domestic legislation. That is what was provided, for example, by Article 46 of the Nauru Act on International Seabed Minerals enacted in 2015.²⁰

However, if the State party grants its sponsorship to the applicant, it becomes responsible to ensure that the person sponsored conducts activities in the Seabed Zone in accordance with its contractual terms and obligations under the UNCLOS. Nonetheless, that State shall not incur liability for any damage resulting from activities of the aforesaid contractor if it has adopted the necessary legislative and regulatory framework and taken suitable measures to guarantee compliance by individuals under its jurisdiction, what mean that in this case, only the contractor shall incur the legal responsibility, and by consequence, he could be prosecuted before the ITLOS.

1.2. Is the sponsorship a preliminary step to the implementation of the 'diplomatic protection'?

It is customary in the international doctrine and jurisprudence that diplomatic protection is the method through which a State enforces another State's responsibility for an act violating international law that impacts the person or property of its nationals.²¹ Or, it is a tool that serves to enforce remedies under international law in cases where the treatment of foreign nationals violates international law standards.²²

Also, diplomatic protection represents measures to protect the State's rights.²³ As the Permanent Court of International Justice (PCIJ) has stated and has reaffirmed: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights to ensure, in the person of its subjects, respect for the rules of international law".²⁴

However, this measure is an ancillary or a secondary measure applied only in cases where the state of residence does not conform to international norms.²⁵ In any case, as the PCIJ had described in its Judgment of August 30, 1924, it remains a fundamental principle of international law.²⁶

So, only the link of nationality connecting the State and the individual grants the State the right to afford diplomatic protection. That is what the PCIJ decided in its Judgment of February 28, 1939,²⁷ and later confirmed by the ICJ in the judgment delivered on April 6th, 1955.²⁸ Also, that is what the International Law Commission had adopted in the third article of the draft articles regarding diplomatic protection,²⁹ and the reason for what ICJ refused Guinea's claims to invoke diplomatic protection by way of substitution in favor of "Africom-Zaire and Africontainers-Zaire", since these corporations had the nationality of the Republic of Congo.³⁰

[iclqaj/20.3.453>](https://doi.org/10.2307/2187430).

20 The Nauru International Seabed Minerals Act. (October 23, 2015). Reprinted in International Seabed Authority National Legislation Database. https://www.isa.org.jm/files/documents/EN/NatLeg/Nauru_ISM.pdf.

21 Hopkins, J. (1971). Review of the book Nationality and diplomatic protection: The Commonwealth of Nations, by C.-J. Joseph. The Cambridge Law Journal, 29(2), 325-327. <https://doi.org/10.1017/S0008197300089960>.

22 Leigh, G. I. F. (1971). Nationality and diplomatic protection. International and Comparative Law Quarterly, 20(3), 455. <https://doi.org/10.1093/>

23 PCIJ. (1924). Case of Mavrommatis Palestine Concessions, Greece v. U.K., No. 9. The Hague.

24 ICJ. (1955). Case of Nottebohm, Liechtenstein v. Guatemala, No. 131. The Hague.

25 Borchard, E. M. (1913). Basic elements of diplomatic protection of citizens abroad. American Journal of International Law, 7(3), 518. <https://doi.org/10.2307/2187430>.

26 Lillich, R. B. (1975). The diplomatic protection of nationals abroad: An elementary principle of international law under attack. American Journal of International Law, 69(2), 360. <https://doi.org/10.2307/2200272>.

27 PCIJ. (1939). Panevezys-Saldutiskis Railway Case, Estonia v. Lithuania, No. 74. The Hague.

28 ICJ. (1955). Case of Nottebohm, Liechtenstein v. Guatemala, No. 131. The Hague.

29 Leigh, G. I. F. Ibid., 2, 3.

30 ICJ. (2007). Ahmadou Sadio Diallo case, Republic of

And, given that there is some overlap between the “sponsorship clause” and the regime of “diplomatic protection”, since the right of a State to invoke the aforesaid protection derives, consequently, from the nationality connection between this State and the person holding her nationality,³¹ one might wonder if the “sponsorship clause” was just a foundational requirement for the enforcement of the diplomatic protection by the State providing sponsorship, and therefore the person enjoying this sponsorship could not litigate before the ITLOS?

As an answer, we believe that the aim of the sponsorship granted by the contracting State in the meaning of UNCLOS and its Annex III is not for the said State to exercise its diplomatic protection for the benefit of the person sponsored, by replacing him when he was a party to a dispute with a contracting State or with the ISA. So that, the exercise of diplomatic protection in compliance with international law requires the existence of preconditions, which consist in the enjoyment of the Protecting State’s nationality by the person under protection, the failure of the person concerned to contribute to the injury, and then the exhaustion of domestic remedies.³² Then, it is clear from these conditions that the possession of the sponsorship granted by the State whose nationality the person holds, or that which implements its effective control over the person concerned, is not required.

In this regard, we note that the SDC did not make any reference to the concept of “Diplomatic Protection” while explaining the meaning of the “sponsorship” in its Advisory opinion issued on February 1st, 2011, according to it: “The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of

domestic legal systems. This result is obtained through the provisions of the Authority’s Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments”.³³

About the liability scope of the State providing sponsorship, the SDC considered that the sponsored contractor’s failure to fulfill its obligations does not, by itself, render the sponsoring State liable. Liability on the part of the sponsoring State arises only under the following conditions: Non-fulfillment of its obligations as provided by the UNCLOS; damage occurrence; and a causal connection between such failure and damage.³⁴

In the case of multiple sponsoring States, the SDC, according to its Advisory Opinion dated 1 February 2001, concluded that Article 139, paragraph 2 of the UNCLOS, and Article 4, paragraph 4, of its third Annex do not guide how liability is to be shared among sponsoring States. Likewise, neither the Nodules Regulations nor the Sulphides Regulations offer clarifications on this matter, save with respect to the certifi-

33 ITLOS. (2011). Case of Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion). Case No. 17. Hamburg. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-17/>.

34 Plakokefalos, I. (2012). Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area, Advisory Opinion. Journal of Environmental Law, 24(1), 136-140. <https://doi.org/10.1093/jel/eqr021>; See also: Anton, D. K. (2012). The principle of residual liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17). McGill International Journal of Sustainable Development Law and Policy, 7(2), 247, 248; Russell-LaMotte, K. (2011). Introductory note to the International Tribunal for the Law of the Sea: Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area. International Legal Materials, 50(4), 456-457. <https://doi.org/10.5305/intelegamate.50.4.0455>; Boyle, A. (2011). Introductory remarks by Alan Boyle. Proceedings of the ASIL Annual Meeting, 105, 424. <https://doi.org/10.5305/procanmeetasil.105.0423>.

Guinea v. Democratic Republic of the Congo, No. 103. The Hague.

31 Hopkins, J. Ibid., 453.

32 Leigh, G. I. F. Ibid., 2-5.

cation of the contractor's financial capacity. The latter, as required by regulation 12(5)(c) of the Nodules Regulations and regulation 13(4)(c) of the Sulphides Regulations, must be issued by the State that exercises effective control over the applicant. Consequently, the State's failure to discharge its obligations gives rise to legal responsibility.

Aside from this case, neither Article 139, paragraph 2, of the UNCLOS nor the other instruments governing sponsorship distinguish single and multiple sponsorship. Consequently, the SDC concluded that, in cases of multiple sponsorship, sponsoring States incur joint and several liability, save where the ISA Regulations dispose otherwise.³⁵

It should be noted that, after issuance of the above-mentioned Advisory Opinion, the Council of the ISA immediately adopted a decision on 21 July 2011 during its seventeenth session in Kingston (Jamaica) calling upon all Sponsoring States to furnish details of relevant national legislation, regulatory frameworks, and administrative measures established by them within the scope of their responsibilities under the UNCLOS, and inviting the ISA's Secretary-General to prepare a report thereon.³⁶

But to date, about 37 States have notified the ISA of the required laws and procedures, among which we find the United Kingdom, the United States, France, China, Russia, Japan, Germany and South Korea, which have indeed the technology to engage in the exploitation or even in the exploration of the Seabed Area's resources.³⁷ And we point out that among these Countries, only China, Russia and South Korea hold exploration contracts relating to all of the three mineral types (Polymetallic Sulphides,

Polymetallic Nodules, and Cobalt-Rich Ferromanganese) which are currently regulated.³⁸

Thus, outside of the said conditions mentioned in the advisory opinion, the contracting party shall bear exclusive responsibility for any failure to comply with its obligations under the contract or under the UNCLOS and its related Annexes. That is what the ITLOS had implicitly confirmed while considering that: "State Party shall not be liable for damage caused by any failure to comply...by a person whom it has sponsored...if the State Party has taken all necessary and appropriate measures to secure effective compliance".³⁹

Indeed, Article 22 of the third Annex to the UNCLOS provides: "the contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority...". In the same regard, Article 190 of the UNCLOS expressly indicates that the person of domestic law can be the principal party to the proceedings, while it provides that: 'in a case where a natural or legal person is a party to a dispute before the SDC concerning activities in the Seabed Area, the sponsoring State should be notified for this dispute, so that it may intervene in the proceedings by submitting written or oral statements'.

To practice this right, the sponsoring State may notify through written notification its intention to file written statements or to make oral submissions within two months after being notified by the application. Once such notice is received, the SDC's president shall determine the time frame within which the sponsoring State may present its written observations, and shall communicate to it the time and the date of hearing.⁴⁰ And of course, it is well known that intervention in a case presupposes that a legal claim exists between the two main opposing parties in the first place; one of them would be,

35 ITLOS. (2011). Case of Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion). Case No. 17. Hamburg. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-17/>.

36 International Seabed Authority Council. (2011). (ISBA Doc. ISBA/17/C/20). <https://isa.org.jm/documents/isba17c20/>.

37 International Seabed Authority. Database on national legislation with respect to activities in the Area. <https://isa.org.jm/national-legislation-database/>.

38 Dingwall, J. Ibid., 159.

39 Freestone, D. Ibid., 758, 759.

40 ITLOS. (2021). Rules of the Tribunal (ITLOS/8). <https://www.itlos.org/en/main/documents/basic-texts/rules-of-the-tribunal/>.

in this case, the natural or legal person concerned.

1.3. Do persons non-sponsored have the right to litigate before the ITLOS?

In addition to persons sponsored, Article 52 of the Rules of the ITLOS raises some ambiguities as to whether other persons belonging to domestic law can appear before the ITLOS, when it impliedly stipulates that communications to juridical or natural persons other than those sponsored shall be transmitted by means of the government of the State where the communication is required to be received.

In fact, it can be concluded that the expression “juridical or natural persons other” than those covered by the sponsorship refers to all juridical or natural persons who are not involved in the dispute, but have an interest that could be affected by the outcome of the proceedings, where they must be informed of the documents of the suit to bring them into the litigation, or because they have already intervened in it, and as a result, they are entitled to the documents of the case. And what reinforces this view is the term ‘an entity other than Party to the case’ cited in the second paragraph of Article 52.

2. 'RATIONE MATERIAE' IN THE SEABED DISPUTES

Although sponsored persons can get the right to litigate before the ITLOS, where the sponsoring State declines to take part in the litigation or to intervene therein on its behalf, this right should be read to a minimum, as that concerns specific disputes that should not be expanded. It comes to:⁴¹

- Disputes involving contracting parties, including States Parties, public enter-

prises, the ISA or its Enterprise, and legal or natural persons, relating to the implementation or even to the interpretation of the pertinent contract or the work plan, or concerning Conduct or failure to act by a party to the contract in connection with activities in the Seabed Area, and producing a direct effect upon the other party's legitimate interests;

- Disputes involving the ISA and a potential contractor enjoying the sponsorship of a State, and has duly performed its legal obligation, concerning the rejection of a contract, or concerning a legal question, appear during the contract negotiations process;
- Disputes arising between the ISA and a contracting State, a public enterprise, judicial or natural person enjoying the sponsorship of a contracting State, in cases where the ISA is claimed to be liable as stipulated in Article 22 of the third Annex of the UNCLOS.

In this regard, we believe that Article 187 of the UNCLOS has respected the legal logic when it expanded the list of entities entitled to litigate before the ITLOS, and specifically before the SDC. Since the Seabed Area is not within the sovereignty of any State, its resources are held as heritage shared by all mankind⁴², and activities in it should be carried out in the interest of all mankind. And as these activities are conducted, including by judicial or natural persons who hold the sponsorship, it is normal that there will be disagreements between practitioners of the aforesaid activities, and it is also normal that each party to those disagreements defends its interests before the ITLOS.

It can be said that the above-mentioned rulings highlight the dual legal nature of the SDC:

41 United Nations Convention on the Law of the Sea. (December 10, 1982). 1833 U.N.T.S. 397.

42 Strati, A. (1991). Deep seabed cultural property and the common heritage of mankind. *The International and Comparative Law Quarterly*, 40(4), 859. <<https://www.jstor.org/stable/760492>>; van Zyl, U. (1993). The “common heritage of mankind” and the 1982 Law of the Sea Convention: Principle, pain, or panacea? *The Comparative and International Law Journal of Southern Africa*, 26(1), 49-52.

in one regard, it is an international adjudicative body in the traditional sense, as it adjudicates disputes arising between States inter se or between a State and an international organization; on the other hand, it resembles a global commercial court, since it has jurisdiction over disputes arising between companies and contractors operating throughout the seabed zone. This reflects the will of the global community to establish a comprehensive judicial mechanism that strikes a compromise reconciling the interests of developed States operating in deep seabed mining with those of developing States for which the seabed Area constitutes a common source of wealth.

3. THE MANDATORY NATURE OF THE PROCEDURES FOR THE SETTLEMENT OF THE SEABED DISPUTES

Indeed, the procedures for the settlement of disputes laid down in UNCLOS derive from a fundamental principle, which is the freedom of choice. Part XV of the above Convention recognizes the right of States to choose peaceful means for the settlement of any dispute between them.⁴³

But, for persons of domestic law, in all cases they will be able to resort to the ISA, since their right to litigation is independent of the State providing sponsorship, and the opposing party to the dispute will often be the ISA as indicated in paragraphs (d) and (e) of article 187 above.

So, it can be said that the Seabed disputes devolve specifically and compulsorily to the SDC, that own the competence to hear any dispute referred to it by one of its parties, even if the second party does not agree to the referral order.

Without exaggeration, the SDC is the most important chamber within the ITLOS. This importance is demonstrated by the fact that the UNCLOS devoted Section Five of its Part XI,

which concerns the Area, to the purpose of regulating the jurisdiction of this Chamber. In addition, Annex VI of the Convention allocates an entire section (Section 4) within the Statute of the ITLOS to the same purpose. This particular attention to the Chamber may be attributed to the sensitivity of the disputes it considers, which are linked to materials and resources extracted from the seabed and which constitute the common heritage of humanity.

The importance accorded to this Chamber is also reflected in the number of its Judges, which is set at eleven (11) judges. They are elected by the members of the ITLOS immediately after the elections for renewal, by a majority of votes, with the election ensuring representation of the world's primary legal systems and fair geographic representation.⁴⁴ As for the validity of the meetings of the Chamber, a special quorum is required, consisting of the presence of at least seven judges chosen by the ITLOS for membership in the Chamber.

In this regard, it should be noted that the rules governing the appointment of judges ad hoc, which are binding on the ITLOS when sitting in its full composition to hear a dispute, also apply to the SDC when it sits to consider a dispute within its jurisdiction.⁴⁵ Accordingly, if the SDC, when hearing a dispute, includes among its sitting members a judge of the nationality of one of the disputing parties, the opposing party is entitled to designate an individual to sit as a member of the Chamber in the dispute hearing. If the SDC does not comprise in its membership any judge of the nationality of the disputing parties, each party is entitled to select an individual to serve as a member of the SDC. For this purpose, the ITLOS President must seek the necessary number of SDC members to relinquish their seats in favor of members of the ITLOS who are nationals of the parties con-

44 United Nations Convention on the Law of the Sea. (December 10, 1982). Annex VI: Statute of the International Tribunal for the Law of the Sea, 1833 U.N.T.S. 397.

45 Article 17, paragraph 4, of the Statute of the ITLOS provides: "This article applies to the chambers referred to in articles 14 and 15 of this Annex..."

43 Seymour, J., *Ibid.*, 4.

cerned, and, in the absence or inability of such members to sit, the relinquishment shall be in favor of judges specifically selected by the disputing parties (judges ad hoc).

In fact, the above provisions do not answer the problem related to the situation where the internal person holds a nationality different than that of the State providing sponsorship, while the SDC comprises among its members a judge of the sponsoring State's nationality. Under these circumstances, if the State providing sponsorship refuses to join the proceedings of the dispute for the account of the internal person, may that person request the appointment of a judge to participate in the sessions of the SDC hearing the dispute concerning him? This is a question neither the Statute of the ITLOS nor its Rules provide an answer to, bearing in mind that an affirmative answer would mean that one of the disputing parties would benefit, during the legal process, from the presence of two judges: one holding the sponsoring State's nationality and the other of the nationality of the internal person who is involved in the dispute!

Within the same framework, it should be noted that the entitlement to designate special judges concerns solely the parties engaged in the dispute, as well as intervening parties in the case may not appoint judges ad hoc regardless of the significance of the legal interest they aim to safeguard, due to an explicit provision in Articles 103 and 104 of the Rules of the ITLOS that prohibits them from doing so. And it is noteworthy that the intervening parties referred to here are not meant to include the sponsoring State, since the latter, once it accepts the request addressed to it concerning participation in the dispute, becomes an original disputing party and not an intervening party, in line with the meaning of the second paragraph of Article 190 of the UNCLOS.

In any case, ad hoc Judges of the SDC must meet the same qualifications required of elected judges, as previously outlined in connection with the duties of judges. They are obliged to

take the same formal oath as the ITLOS members, when assuming office, and this shall be done in the public sitting convened for the case in which they participate. They are ranked in the Chamber according to their seniority, but in all cases after the permanent members of the ITLOS. They shall enjoy the entitlement to engage in the case for which they have been appointed on the same footing as the elected judges. In addition, they are entitled to make a statement on the occasion of each case in which they take part.

Just as the SDC can decide on disputes brought before it that lie within its competence, pursuant to the 36th Article of the ITLOS Statute, it may constitute an ad hoc chamber to investigate a specific claim concerning the seabed brought before it in line with subparagraph (b) of the first paragraph of Article 188 of the UNCLOS.

It is sufficient for the establishment of the designated chamber to submit a motion from one of the parties to the international dispute brought before the SDC, provided that it must be submitted within three months of the dispute commencement. The opposition of the second party to the establishment of the designated chamber is irrelevant here,⁴⁶ as the SDC must comply with the request directed to it and has no discretion to decide whether to establish the designated chamber or not. As is apparent from the wording of the first paragraph of Article 36 above, the wording is imperative rather than permissive: "The Seabed Disputes Chamber shall establish a designated chamber".

The SDC jurisdiction is limited to selecting the judges of the designated chamber only and does not extend to assessing the necessity of establishing it or not. Moreover, it does not even extend to determining the number of judges of the designated chamber that should be established, as this number is legally set at three judges, who are to be chosen by the SDC

46 ITLOS. (2021). Rules of the Tribunal (ITLOS/8). <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/rules_en.pdf>.

with the consent of the States party to the dispute, and they must not be employed by or be nationals of any of the parties involved in the dispute.⁴⁷

If the disputing parties fail to agree on forming the designated chamber within the timeframes determined by the SDC President, each of the parties shall designate one member, and the two designated members shall designate a third member by mutual agreement within the set timeframe specified by the SDC President. If the parties disagree again or in the event that any of the parties does not appoint a member, the SDC President shall immediately undertake the mandatory selection from among the chamber members upon consulting the disputing parties.

However, it is noteworthy that despite all these details provided for in both the statute and Rules of the Tribunal, at the time of writing these lines, the SDC has not yet established a dedicated chamber to consider any case within its jurisdiction.

As for disputes relating to the implementation or even to the interpretation of a pertinent contract or to the plan of work, although they come within the competence of the SDC as mentioned above, it will be necessary to refer them to commercial arbitration at the request of one of the disputing parties, unless the disputing parties otherwise agree. So, if a dispute is referred to an arbitral Tribunal, the latter must refrain from deciding on questions. And if the aforementioned dispute raises a question related to the interpretation of Part XI of the UNCLOS and the relevant annexes, that matter shall be brought before the SDC for decision. Similarly, if the Commercial Arbitration Tribunal to which the dispute is referred finds that its ruling hinges on the SDC's decision, whether the matter is raised by one of the disputing parties or by the court's own motion, the aforesaid Tribunal must stop deciding on the dispute, and

bring the matter in question before the SDC for decision. Only then, the Commercial Arbitration Tribunal may decide on the dispute referred to it, without violating the decision of the SDC.

But, if the SDC has, as a general rule, compulsory jurisdiction concerning disputes mentioned in article 187 above, it doesn't have the competence to decide on matters relating to the exercise by the ISA of its discretion conferred upon it by the eleventh Part of the UNCLOS, as it cannot replace the discretion of the ISA with its own discretion.

Also, although the aforesaid SDC has the competence to deliver advisory opinions when requested by the ISA Assembly or by the ISA Council, it does not have the competence to give an opinion on the consistency of the ISA's rules, regulations, and procedures with UNCLOS. Rather, its competence is limited to adjudicating allegations that the application of any of the regulations, rules, and procedures established by the ISA in specific cases is incompatible with obligations stipulated in the contract concluded by the disputing Parties, or with their obligations pursuant to the Convention. Also, it has the competence to adjudicate allegations of abuse of jurisdiction or abuse of powers, and claims for financial compensation for damages or other compensation due to a party's breach of its obligations under the contract or under UNCLOS.⁴⁸

CONCLUSION

Overall, in light of this study, it can be said that seabed disputes are highly distinct from other maritime disputes. This is primarily because the United Nations Convention on the Law of the Sea (UNCLOS) and its Annex VI allow individuals and legal entities subject to national law to be parties before the Seabed Disputes Chamber (SDC) exclusively in seabed-related disputes, and to defend their interests before the International Tribunal for the Law of the Sea.

47 United Nations Convention on the Law of the Sea. (December 10, 1982). Annex VI: Statute of the International Tribunal for the Law of the Sea, 1833 U.N.T.S. 397.

48 Ibid.

However, for this advantage to be realized, certain conditions set forth by UNCLOS must be met. Without them, seabed disputes become just like other maritime disputes regulated by the Convention regarding the parties to the case. The first of these conditions is that the interested natural or legal person must be sponsored by at least one State Party to the UNCLOS. Secondly, the sponsoring State must refrain from intervening in the dispute, even after being invited to do so. This is because, pursuant to Article 190 of the UNCLOS, a State sponsoring a natural or legal person – whether as a claimant or a respondent – has the right to intervene in the proceedings on their behalf and submit its written or oral pleadings. In other words, if the sponsoring State accepts the request referred to it by the other party to the dispute before the SDC to substitute the person it sponsors, the dispute shifts to become between two States, rather than between a State and a person subject to domestic law.

As for the second specific advantage, it lies in the non-consensual nature of litigation before the SDC. The UNCLOS allows cases brought before the SDC, or before an ad hoc chamber formed by it, to be heard upon the mere request of one of the parties, without requiring the consent of the other party in this case. In contrast, establishing jurisdiction for a tribunal in other maritime disputes requires the mutual consent of both parties.

Consequently, it can be said that while the subject-matter jurisdiction (*ratione materiae*) of the SDC is limited, given that seabed disputes are exclusively defined in Article 187 of the UNCLOS, its personal jurisdiction (*ratione personae*) is very broad. One or both parties to a case brought before the Chamber may be international legal entities (States or international organizations), or one of the parties may be a person subject to domestic law, which is unusual in litigation before international tribunals.

We believe that this modern approach represents a significant step forward. Outside of human rights cases and those involving international civil servants, we do not find any

international judicial body whose statute allows individuals to appear before it against States. We also believe that this trend is highly positive. Granting individuals and private entities the capacity to participate in activities regulated by the UNCLOS should be matched by expanding the rules of liability to address any breach they might commit during these activities. At the same time, it requires granting them the right to defend their interests before the SDC in disputes relating to the interpretation and application of this Convention and the contracts arising from it, in the event that the sponsoring State refrains from defending them.

Nevertheless, it can be said that this modern approach established by UNCLOS, granting individuals the right to litigate before the SDC even if the opposing party objects, clashes with what could be described as a shortcoming that might render this approach meaningless. Ultimately, the matter depends on the States Parties to the Convention accepting the jurisdiction of the ITLOS to hear disputes related to the application or interpretation of its provisions. In other words, if these States choose to submit their maritime disputes, regardless of their nature, to the International Court of Justice or to arbitral tribunals, this will nullify any expansion of the personal jurisdiction of the ITLOS, as well as the rules of liability for breaching international law, to include individuals.

In reality, the facts reveal that the expansion of the personal jurisdiction of the SDC has not been put into practice to this day. Since its establishment, the ITLOS has only heard, or is currently hearing, 29 cases. The majority of these involve the mandatory jurisdiction of the Tribunal, and none of them include persons subject to domestic law. This is the case despite the International Seabed Authority (ISA) having signed contracts with 22 contractors for the exploration of polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts on the seabed.

Accordingly, we believe that international debate, both now and in the future, should

focus on ways to impose the mandatory jurisdiction of the ITLOS and its SDC over all seabed disputes, without this being dependent on an explicit declaration by States Parties. Only through this approach, we believe, can

the unique characteristics of seabed disputes, namely the ability of domestic persons to appear before international tribunals, be put into practice.

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