

CASE NOTE

MINERALS AND MECHANISMS: THE LEGAL SIGNIFICANCE OF THE NOTION OF THE ‘COMMON HERITAGE OF MANKIND’ IN THE ADVISORY OPINION OF THE SEABED DISPUTES CHAMBER

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The sea is everything ... it is the ‘Living Infinite’ ... In fact ... Nature manifests herself in it by her three kingdoms — mineral, vegetable, and animal. The sea is the vast reservoir of Nature ... Upon its surface men can still exercise unjust laws, fight, tear one another to pieces, and be carried away with terrestrial horrors. But at thirty feet below its level, their reign ceases, their influence is quenched, and their power disappears. Ah! sir, live — live in the bosom of the waters! There only is independence! There I recognise no masters! There I am free!

— Captain Nemo of the Nautilus¹

Nautilus Minerals Inc [parent company of Nauru Ocean Resources Inc] ... is the world leader in the commercial exploration and sustainable development of deep sea mineral resources. ... [it] is the only company in the world that has been able to successfully explore for polymetallic sulphides, sample, drill and trial mine in water depths greater than 1500 m.

¹ Jules Verne, *Twenty Thousand Leagues under the Sea* (Mercier Lewis trans, 1873) [trans of: *Vingt Mille Lieues sous les Mers* (first published 1870)].

To date, Nautilus's activities have focused on pioneering the commercial development of seafloor polymetallic sulphides within the exclusive economic zones of south-west Pacific island nations ... Through Nauru Ocean Resources, Nautilus brings its world-leading deep sea exploration and mining expertise to polymetallic nodules within the Area.²

I INTRODUCTION

Were Captain Nemo's Nautilus to sail today, the sea in which it would be submersed would be fundamentally different from the sea of 1869. Nemo's 'unregulated freedom' has been wholly replaced by the 'Constitution for the Oceans',³ the UN *Convention on the Law of the Sea* ('UNCLOS').⁴ This convention is a signature achievement of multilateral international cooperation in lawmaking through the UN. The sea's mineral, vegetable and animal resources have been researched and exploited to a far greater extent, and activities in relation to them are now regulated in great detail by UNCLOS. In particular, technological and scientific progress now enables mankind to explore, research and even exploit the resources of the world's most remote and inhospitable environment — the deep seabed — and Part XI of UNCLOS and its related international instruments (collectively referred to as the 'Seabed Regime') are dedicated to regulating deep seabed activities.⁵ The Seabed Regime has been described as one of the most complex legal regimes for international cooperation,⁶ and involves the intricate interaction of two fundamental legal notions that often arise when the management of natural resources is concerned: the 'common heritage of mankind' and the 'common concern of mankind'.⁷

The Seabed Disputes Chamber ('Chamber') of the International Tribunal for the Law of the Sea ('ITLOS') recently delivered a unanimous Advisory Opinion concerning the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.⁸ The Opinion — prompted in part by the 'Nautilus' of today, Nautilus Minerals Inc, part of whose application is extracted above — was principally concerned with clarifying the legal responsibilities, potential liabilities and required conduct of states who sponsor deep seabed mining by private contractors ('sponsoring states') with respect to

² Legal and Technical Commission, International Seabed Authority, *Nauru Ocean Resources Inc Application for Approval of a Plan of Work for Exploration*, 14th sess, ISBA/14/LTC/L.2 (21 April 2008) paras [2]–[3].

³ Nico Schrijver, *Development without Destruction: The UN and Global Resource Management* (Indiana University Press, 2010) 218.

⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) ('UNCLOS').

⁵ See further Part II(A) below.

⁶ See, eg, R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 346.

⁷ For a general discussion of these two notions, see Schrijver, above n 3, 111–12.

⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Advisory Opinion)* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) ('Advisory Opinion').

such sponsorship relationships.⁹ The Opinion was formally requested by the Council of the International Seabed Authority (the ‘Authority’) under art 191 of *UNCLOS*,¹⁰ which reformulated an earlier request submitted by Nauru to seek an advisory opinion regarding the responsibility and liability of sponsoring states.¹¹ Prior to making that request, Nauru and Tonga had asked the Legal and Technical Commission of the Authority to postpone consideration of their respective applications for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing states pursuant to art 8 of annex III to *UNCLOS*.¹² Each case involved the relevant state sponsoring a local subsidiary of Nautilus Minerals Inc in undertaking prospecting and exploration activities in respect of polymetallic nodules on the deep seabed in international waters, in accordance with the Seabed Regime (explained in greater detail in Part II below).¹³ The Legal and Technical Commission agreed to defer consideration of the applications, enabling Nauru and Tonga to obtain the benefit of the Opinion before being required to pursue or withdraw their respective applications.¹⁴

In delivering what has been viewed as a progressive and even ‘historic’¹⁵ unanimous opinion, the Chamber drew heavily on principles of international environmental law and state responsibility more generally in seeking to manage the balance between effective utilisation of the seabed (the ‘common heritage of mankind’) and the need to protect the marine environment from pollution and ecosystem damage (the ‘common concern of mankind’).

This case note contends that the Chamber has struck the right balance between the obligations and potential liabilities of sponsoring states and private contractors, and that the Chamber has usefully and appropriately incorporated principles of environmental law from other tribunals — principally the International Court of Justice (‘ICJ’) — in a way that promotes sustainable development. Part II of this case note briefly summarises key aspects of the Seabed Regime, and identifies the key environmental law principles applicable

⁹ Ibid [1]–[4].

¹⁰ Council, International Seabed Authority, *Decision of the Council of the International Seabed Authority Requesting an Advisory Opinion Pursuant to Article 191 of the United Nations Convention on the Law of the Sea*, 16th sess, 161st mtg, ISBA/16/C/13 (6 May 2010).

¹¹ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [4]; see also Council, International Seabed Authority, *Proposal to Seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters regarding Sponsoring State Responsibility and Liability*, 16th sess, ISBA/16/C/6 (5 March 2010).

¹² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) annex III.

¹³ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [4].

¹⁴ Following the Opinion, both applications were reactivated and subsequently approved by the Seabed Council: see International Seabed Authority, ‘Seabed Council Approves Four Applications for Exploratory Contracts with Authority in Deep Seabed Area’ (Media Release, SB/17/11, 19 July 2011) <<http://www.isa.org.jm/files/documents/EN/Press/Press11/SB-17-11.pdf>>.

¹⁵ See, eg, David Freestone, ‘Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on “Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area”’ (2011) 15(7) *ASIL Insights* <<http://www.asil.org/insights110309.cfm>>.

to it. Parts III, IV, and V then deal, respectively, with the three express questions addressed by the Chamber in the Opinion: what are the sponsoring state's legal obligations and responsibilities; what potential liability for damage attaches to sponsoring states that fail to comply with *UNCLOS*; and finally, what steps must sponsoring states take to satisfy their legal obligations and responsibilities under the Seabed Regime?¹⁶ Part VI considers four key issues with respect to the Seabed Regime that remain open following the Opinion.

II SUMMARY OF THE SEABED REGIME AND APPLICABLE ENVIRONMENTAL LAW PRINCIPLES

A Summary

The Seabed Regime includes *UNCLOS*, the *Agreement relating to the Implementation of Part XI of the Convention* ('1994 Agreement'),¹⁷ and other rules and regulations promulgated by the Authority, including the *Nodules Regulations*¹⁸ and the *Sulphides Regulations*.¹⁹ The Seabed Regime has been the subject of significant academic consideration,²⁰ particularly concerning implementation difficulties and the need to negotiate the *1994 Agreement*.²¹ While some describe Part XI of *UNCLOS* as an 'exceptionally precise, detailed instrument closer in appearance to a commercial contract or concession than to an international treaty',²² this 'look and feel' is not determinative: the Opinion makes clear that the normal rules of treaty interpretation, drawn from both the terms of *UNCLOS* itself, and also the *Vienna Convention on the Law of Treaties*,²³ continue to apply.²⁴

The object of Part XI is to 'develop the principles' embodied in the *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the*

¹⁶ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [1].

¹⁷ *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 42 (entered into force 28 July 1996) ('1994 Agreement').

¹⁸ International Seabed Authority, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* <<http://www.isa.org.jm/files/documents/EN/Regs/MiningCode.pdf>> ('*Nodules Regulations*').

¹⁹ International Seabed Authority, *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area* <<http://www.isa.org.jm/files/documents/EN/Regs/PolymetallicSulphides.pdf>> ('*Sulphides Regulations*').

²⁰ See, eg, Churchill and Lowe, above n 6; Budislav Vukas, *The Law of the Sea: Selected Writings* (Martinus Nijhoff, 2004). See also Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1985).

²¹ See, eg, Bernard Oxman, 'The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea' in Davor Vidas and Willy Østreng (eds), *Order for the Oceans* (Kluwer Law International, 1999) 15; Schrijver, above n 3, 76–7. See also the recent discussion in Eric Posner and Alan O Sykes, 'Economic Foundations of the Law of the Sea' (2010) 104 *American Journal of International Law* 569, who themselves, however, appear to cautiously endorse the regime.

²² Churchill and Lowe, above n 6, 18.

²³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

²⁴ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [57]–[58].

Subsoil Thereof, beyond National Jurisdiction.²⁵ It gives legal effect to the notion that ‘the Area’ — defined in art 1(a) of *UNCLOS* as ‘the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction’ — and its ‘resources’²⁶ are the ‘common heritage of mankind’,²⁷ the latter being ‘vested in mankind as a whole, on whose behalf the Authority shall act’.²⁸ Those resources are not capable of unilateral sovereign claims or alienation outside the Seabed Regime,²⁹ and *UNCLOS* parties and the Authority are obliged not to recognise any such contrary claims.³⁰ While the benefits of mining activities within the Area are to be shared on a non-discriminatory basis for the benefit of all mankind,³¹ the Seabed Regime does place a special emphasis on facilitating the ability of developing states to participate in activities in the Area,³² and on the ‘needs and interests of developing States and peoples who have not obtained full independence’.³³

The development of the Area is managed by the Authority, which is responsible for promulgating applicable rules,³⁴ and for acting as the regulator of prospecting, exploration and exploitation activities within it.³⁵ Article 153 of *UNCLOS* is critical: it effectively provides that private contractors sponsored by states must contract with the Authority before undertaking activities in the Area,³⁶ and that the Authority ‘shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance’ with the Seabed Regime.³⁷ Only the Authority can issue such contracts.³⁸ Furthermore, states are obliged to assist the Authority,³⁹ reinforcing their own obligations under art 139 to ensure compliance by ‘state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals’.⁴⁰

The notion of the ‘common heritage of mankind’ has had a slow and perhaps incomplete introduction into the rules of international law. While it was included in the 1979 *Agreement Governing the Activities of States on the Moon and Other*

²⁵ *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*, GA Res 25/2749, UN GAOR, 25th sess, 1933rd plen mtg, UN Doc A/RES/25/2749 (17 December 1970).

²⁶ ‘Resources’ are defined in art 133(a) of *UNCLOS* as ‘all solid, liquid and gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules’, and are referred to as ‘minerals’ once extracted from the area: art 133(b).

²⁷ *UNCLOS* art 136.

²⁸ *Ibid* art 137(2).

²⁹ *Ibid* art 137(1)–(2).

³⁰ *Ibid* art 137(3).

³¹ *Ibid* art 140(2); see also art 150(g).

³² *Ibid* art 148.

³³ *Ibid* art 140(1).

³⁴ *Ibid* arts 150–1.

³⁵ *Ibid* arts 152–3.

³⁶ *Ibid* arts 153(2)(b), 153(3), 153(6).

³⁷ *Ibid* art 153(4).

³⁸ Schrijver, above n 3, 77.

³⁹ *UNCLOS* art 153(4).

⁴⁰ *Ibid* art 139.

Celestial Bodies,⁴¹ it was not included in later conventions negotiated in the 1990s, which preferred to use the concept of the ‘common concern of mankind’.⁴² As a concept, it remains both radical and controversial, and the debate concerning its theoretical significance and implications continues.⁴³ This case note does not seek to participate in that debate, but rather to outline the approach taken by the Chamber in interpreting the notion within the specific context of the Seabed Regime. To reformulate Malcolm Shaw’s cautious analysis of the potential practical effectiveness of the notion,⁴⁴ this case note seeks to consider whether the problems presented by the complex management structure of the Seabed Regime can be implemented in a way that is legally sound and commercially feasible, and which achieves the objectives of both sustainable development (particularly for developing states) and global environmental protection.

B *Applicable Sustainable Development Principles*

Part XII of *UNCLOS* aims to balance the exploitation of the sea’s common resources under Part XI with the need to protect the marine environment. This is a classic dilemma of sustainable development. Part XII supplements a flag state’s traditional competence to regulate pollution standards for its fleets by imposing obligations to adopt laws and regulations to prevent, reduce and control pollution from vessels flying its flag or belonging to its registry.⁴⁵ Several provisions also address coastal states’ rights to adopt laws, receive notifications of, or be required to consent to, certain pollution events, and to take enforcement action within their territorial waters, Exclusive Economic Zone or continental shelf.⁴⁶

Such provisions are not, however, exclusive to Part XII: art 142 in Part XI also seeks to manage resources that straddle the boundary between a state’s continental shelf and the Area, and preserves a coastal state’s right 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.

The Authority’s competence to develop rules relevant to activities in the Area also expressly incorporates both economic development and environmental protection mandates. Article 145 requires the Authority to adopt specific rules, regulations and procedures directed towards both particular operational activities

⁴¹ Opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) (*Moon Agreement*). Art 11 states that ‘[t]he moon and its natural resources are the common heritage of mankind.’

⁴² Schrijver, above n 3, 9.

⁴³ For a broad discussion of the entire debate, a useful starting point is Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff, 1997).

⁴⁴ Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 533–4.

⁴⁵ *UNCLOS* art 211(2); see also Churchill and Lowe, above n 6, 346.

⁴⁶ See, eg, *ibid* arts 208(1), 210(5), 211(1), (4)–(7).

and specified preservation or conservation outcomes. Article 150 clearly identifies the Authority's mandate in seeking to 'foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the overall development of all countries, especially developing states'. Neither provision is given precedence by *UNCLOS*. The Chamber pointed towards the *Nodules Regulations* and *Sulphides Regulations* as examples of how the Authority may appropriately seek to integrate these two streams, particularly by drawing on general environmental law principles set out in, for example, the *Rio Declaration on Environment and Development* ('*Rio Declaration*').⁴⁷

While there is explicit mutual recognition between Parts XI and XII,⁴⁸ their precise interaction remains unclear. Importantly, therefore, the Chamber indicated that *UNCLOS* — particularly art 304 — ensures that the Seabed Regime, especially concerning questions of responsibility and liability, will be influenced by developments in international law generally.⁴⁹ The Chamber's own reasoning also demonstrates an inclination towards a 'living tree' approach to interpretation,⁵⁰ as evidenced by its reading of the earlier *Nodules Regulations* in the light of the later *Sulphides Regulations*.⁵¹ Hence, the progressive development of norms relevant to sustainable development generally, in which development and environmental concerns are effectively balanced, may also influence the interpretation of the Seabed Regime generally, at least to the extent to which those developments are not incompatible with *UNCLOS*.⁵²

III RESPONSIBILITIES OF SPONSORING STATES

The Chamber's detailed yet concise *dispositif* concerning Question One is a very clear statement of the findings of the Chamber, and is worth quoting in full,

⁴⁷ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [125]–[135]; *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (Vol I) (12 August 1992) annex I ('*Rio Declaration on Environment and Development*'). See further Part III below.

⁴⁸ See, eg, *UNCLOS* arts 145, 209.

⁴⁹ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [211].

⁵⁰ The concept of interpreting a convention or statute as a 'living tree' — a progressive approach that takes changing times and usages into account — was famously articulated by Lord Sankey in *Edwards v Attorney-General of Canada* [1930] AC 124 with respect to the *Constitution* of Canada, where he stated that the *Constitution* was 'a living tree capable of growth and expansion within its natural limits': at 136. The approach has also been discussed extensively in cases concerning the *European Convention on Human Rights* before the European Court of Human Rights, starting with *Tyrer v United Kingdom* (1978) 2 Eur Court HR (ser A). Ian Brownlie refers to this interpretative practice as an 'evolutionary' or 'teleological' approach which has 'many pitfalls': Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 635–6. For an interesting and insightful recent analysis of this interpretive approach, see Baroness Hale, *Beanstalk or Living Instrument? How Tall Can the European Convention on Human Rights Grow?* (Gray's Inn Reading delivered at Gresham College, London, 16 June 2011) <<http://www.gresham.ac.uk/lectures-and-events/beanstalk-or-living-instrument-how-tall-can-the-european-convention-on-human>>.

⁵¹ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [137].

⁵² *UNCLOS* art 293(1) provides that '[a] court or tribunal ... shall apply this *Convention* and other rules of international law not incompatible with this *Convention*.'

as it identifies the key principles of significance with respect to the Seabed Regime:

Sponsoring States have two kinds of obligations under the *Convention* and related instruments:

A The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the *Convention* and related instruments.

This is an obligation of 'due diligence'. The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors.

The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.

This 'due diligence' obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be 'reasonably appropriate'.

B Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors.

Compliance with these obligations may also be seen as a relevant factor in meeting the 'due diligence' obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are:

- (a) the obligation to assist the Authority set out in article 153, paragraph 4, of the *Convention*;
- (b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the 'due diligence' obligation of the sponsoring State and applicable beyond the scope of the two Regulations;
- (c) the obligation to apply the 'best environmental practices' set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;
- (d) the obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and
- (e) the obligation to provide recourse for compensation.

The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the Annex to the *1994 Agreement*. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the *Convention* and as an aspect of the sponsoring State's obligation to assist the Authority under article 153, paragraph 4, of the *Convention*.

Obligations of both kinds apply equally to developed and developing States, unless specifically provided otherwise in the applicable provisions, such as

Principle 15 of the *Rio Declaration*, referred to in the *Nodules Regulations* and the *Sulphides Regulations*, according to which States shall apply the precautionary approach ‘according to their capabilities’.

The provisions of the *Convention* which take into consideration the special interests and needs of developing States should be effectively implemented with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States.⁵³

As can be seen, this part of the *dispositif* draws heavily on sustainable development principles, and identifies both the direct obligations and the obligation of ‘due diligence’ — the latter being derived from the sponsoring state’s express ‘responsibility to ensure’,⁵⁴ discussed further below — that are imposed on sponsoring states by Part XI.⁵⁵ Before turning to those obligations, however, two preliminary points must be emphasised.

First, the Chamber confirmed that there is no obligation on any state to sponsor an entity that holds its nationality or that is controlled by it or its nationals.⁵⁶ Sponsorship requires a ‘specific act emanating from the will of the State or States of nationality and of effective control’.⁵⁷ This consent criterion was doubtless a significant factor in the Chamber’s determination that, unless otherwise provided, obligations of both types apply equally to developed and developing states.

Secondly, the Opinion is limited to prospecting and exploration activities, as the *Regulations* do not yet cover exploitation, and the Chamber did not ‘consider itself to be called upon to lay down such future rules on liability’.⁵⁸ Nevertheless, similarities in treatment of exploration and exploitation activities under the Seabed Regime support the Chamber’s assertion that states may ‘take some guidance from the interpretation in this Advisory Opinion of the pertinent rules on the liability of sponsoring States in the *Convention*’ in relation to liability for exploitation activities.⁵⁹

A *Due Diligence Obligations*

The Chamber cited *UNCLOS* arts 139(1), 153(4) and annex III art 4(4) in stating that sponsoring states have a ‘responsibility to ensure’ that any ‘activities in the Area’⁶⁰ conducted by a sponsored contractor are ‘in conformity’ or comply with the relevant rules within the Seabed Regime.⁶¹ Despite drafting differences concerning the applicable ‘rules’ within each of those provisions, the Chamber

⁵³ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [242] Finding 3.

⁵⁴ *Ibid* [107]–[110].

⁵⁵ *Ibid*.

⁵⁶ *UNCLOS* art 153(2)(b).

⁵⁷ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [78].

⁵⁸ *Ibid* [168].

⁵⁹ *Ibid*.

⁶⁰ *Ibid* [82]–[97], where the Chamber explains what is meant by ‘activities in the Area’.

⁶¹ *Ibid* [99]–[106]. See especially [103].

considered that the scope of obligations in each is ‘substantially the same’.⁶² After describing this ‘responsibility to ensure’ as an obligation of ‘conduct’ rather than ‘result’, and as one of ‘due diligence’,⁶³ the Chamber quoted approvingly from the ICJ’s judgment in the *Pulp Mills Case*⁶⁴ to explain that the obligation

entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.⁶⁵

Importantly, given that seabed activities may frequently be conducted by private entities, the Chamber explained that, consistent with art 8 of the International Law Commission’s (‘ILC’) *Articles on State Responsibility*,⁶⁶ the ‘expression “to ensure” is often used in international legal instruments’ in circumstances where imposing a strict liability regime on states would be unreasonable, but where it equally does not seem satisfactory to allow a situation merely to be subject to the general rule that the acts of private persons cannot be attributed to states.⁶⁷ As the regulation of private actors by international law has been recognised as problematic in many areas,⁶⁸ *UNCLOS* seeks to address this traditional weakness by requiring sponsoring states to both implement domestic legislation consistent with the Seabed Regime, and also to cooperate with the Authority in its regulatory, coordination and standards-setting function.⁶⁹ This strategy is designed to obtain the benefits of increased enforcement from domestic jurisdictions while retaining the benefits of international regulation which is more appropriate for the management of a common resource.

While the Opinion is brief regarding the content of the obligation and provides further details when answering Question Three, it is clear that no single approach will guarantee compliance: states must take ‘all necessary and appropriate measures to secure effective compliance’ by the sponsored contractor, and these measures must be ‘administrative measures which are,

⁶² Ibid [106].

⁶³ Ibid [110].

⁶⁴ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* (International Court of Justice, General List No 135, 20 April 2010) (‘*Pulp Mills Case*’).

⁶⁵ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [115], quoting *ibid* [197].

⁶⁶ International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (‘*Draft Articles on Responsibility of States for Internationally Wrongful Acts*’) (‘*Articles on State Responsibility*’).

⁶⁷ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [112].

⁶⁸ Particularly in human rights law: see, eg, Andrew Clapham, ‘Non-State Actors’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010).

⁶⁹ See, eg, *UNCLOS* arts 139(1), 153(4), 235(2), annex III art 4(4).

within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction'.⁷⁰

B Direct Obligations

The Chamber was more prescriptive concerning the direct obligations of sponsoring states contained within the Seabed Regime. The *dispositif* indicates that direct obligations concern a range of technical, regulatory and environmental obligations. Several of these obligations, notably the customary law obligation to apply a precautionary approach and the obligation to conduct an environmental impact assessment, have been the subject of recent international decisions (including from ITLOS)⁷¹ and arbitral awards.⁷² It is unfortunate that this potentially relevant jurisprudence was not referred to more fully by the Chamber in elucidating these concepts in the context of the Seabed Regime. Nevertheless, as noted above, the Chamber may have regard to other relevant principles in future contentious cases should the circumstances or applicable rules of the Seabed Regime indicate that this is appropriate.

In relation to the precautionary principle, the Chamber highlighted the fact that both the *Nodules Regulations*⁷³ and *Sulphides Regulations*⁷⁴ contain express references to Principle 15 of the *Rio Declaration*,⁷⁵ which requires states to adopt a precautionary approach 'according to their capabilities'.⁷⁶ The Chamber noted that this may result in 'differences in application of the precautionary approach in light of the different capabilities of each State'.⁷⁷ Hence, 'the requirements for complying with the obligation to apply the precautionary principle may be stricter for the developed than for the developing sponsoring States'.⁷⁸ The Chamber was careful to limit the scope of this differential standard, however, describing the term 'capabilities' as a 'broad and imprecise reference to the differences in developed and developing States', and noted that 'what counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields'.⁷⁹

⁷⁰ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [118]–[119], quoting *UNCLOS* art 139(2), and annex III art 4(4). See further Part V below.

⁷¹ See, eg, *Pulp Mills Case* (International Court of Justice, General List No 135, 20 April 2010) [187], [205]; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7; *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) (Order)* (International Tribunal for the Law of the Sea, Case Nos 3 and 4, 27 August 1999) [77]–[80].

⁷² *Iron Rhine Railway (Belgium v Netherlands) (Award)* (Permanent Court of Arbitration, Arbitral Tribunal, 24 May 2005).

⁷³ Reg 31(2).

⁷⁴ Reg 33(2).

⁷⁵ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [125].

⁷⁶ *Rio Declaration*, UN Doc A/CONF.151/26 (Vol I) (12 August 1992) annex I Principle 15, quoted in *ibid* [129].

⁷⁷ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [125].

⁷⁸ *Ibid* [161].

⁷⁹ *Ibid* [162].

Interestingly, the Chamber made these comments regarding the precautionary principle together with its assessment that

none of the general provisions of the *Convention* concerning the responsibilities (or the liability) of the sponsoring State ‘specifically provides’ for according special preferential treatment to sponsoring States that are developing States.⁸⁰

Hence, the Chamber held that the general provisions of the Seabed Regime impose responsibilities and liabilities equally on developed and developing sponsoring states.⁸¹ The Chamber’s analysis of this finding goes to the core of Part XI:

Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States ‘of convenience’ would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.⁸²

This aspect of the Opinion has rightly been welcomed as a desirable outcome in respect of the protection of the marine environment and seabed resources.⁸³

Both *UNCLOS* (art 206) and customary international law were also held to impose obligations on states to conduct environmental impact assessments,⁸⁴ and again, the Chamber did not indicate that a differential standard would apply to developing states. In addition, the Chamber noted that s 1(7) of the annex to the *1994 Agreement* imposes a due diligence obligation on sponsoring states to ensure that an impact assessment is included in a contractor’s application for approval of a plan of work.⁸⁵ Most significantly, the Chamber quoted approvingly from the *Pulp Mills Case* concerning the customary law duty to conduct impact assessments,⁸⁶ and stated that:

The [ICJ’s] reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court’s references to ‘shared resources’ may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in art 142 of the *Convention* with respect to ‘resource deposits in the Area which lie across limits of national jurisdiction’.⁸⁷

⁸⁰ Ibid [158].

⁸¹ Ibid [158].

⁸² Ibid [159].

⁸³ See, eg, Freestone, above n 15.

⁸⁴ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [142]–[148].

⁸⁵ Ibid [141].

⁸⁶ Ibid [147]–[148].

⁸⁷ Ibid [147].

The Chamber therefore concluded that ‘the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the *Regulations*’.⁸⁸

Finally, the Chamber drew a link between a state’s direct obligations and its due diligence obligations, indicating that ‘compliance with [direct] obligations can also be seen as a relevant factor in meeting the due diligence “obligation to ensure”’.⁸⁹ This is particularly the case given the obligation of the sponsoring state contained in art 153(4) to assist the Authority ‘in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of *UNCLOS* and related instruments’.⁹⁰

IV THE LIABILITIES OF SPONSORING STATES

As a preliminary matter, the Chamber considered that the Seabed Regime, in particular *UNCLOS* art 139(2) and annex III art 4(4), imposes a liability regime on sponsoring states that is ‘without prejudice’ to international law rules regarding liability — the application of which *UNCLOS* does not seek to limit⁹¹ — and in this context it is important to recall the Chamber’s proviso regarding the limitation of the Opinion’s applicability to prospecting and exploration (and not exploitation) activities.⁹² International conventions and customary law rules may impose liability on states for certain activities undertaken at sea that cause damage to the interests of other states,⁹³ and the Chamber confirmed that those regimes may potentially apply with respect to activities within the Area.

A Triggers for Liability

A distinction can be drawn between liability ‘triggers’ for a sponsoring state’s failure to comply with its ‘responsibility to ensure’ and a breach of its direct obligations. With respect to the former, the Chamber noted that both sentences of art 139(2) cover the liability of a state for a failure to meet its obligations in relation to damage caused by a sponsored contractor, while liability for a breach of its direct obligations is ‘governed exclusively’ by the first sentence.⁹⁴ In both cases, art 139(2) requires damage in order for liability to be triggered,⁹⁵ and the Chamber recognised that this requirement constitutes a departure from the general position under customary international law, where no material damage need occur for a state to be held liable for a breach of its international obligations.⁹⁶ The trigger mechanism does, however, appear comparable to that

⁸⁸ Ibid [150].

⁸⁹ Ibid [123].

⁹⁰ Ibid [124].

⁹¹ Ibid [171].

⁹² Ibid [168].

⁹³ See, eg, the discussion in Churchill and Lowe, above n 6, ch 15. See also Vaughan Lowe and Stefan Talmon (eds), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (Hart, 2009).

⁹⁴ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [177].

⁹⁵ Ibid [176]–[178].

⁹⁶ Ibid [178].

articulated by the ICJ in the *Bosnian Genocide Case*,⁹⁷ in which the Court considered that while a state's 'obligation to prevent' genocide arises at any point before the genocide takes place, the liability of that state for reparations or compensation as a result of that genocide only arises if and when such acts of genocide actually occur.⁹⁸

As a result, no liability arises if the state has failed to carry out its obligations and no damage arises, nor does any arise when damage occurs but a state has fulfilled its obligations.⁹⁹ While the Seabed Regime is not specific as to the nature of damage required, the Chamber considered that damage to both the 'common heritage of mankind' (that is, the Area and its resources) and the marine environment 'may be envisaged'.¹⁰⁰ While the potential claimants in respect of such damage are also unclear, the Chamber suggested that it could be argued that the Authority may be entitled to claim compensation, as

such entitlement is implicit in Article 137, paragraph 2, of the *Convention*, which states that the Authority shall act 'on behalf' of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area.¹⁰¹

Further, the Chamber held that art 139 requires a causal link between the state's failure to meet its responsibilities and the damage in order for state liability to arise.¹⁰² While not precluding the potential for liability to arise under customary international law,¹⁰³ the Chamber appears to have indicated that damage caused by a sponsored contractor is the most likely trigger for liability to attach to sponsoring states for failure to meet their 'responsibility to ensure'.¹⁰⁴ The Chamber also noted the ILC's lack of progress in establishing rules dealing with state liability for damage arising from acts that are not wrongful, and in this context indicated the desirability of the creation of the trust fund contemplated by art 235(3).¹⁰⁵

More briefly, the Chamber also confirmed that art 139 provides that liability may arise from a state's breach of its direct obligations.¹⁰⁶ While the Chamber did not elaborate on this point, its previous reference to the ILC's *Articles on State Responsibility* and general international law would seem to indicate that the liability would arise as provided for in those *Articles*. The Chamber also noted

⁹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, [428]–[438] ('*Bosnian Genocide Case*').

⁹⁸ *Ibid.*

⁹⁹ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [178].

¹⁰⁰ *Ibid* [179].

¹⁰¹ *Ibid* [180], quoting *Articles on State Responsibility*, UN Doc A/56/10, art 48 with approval.

¹⁰² *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [181].

¹⁰³ *Ibid* [208]–[211].

¹⁰⁴ *Ibid* [201].

¹⁰⁵ *Ibid* [209]; see also [205].

¹⁰⁶ *Ibid* [206].

that the exemption from liability set out in the second sentence of art 139(2) (discussed below) is not available for breaches of direct obligations.¹⁰⁷

B *Key Liability Issues*

After noting that the due diligence nature of the ‘responsibility to ensure’ cannot impose a strict liability regime,¹⁰⁸ the Chamber articulated the view that the current regime does not provide for the apportionment of liability where there are multiple sponsors, and that accordingly, multiple sponsors will be jointly and severally liable for contractors that hold more than one nationality or are controlled by multiple states.¹⁰⁹ The Chamber also noted that the respective liabilities of contractors (for their own non-compliance) and sponsoring states (for their failure to carry out their obligation of due diligence) for damage are parallel, not co-extensive, and thus states retain no residual liability in respect of their sponsored contractors in the event that a contractor cannot meet its liabilities.¹¹⁰ This is the second instance in which the Chamber indicated a potential liability gap which the creation of a trust fund could help to mitigate.¹¹¹

C *Exemptions from Liability*

As indicated above, art 139(2) — incorporating a similar yet more specific exemption contained in annex III art 4(4) — also provides that a sponsoring state will not be liable for damage if it has taken ‘all necessary and appropriate measures to secure effective compliance’ by the contractor. The specific measures to be taken are discussed in further detail in Part V below.

It is important to note that a state’s compliance with its due diligence obligations does not necessarily guarantee the availability of this liability exemption. The Chamber does note that it is ‘inherent in the “due diligence” obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable’,¹¹² and that ‘a necessary requirement for carrying out the obligation of due diligence of the sponsoring State and for seeking exemption from liability’¹¹³ is the adoption of such measures required by art 139(2) (and by extension annex III art 4(4)). But regarding the relationship between the due diligence and exemption requirements, the Chamber merely noted that the concept of “necessary and appropriate measures” [has] two distinct, although interconnected, functions’ — namely, to ensure compliance by the contractor as well as to provide an exemption for liability — and that while the former function had been ‘illustrated’ in its response to Question One, the second would be ‘partially addressed’ in the reply to Question Two and would receive further attention in the context of Question Three.¹¹⁴ The relationship between the two functions as such was not elaborated upon. While this ambiguity is understandable given the somewhat circular drafting of arts 139 and

¹⁰⁷ Ibid [207].

¹⁰⁸ Ibid [189].

¹⁰⁹ Ibid [190]–[192].

¹¹⁰ Ibid [202]–[204].

¹¹¹ Ibid [205].

¹¹² Ibid [239].

¹¹³ Ibid [242].

¹¹⁴ Ibid [217].

153, and while there is likely to be extensive overlap, it is nevertheless unfortunate that the Chamber did not clearly state the requirements for complying with due diligence obligations and obtaining the benefit of the exemption. However, given the Chamber's strong statements in other parts of the Opinion, it may be that this ambiguity is merely an oversight or lack of emphasis, and it may not present an enduring dilemma for the Chamber in future cases.

V 'NECESSARY AND APPROPRIATE MEASURES' TO BE TAKEN BY SPONSORING STATES

The last question addressed by the Chamber — the content of the 'necessary and appropriate' measures that must be taken by the sponsoring state in order to fulfil its responsibilities under *UNCLOS* — highlights the dual role of the sponsoring state under the Seabed Regime: a sponsor of a contractor developing common seabed resources, as well as the guardian of those resources and the broader rights and interests protected by *UNCLOS*. The latter regulatory role was most clearly identified by the Chamber when it stated that it is not sufficient for a sponsoring state to rely on mere contractual provisions (within a contract with the sponsored contractor) to satisfy its obligation to take 'necessary and appropriate' measures: such an approach would not only 'lack transparency',¹¹⁵ but would also prevent legal obligations from being invoked against the state by entities other than the contractor.¹¹⁶ The Chamber further noted that the Seabed Regime only requires the sponsor to provide a certificate of sponsorship, rather than a formal sponsorship agreement, to the Authority; consequently, the state is not even under an obligation to enter into a sponsorship contract.¹¹⁷

It is also clear that simply adopting laws and regulations, even comprehensive ones that may fully implement *UNCLOS*'s requirements, is insufficient to meet this regulatory obligation: states must also take administrative measures to secure compliance with the Seabed Regime, which may include

enforcement mechanisms for active supervision of the activities of the sponsored contractor ... [and] provide for the co-ordination between the various activities of the sponsoring State and those of the Authority with a view to eliminating avoidable duplication of work.¹¹⁸

The measures must be maintained for the entire duration of any activities undertaken within the Area, and must be reviewed to ensure '[the application of] current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind'.¹¹⁹

Regarding the content of the measures, the Chamber articulated some 'general considerations' that should be taken into account in devising the relevant measures.¹²⁰ Such measures must be "reasonably appropriate" for securing compliance [with the Seabed Regime] by persons under its jurisdiction' — that

¹¹⁵ *Ibid* [225].

¹¹⁶ *Ibid* [224].

¹¹⁷ *Ibid* [225].

¹¹⁸ *Ibid* [218].

¹¹⁹ *Ibid* [222].

¹²⁰ *Ibid* [227].

is, they must be ‘agreeable to reason and not arbitrary’.¹²¹ They must be appropriate with respect to the ‘particular characteristics’ of the state’s ‘own legal system’,¹²² and must also assist rather than hinder the contractor in complying with its contractual obligations owed to the Authority.¹²³ In addition, measures must not be inconsistent with, but may be ‘more stringent’ than, the standards imposed by the Seabed Regime.¹²⁴ Specifically, decisions of the Chamber should be enforceable within the state’s jurisdiction.¹²⁵ Further, and by way of a non-exhaustive, indicative list, the Chamber also suggested that the state’s direct obligations, listed in the *dispositif* in response to Question One, would also be appropriate guides when considering the necessary and effective measures required.¹²⁶

In a fascinating passage, the Chamber eschewed providing specific advice concerning the ‘policy choices’ a state must take when fulfilling this responsibility, suggesting that to do otherwise would ‘not [be] in keeping with [its] judicial character’.¹²⁷ Nevertheless, it went on to note that the state does not have ‘absolute discretion’ with respect to complying with its obligations under annex III art 4(4):

In the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole.¹²⁸

This section of the Opinion highlights how the notion of the ‘common heritage of mankind’ represents a significant departure from the traditional, state-centric and positivist view of international law often referred to in shorthand as the ‘*Lotus* principle’,¹²⁹ and which partly explains why the notion is still relatively controversial. While the application of the international law environmental principles and due diligence obligations confirmed by the Chamber may be the most recognisable achievements of the Opinion, this gloss on the legal consequences of the notion of ‘common heritage of mankind’ for individual states — where the good faith requirement noted by the Chamber is understood to require sponsoring states to act reasonably and not arbitrarily¹³⁰ — could prove to be the most significant normative contribution by the Chamber itself. Indeed, the Chamber expressly indicated that ‘any failure on

¹²¹ Ibid [228].

¹²² Ibid [229].

¹²³ Ibid [238].

¹²⁴ Ibid [231]–[233].

¹²⁵ Ibid [235].

¹²⁶ Ibid [236]; see also [121]–[122].

¹²⁷ Ibid [227].

¹²⁸ Ibid [230]; see also [76].

¹²⁹ The ‘*Lotus* principle’ is derived from the case of *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, and generally dictates that states have complete freedom of action so long as they do not contravene any explicit international prohibitions.

¹³⁰ Ibid [230].

the part of [a] sponsoring State to act reasonably may be challenged before [the] Chamber under article 187(b)(i) of the *Convention*'.¹³¹

VI ADDITIONAL ISSUES REQUIRING FURTHER CONSIDERATION

A *Joint and Several Liability*

As noted above, the Chamber considers that multiple sponsors will in principle bear joint and several liability, except where the regulations provide otherwise.¹³² The Chamber seems to have based this view on art 139(2), which provides that 'States Parties ... acting together shall bear joint and several liability', presumably on the basis that two states have issued a certificate of sponsorship in favour of the relevant contractor.

While a discrete act with a readily definable outcome (like insolvency or a collision) is a common event for which joint and several liability may arise, it is difficult to see how this form of liability could usefully be applied to two states in respect of their failure to comply with due diligence obligations. A joint and several liability regime works best to encourage compliance and high standards of performance in legal situations, such as commercial partnerships or offshore oil drilling consortiums, in which the entities bearing the joint and several liability have comparable profiles, resources and obligations. It is not clear that sponsoring states will always share such features. Indeed, if the Nautilus group corporate structure is indicative of how other such commercial ventures will be structured, then a developed and a developing state may find themselves together in a co-sponsorship relationship.

Because the provisions of *UNCLOS* cannot be easily amended, it would seem desirable for the Authority to prescribe, by way of regulations, which of any multiple sponsors should bear liability for specific parts of the operations (financial viability, operational guidelines and so forth). While there are dangers inherent in simply adopting a list of liabilities to be borne by one or the other co-sponsoring state — essentially, that unforeseen categories of damage or injury may highlight gaps in the coverage of such a list — such an approach would ensure a clear allocation of liability, and reduce unnecessary negotiations concerning its apportionment, thereby encouraging the efficient commercial development of the seabed resources. One approach to limiting the problem of liability gaps would be to allocate liability for certain types of liability to the sponsor that is more closely connected with fewer features of the overall transaction, and allocate both certain other specific liabilities based on transactional features, together with a general residual liability, to the other state. Finally, it should also be recalled that the liability rules under the Seabed Regime are 'without prejudice' to the general international law rules concerning the liability of states, and that the Chamber has so far only made observations in relation to prospecting and exploration areas in the Area. It remains to be seen whether the Chamber, or other international tribunals, may view the liability

¹³¹ *Ibid.*

¹³² *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [192]. Currently, only the controlling state is liable in respect of certificates of financial viability: *Nodules Regulations*, above n 18, reg 12(5)(c); *Sulphides Regulations*, above n 19, reg 13(4)(c).

provisions of the Seabed Regime as *lex specialis* in appropriate contexts, and how the words ‘without prejudice’ might affect their ability to do so.

The sponsorship agreement between Nauru and Nautilus Resources Inc, attached to the submissions of Nauru (‘Sponsorship Agreement’),¹³³ contains provisions that seek to comprehensively indemnify the state against any liability, including the state’s own liability, that might arise as a result of the acts or omissions of the company in connection with the sponsorship arrangement or the activities of the company in the Area.¹³⁴ This indemnity is also backed by stringent obligations on the company to maintain appropriate insurances.¹³⁵ Provisions of this nature should, subject to the creditworthiness of the relevant companies, provide a reasonable level of comfort to developing countries in a sponsorship situation. However, if the scope of the sponsoring state’s liability which is the subject of these indemnities and insurance obligations is less clear (for example, in a co-sponsorship situation), it will be more difficult for companies to either commit to or obtain finance for their activities. From a commercial perspective too, therefore, it would be desirable if this uncertain situation could be clarified by the Authority.

B *Flag State Liability*

While the Opinion briefly referred to art 209 of *UNCLOS* (which addresses flag state liability for pollution of the Area) by way of comparison with annex III art 21(3) — in that state measures may exceed, but must at least meet, the ‘minimum standard of stringency’ for environmental laws and regulations with respect to the prevention of marine pollution within the Area¹³⁶ — the Chamber did not discuss the potential liability interface between sponsoring states and flag states.

The conduct of mining activities in the Area is generally impossible without using a range of vessels: current exploration activities conducted by Nautilus Minerals Inc¹³⁷ indicate that production vessels, raw materials barges and support craft are all likely to be utilised in seabed mining operations.¹³⁸ Therefore, in addition to potential multiple sponsoring states, a number of different flag states may also find themselves exposed to pollution prevention obligations under the Seabed Regime, and consequently may be exposed to liability for damage to the marine environment arising from mining in the Area.

One of the fears underlying the initial request for the Opinion was that small developing nations like Nauru and Tonga would potentially be exposed to

¹³³ Permanent Mission of the Republic of Nauru to the United Nations, *Statement by the Republic of Nauru regarding the Questions Submitted to the Seabed Disputes Chamber for an Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Entities with respect to Activities in the International Seabed Area* (5 August 2010) appendix 1 (‘Sponsorship Agreement’) <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Nauru.pdf>.

¹³⁴ *Ibid* cl 23.

¹³⁵ *Ibid* cl 22.

¹³⁶ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [240]–[241].

¹³⁷ As discussed in Part I above.

¹³⁸ See, eg, Nautilus Minerals Inc, *Nautilus Forms Strategic Partnership and Secures Vessel* (13 April 2011) <<http://www.nautilusminerals.com/s/MediaNewsReleases.asp?ReportID=451777>>.

disproportionate and unmanageable cost liabilities.¹³⁹ In the context of flag state liability and marine pollution, this concern also applies with respect to many small states in which vessels are regularly registered, such as Panama and Malta. Although potential liability already exists for such states and the fact that the Seabed Regime imposes potential liabilities is not unique, a fair apportionment of liability between sponsoring states and states in which relevant vessels are registered must also be achieved. If Nautilus Minerals Inc and other general industry practice is any guide, such vessels will be chartered rather than owned by the relevant tenement owner or licensee. The Sponsorship Agreement would again in this situation appear to provide a general indemnity to the sponsoring state with respect to damage or injury caused by foreign registered ships chartered by the sponsored company. However, because the prospecting or exploration activities will occur in large part in international waters, the dislocation between the state of sponsorship and the state of registration results in a considerably limited ability on the part of the sponsoring state to, for example, take emergency action regarding, or compel changes in activities by, the relevant vessels. This is a potentially significant area of liability overlap, this time between sponsoring states and states of vessel registration, that requires further clarification, and would also warrant a further advisory opinion from the Chamber.

C Benefits to Developing States

Nauru, in its proposal to the Council of the Authority to seek an Advisory Opinion, stated that: ‘To participate effectively in activities in the Area, [developing] States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment).’¹⁴⁰ Although the Opinion was primarily concerned with questions of responsibility and liability, the Chamber did acknowledge that the Seabed Regime also provides certain benefits to developing states, in particular the ‘reserved area’ scheme under annex III art 9(4) which effectively sets aside half of any proposed contract areas for the Authority and developing states.¹⁴¹

However, recent seabed practice within national jurisdictions indicates that certain benefits also flow to the developing state in which a contractor chooses to establish a special purpose mining entity, set up its headquarters or locate its

¹³⁹ See Government of Nauru, *Statement by the Republic of Nauru regarding the Questions Submitted to the Seabed Disputes Chamber for an Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Entities with respect to Activities in the International Seabed Area* (5 August 2010) [10]–[12] <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Nauru.pdf>; see also *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [4]. As Freestone, above n 15, observes:

In particular, [Nauru] stressed that its sponsorship [of the Nautilus Inc subsidiary] had originally been based on the assumption that it could mitigate its potential liabilities. If this was not the case, it continued, developing countries would effectively be precluded from taking part in such activities, despite the fact that their participation was a basic precept of the *Convention*.

¹⁴⁰ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [4].

¹⁴¹ *Ibid* [163].

operations.¹⁴² These benefits may include the creation of jobs, the development of infrastructure and the provision of aid. Should these benefits be taken into account by the Authority in determining how to distribute subsequent proceeds from seabed exploitation, in a manner that might reduce payments to the headquarters state when compared to other developing nations? Again, the Authority should perhaps consider this issue when developing policies in relation to activities within the Area in accordance with art 150 of *UNCLOS*, and perhaps also seek clarification from the Chamber in relation to the legal constraints, if any, on its discretion in relation to this issue, particularly given art 150(i), which provides that:

Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring ... (i) the development of the common heritage for the benefit of mankind as a whole.

D Expert Evidence

Several dissents in the *Pulp Mills Case* criticised the ICJ majority's handling of scientific and technical evidence as being methodologically flawed.¹⁴³ Chief among the criticisms was that a lack of scientific certainty in the evidence presented, and the Court's failure to use experts to inform its own decision (although such experts were not requested by the parties themselves) undermined the conclusions reached by the Court on the evidence.¹⁴⁴

In the context of the Seabed Regime, an issue of this nature could become particularly significant for developing states, given the scientific and technical gloss the Chamber placed on the interpretation of the precautionary principle within the Regulations.¹⁴⁵ Articles 72, 73(2), 77–80 and 82 of the *Statute for the International Tribunal for the Law of the Sea*¹⁴⁶ concerning the use of expert witnesses and opinions also apply to the Chamber by virtue of art 115 of the *Statute*. These are complicated by art 289 of *UNCLOS*, which allows the Chamber, together with the parties, to select a number of experts to sit with the Chamber but not vote. Those provisions give the Chamber a significant amount of discretion in the way in which expert evidence can be provided, tested and used in the final determinations. The Chamber must seek to use the more detailed provisions available to it with respect to scientific and expert evidence, and

¹⁴² See, eg, the local investments reportedly made by Nautilus Minerals Inc in Tonga, in the context of a deep seabed project in Tongan waters: Nautilus Minerals Inc, *Community Work in Tonga* (2008) <<http://www.cares.nautilusminerals.com/TongaCommunityWork.aspx>>.

¹⁴³ *Pulp Mills Case* (International Court of Justice, General List No 135, 20 April 2010) (Judges Al-Khasawneh and Simma; Judge Vinuesa).

¹⁴⁴ *Ibid*; see especially the joint dissenting opinion of Judges Al-Khasawneh and Simma, [2]–[17].

¹⁴⁵ *Advisory Opinion* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 17, 1 February 2011) [163].

¹⁴⁶ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) annex IV ('Statute for the International Tribunal for the Law of the Sea').

would be well advised to do so as soon as an opportunity permits it to in a comprehensive and progressive manner.

VII CONCLUSION

The Seabed Regime represents perhaps the most effective and detailed elaboration to date of a functioning legal regime based on the concept of the common heritage of mankind, a concept that was, ‘on its appearance, judged a slogan void of any legal significance’.¹⁴⁷ This is no longer the case, and the common heritage of mankind is increasingly recognised as a significant, if not fundamental, legal notion that facilitates useful and sustainable human activity in areas and with respect to resources that transcend national boundaries. Further, as the Opinion demonstrates, the common heritage of mankind, together with the common concern of mankind in preventing marine pollution, is a notion capable of acting as the legal foundation for a complex legal regime in which norms relating to economic development and environmental protection can be effectively and rationally balanced.

The Opinion therefore represents a sound beginning to the more detailed development of a comprehensive deep sea mining regime. However, it is important not to overstate its value. One advisory opinion is not sufficient to definitively articulate the Seabed Regime, nor is it capable of drawing to a close the debate concerning the legal value and scope of the notion of the ‘common heritage of mankind’. Nevertheless, it is a positive start, and ongoing practical, balanced and commercially-sensitive analysis and decisions by the Chamber can build upon it, and continue to strengthen the Seabed Regime, encourage the pursuit of its objectives and bolster the legal significance of the notion of the ‘common heritage of mankind’. While the Chamber is a relatively new tribunal, and thus its decisions and advisory opinions perhaps cannot (yet) be considered to be on a par with those of the ICJ, the Chamber’s jurisdiction under art 191 of *UNCLOS* and the effective, precise and timely manner in which it rendered this advisory opinion can be expected to lead to further requests from the Council or Assembly of the Authority. Future decisions of the Chamber will need to take into account not only the issues identified in Part VI of this case note, but also new challenges presented by technological and scientific advances, both in relation to the resources of the sea and techniques for exploiting them, as well as in relation to the risks and consequences of environmental degradation, and the interrelationship between the utilisation of both the living and mineral resources of the sea.

Whether the *Nautilus* of the 21st century will commence operations within the Area depends on a wide range of factors — for example, commodity prices, the extent of conflict in alternative minerals production zones, developments in and the reduced costs of new technologies — that are unrelated to the effectiveness of the Seabed Regime. However, the contribution made by the Chamber in the Opinion is a welcome and positive first step to ensuring that the Seabed Regime effectively balances authorisations to conduct exploitation operations with the protection of the marine environment, and in a way that will encourage sustainable development in the Area and achieve the benefits for the global

¹⁴⁷ See, eg, Vukas, above n 20, 129.

community that the notion of the common heritage of mankind was intended to promote.

PETER HOLCOMBE HENLEY*

* BA/LLB (Hons) University of Melbourne, Advanced LLM in Public International Law (Peace, Justice and Development Specialisation) (cum laude) Leiden University, The Netherlands. The author wishes to thank Professor Nico Schrijver and the anonymous referees for their insightful comments on an earlier draft of this case note.