Seabed Disputes
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A. The Legal Framework

1 Section 5, Part XI United Nations Convention on the → Law of the Sea (1982) (‘Convention’) establishes the structure and characteristics of the special dispute settlement system applicable to disputes with respect to activities in the → International Seabed Area (‘Area’).

2 The Area is defined in Article 1, 1 (1) of the Convention that sets out that this space is the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction. The common heritage of mankind provides the bases for a system of norms applicable to the Area and its resources, including a dispute settlement structure enshrined therein (Paolillo, 1984, 168–72).

3 The term ‘activities’ in the Area was analysed in the Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber (‘2011 Advisory Opinion’), issued by the Seabed Disputes Chamber (‘Chamber’) in 2011. In para 82, the Chamber states that the term ‘activities’ is defined in Article 1, para 1 (3) of the Convention as ‘all activities of exploration for, and exploitation of, the resources of the Area’.

4 Part XI, Article 133 (a) of the Convention gives a definition of ‘resources’ which are ‘all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules’.

5 Furthermore, the Chamber states that:

[t]he expression ‘activities in the Area’, in the context of both exploration and exploitation, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface’ (2011 Advisory Opinion, para 94).

6 According to the 2011 Advisory Opinion, these definitions do not specify the meaning of exploration and exploitation.

7 Regarding the nature and content of the concept of ‘activities in the Area’, Annex IV, Article 1, para 1, on the Statute of the Enterprise (of the Convention) provides further guidance to comprehend the scope of that notion:

The Enterprise is the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

8 Thence, the distinction between ‘activities in the Area’ which the Enterprise carries out directly pursuant to Article 153, para 2 (a) of the Convention, and other activities which can be performed by it, namely, the transporting, processing, and marketing of minerals recovered from the Area, shed light on the meaning of ‘activities in the Area’ referred to in Article 1, para 1 of Annex IV, and Article 1, para 1 (3) of the Convention.

9 Other provisions relevant to the definition of ‘activities in the Area’ are framed in Article 145 of the Convention, regarding the taking of ‘[n]ecessary measures ... with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities’.
This provision relates to activities for which the → International Seabed Authority (ISA) ('Authority') shall adopt rules, regulations, and procedures. These activities include: ‘drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities’. Such activities encompass disposal, dumping, and discharge into the marine environment of sediment, wastes, or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities.

In relation to the protection of the environment, Annex III, Article 17, para 2 (f) of the Convention specifies that the notion of ‘activities in the Area’ for which the Authority can draw up rules, regulations, and procedures, encompasses the following:

Rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.

For further clarity on this matter, when reference is made to the harmful effects resulting directly from ‘activities in the Area’ and from ‘shipboard processing’, the two are to be seen as part of the activities subject to the competences of the Authority, as the 2011 Advisory Opinion (para 88) underscored.

The notion of ‘activities in the Area’ appears in several provisions of the Convention and Annexes dealing with issues such as the environmental responsibilities of different entities or the scope of work of the Enterprise, eg Articles 139 and 145 of the Convention, Article 4 (4) and Article 17 (2) (f) of Annex III of the Convention, Article 1 (1) of Annex IV of the Convention interpreted in the light of section 2 Annex to the 1994 Agreement.

Additionally, when the Nodules Regulations and the Sulphides Regulations define ‘exploration’ and ‘exploitation’ in the context of polymetallic nodules and polymetallic sulphides respectively, they also envisage actions covered by the notion of ‘activities in the Area’ (Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (2010)).

On the other hand, processing and transporting as mentioned in Annex IV, Article 1 (1) of the Convention are excluded from the notion of ‘activities in the Area’. Extraction of metals from minerals which is normally conducted at a plant situated on land is also excluded from the ambit of ‘activities in the Area’.

With the view to applying a unified concept of ‘activities in the Area’, the 2011 Advisory Opinion (para 93) highlights that to ensure consistency regarding the scope of ‘activities’ in the Area, the provisions of the Convention prevail over the Nodules Regulations and the Sulphides Regulations, which are subordinate to the Convention.

Although not defined as ‘activities’ in the area, given that mining practice prospecting could be considered a preliminary phase of exploration, it may raise further legal issues under the Convention, eg the obligations incumbent on the Authority or a State Party concerning the environmental protection. In this respect, account must be taken of the duty incumbent upon prospectors to adopt necessary measures to prevent, reduce, and control pollution and other hazards to the marine environment, as far as reasonably possible, applying a precautionary approach and best environmental practices (Nodules Regulations;
Sulphides Regulations; Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (2012) (‘Cobalt Regulations’).

B. The Disputes Settlement System for Seabed Activities

18 The disputes settlement system applicable to Seabed Area activities is binding on all Parties to the Convention and no declaration under Article 287 of the Convention is required.

19 The establishment of a special Chamber as a permanent tribunal is one of the leading features of the system (→ Seabed Disputes Chamber: International Tribunal for the Law of the Sea (ITLOS)). It coexists with other special tribunals, as the Convention admits the establishment of ad hoc chambers and special chambers to deal with specific disputes, as well as commercial arbitration (Eiriksson, 2000, 66–76).

20 These chambers will always be composed of members of the Chamber, nominated either by agreement of the parties or by the President of the Chamber, upon consultation with the parties. Members of an ad hoc chamber must not be in the service of any of the parties to the dispute or be nationals of them.


22 Article 285 of the Convention sets forth a general rule for any dispute including those pursuant to Part XI, section 5, devoted to seabed disputes, namely that section 1 of Part XV applies. According to this provision if an entity other than a State Party is a party to such a dispute, section 1 of Part XV of the Convention applies mutatis mutandis. The effect of this provision may lead to the acceptance of the selection by agreement between the parties to a dispute of other means entailing a binding decision or conciliation (García García-Revillo, 2015, 65).

23 It has been noted that ‘the originality of the system lies in its comprehensiveness and its mandatory character’ (Caflisch, 1983, 323). To be highlighted also is the equal footing between different subjects intervening in seabed disputes according to the various types of relationships: States Parties, the Authority, the Enterprise, and juridical or natural persons.

24 The system is modelled taking into consideration other international institutional systems existing at the time (eg the European Community) while introducing elements of judicial review of the decisions of the main body of the regime, the Authority. The analysis of the elements of the negotiations and the underlying bargains conducive to the establishment of this new legal structure are fundamental to clarify the bases of the regime (Sohn, 1995, 211–12; Paolillo, 1984, 149–56). In this respect, attention should be paid to the general features of the legal order for the oceans embedded in the Convention, as well as the differentiation between various actors interplaying in the Seabed area and its resources.

C. The Law Applicable by the Seabed Disputes Chamber

25 As Article 38 of Annex VI of the Convention sets out, Article 293 of the Convention applies to the seabed dispute settlement system. It means that the tribunals having jurisdiction over disputes arising from the seabed activities and other matters subject to
compulsory jurisdiction will have to apply the Convention and other rules of international law not incompatible with it.

26 In addition to Article 293, Article 38 of Annex VI Convention on the Statute of the International Tribunal for the Law of the Sea (‘ITLOS Statute’) also provides for the application throughout the system, of the rules, regulations, and procedures of the Authority adopted in accordance with the Convention, and the terms of contracts concerning activities in the Area in matters related to those contracts. This provision covers both substantive and procedural matters.

27 Article 293 also affords the possibility for the parties to agree on granting the Chamber the power to decide a case *ex aequo et bono*, a possibility that may challenge the uniformity and consistency of the applicable law in the Seabed Area subject to an international regulated regime.

28 As applicable law, account must be taken of the Agreement relating to the Implementation of Part XI United Nations Convention on the Law of the Sea of 10 December 1982 (1994) (‘1994 Agreement’). In accordance with its Article 2, para 1, the provisions of the 1994 Agreement and Part XI of the Convention shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail.’

D. Characteristics of the Seabed Disputes System Under the Convention and the Functions of the Seabed Disputes Chamber

29 The Convention establishes an institutional nexus between the general system of the Tribunal which is provided for in Part XV of the Convention and the Chamber set up in section 5 of that Part. This gives place to a special judicial system within the International Tribunal for the Law of the Sea (Akl, 2001, 75–78).

30 The Chamber is the organ specifically entrusted with the general functions of settlement of disputes and of giving advisory opinions, in conformity with section 5 of Part XI. The manner in which the Chamber shall exercise its jurisdiction is governed by Part XV and Annex VI of the Convention.

31 According to para 35 2011 Advisory Opinion, the ‘Chamber is a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.’

32 The compulsory jurisdiction of the Chamber is affirmed by various provisions of the Convention, eg by Article 187 on categories of disputes. Article 287 (2) provides that parties to a dispute subject to the jurisdiction of the Chamber ‘to the extent and in the manner provided for in Part XI, section 5’ cannot opt out from its power. The Chamber is also endowed with advisory functions. Both powers, to adjudicate and to advise, are regulated in a manner aimed to provide better governance to the Area with the support of judicial institutions.

33 The Chamber (Article 35, section 4 Annex VI of the Convention), is composed of 11 members of the International Tribunal for the Law of the Sea, selected by a majority of the elected members of the Tribunal from among them. This takes place every three years and members can be selected for a second term. Article 35 of Annex VI also regulates quorum, vacancies, and the composition of the Chamber in situations of pending issues at the end of
any three-year period for which the Chamber may have been selected. For quorum matters, seven of the members selected by the Tribunal is required for the Chamber to operate.

34 Criteria such as representation of the principal legal systems of the world and equitable geographical distribution shall be assured. The Assembly of the Authority may adopt recommendations of a general nature relating to such representation and distribution.

35 In addition, Articles 23 to 25 of section B, subsection 1 and 2 of Part II ITLOS Rules contain special provisions regarding the functioning and integration of the Chamber, regulating aspects related to members, terms of office, the presidency, and judges ad hoc.

36 The dispute settlement system does not only consist of a Chamber with special and exclusive competences, the Convention sets forth other special tribunals with jurisdiction over disputes between States Parties referred to in Article 187 (Adede, 1987, 269–73). The categories of disputes which may fall into the jurisdiction of special chambers will be discussed in the next sections.

E. The Interpretation or Application of Part XI of the Convention: Choice of Tribunal for Disputes between States Parties

37 In accordance with Article 188 1 (a) of the Convention, for disputes regarding the interpretation or application of provisions of Part XI and Annexes thereto, a special chamber of the Tribunal can be set up at the request of the States Parties to the dispute. The composition of this special chamber is regulated in Annex VI, Articles 15 and 17 of the Convention.

38 For the same category of dispute between States Parties, in accordance with Article 188 1 (b) of the Convention, at the request of any party to the dispute, an ad hoc chamber of the Chamber can be formed in accordance with Annex VI, Article 36.

39 The composition of a special chamber of three or more members of the Tribunal formed pursuant to Article 15 (2) of Annex VI of the Convention, at the request of the parties in the dispute, resembles the arbitral procedure. This is because the composition of the chamber will be subject to the approval of the parties; the chamber may include members of the nationality of the parties concerned, and failing such possibility, or if they are unable to be present, Article 17 (4) of Annex VI provides that the special chamber may be composed of members specially chosen by the parties.

40 The Convention also provides that in absence of an agreement, a party may choose either the Chamber itself or an ad hoc chamber of the Chamber. This chamber will be composed of three of its members to be determined by the Chamber with the approval of the parties.

41 This special system envisions the possibility for parties to a contract whose interpretation or application is in question, to have recourse to arbitration. This type of controversy may arise from the interpretation or application of a contract referred to in Article 187 (a seabed mining contract or a plan of work), subpara (c) (i). Unless otherwise agreed, in accordance with Article 188 (2) (a), any party to such dispute may request to submit the dispute to binding commercial arbitration.

42 In all these cases the compulsory jurisdiction of the Chamber does not have an exclusive character.
F. Contentious Jurisdiction of the Seabed Disputes Chamber

As set forth in Article 187 of the Convention, the contentious jurisdiction of the Chamber is designed to deal with different controversies which fall within the following categories, considering in conjunction *ratione personae* and *ratione materiae* criteria:

(a) Disputes between States Parties concerning the interpretation or application of Part XI and the Annexes relating thereto;

(b) Disputes between a State Party and the Authority concerning:

   (i) acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or

   (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;

(c) Disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning:

   (i) the interpretation or application of a relevant contract or a plan of work; or

   (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;

(d) Disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the refusal or a contract or a legal issue arising in the negotiation of the contract;

(e) Disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b) where it is alleged that the Authority has incurred liability as provided in Annex III, article 22;

(f) Any other disputes for which the jurisdiction of the Chamber is specifically provided in the Convention.

G. Participants in Proceedings in Accordance with Part XI and Annexes. Ratione Personae Jurisdiction

As mentioned above, various subjects are endowed with *locus standi* to participate in judicial or arbitral proceedings in relation to activities in the Area. They are:

— The Authority

— States Parties, including the subcategory of sponsoring States
The Enterprise

— Contractors, whether natural or legal persons, State enterprises, and

— Sponsoring States in cases in which a natural or juridical person is a party to a dispute. For an entity to be sponsored, including State enterprises, it must have the nationality or enjoy an effective connection with a State Party. The sponsoring system is one of the elements of eligibility for entities applying for authorization to explore or exploit the resources of the Area.

H. Procedural Aspects of the Seabed Disputes Chamber

45 Provisional Measures: Article 290 of the Convention expressly sets forth the power of a court or tribunal which considers that prima facie has jurisdiction under Part XV or Part XI, section 5, to prescribe provisional measures ‘which it considers appropriate under the circumstances to preserve the respective rights of the parties or to prevent harm to the marine environment.’

46 Moreover, following Article 40 of Annex VI of the Convention, other sections of that Annex which are not incompatible with the special norms applicable to the Chamber, shall apply to this judicial organ. This means that section 3 on Procedure contained in Annex VI of the Convention relating to the power to prescribe provisional measures, as provided in Article 25 of Annex VI, applies to the Chamber.

47 Hearings, conducting cases, default situations, majorities required to adopt decisions, the content of judgments, and intervention rules are subject to the norms of Annex VI of the Convention.

48 Regarding the legal nature of the decisions given by the Chamber, special chambers and ad hoc chambers, as well as commercial arbitral tribunals, Article 33 of Annex VI of the Convention clearly states that:

— Decisions are final and shall be complied with by all the parties to the dispute;

— They will have no binding force except between the parties in the particular case;

— In the event of dispute as to the meaning or scope of a decision, the tribunal shall construe it upon the request of any party to the case.

I. Enforceability of the Decisions of the Seabed Disputes Chamber or Other Chambers

49 Article 39 ITLOS Statute deals with the enforcement of decisions of the Chamber and provides that, ‘[t]he decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.’

50 On this matter, reference has also to be made to Annex III, Article 21, para 2 of the Convention which provides, ‘[a]ny final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the Authority and of the contractor shall be enforceable in the territory of each State Party’.

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Whether this provision may require the enactment of domestic legislation for its implementation is a matter to be considered by every State Party, especially when it acts as a sponsoring State. As has been pointed out, it is inherent in the ‘due diligence’ obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable. Thus, the decision of the Chamber regarding the responsibilities of a sponsoring State enjoys the power of its enforceability.

Enforceability in the territory of any State Party to the Convention is also provided for decisions rendered by any court or tribunal having jurisdiction under the Convention relating to rights and obligations of the Authority or of the contractor. This issue is also addressed in Article 40 (2) Nodules Regulations; Art 42 (2) Sulphides Regulations; Art 42 (2) Cobalt Regulations.

The Draft Regulations on Exploitation of Mineral Resources in the Area (2018) explicitly prescribes that according to Article 21 (2) Annex III of the Convention ‘any final decision rendered by a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the Authority and of the Contractor shall be enforceable in the territory of any State Party to the Convention affected thereby’ (Draft Regulation 104 (2)).

Regarding enforceability, according to Article 39 of Annex VI (section 4) of the Convention, decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought (Eiriksson, 2000, 273).

J. Exclusivity or Primacy of the Disputes Settlement Chamber

The role of the consent of the parties to a dispute is highlighted by the provisions of the Convention. The judicial system always operates within the Convention framework, but States Parties may decide to have recourse to judicial organs other than the Disputes Settlement Chamber. This is so because according to Article 188 of the Convention, in order to settle some of the disputes arising in connection with Part XI, the Convention allows the establishment of special judicial mechanisms either within the Disputes Settlement Chamber or the Tribunal itself. In those cases, the Chamber does not have the exclusive jurisdictional power to deal over such group of disputes.

In accordance with the above, the system functions as follows. There is exclusive competence of the Chamber for certain categories of disputes:

— Disputes over acts or omissions of a party to a contract and directed to the other party or directly affecting its legitimate interests (Art 187 (c) (ii) of the Convention);

— Disputes over pre-contractual disputes (Art 187 (d) of the Convention); and

— Disputes regarding the liability of the Authority pursuant to Article 22 of Annex III (Art 187 (e) of the Convention).

In addition to the Chamber, a special chamber of the International Tribunal for the Law of the Sea or an ad hoc chamber of the Chamber, or a binding commercial arbitration, may also be competent, for disputes referred to in Article 188. Under Article 188 (2), the interpretation or application of a contract or a plan of work (Art 187 (c)) may be submitted at the request of any party to the dispute to binding commercial arbitration. Likewise, Article 13 (15) of Annex III (not amended by the 1994 Agreement) refers to disputes between the Authority and a contractor over the interpretation or application of the financial terms of a contract, which may be submitted to commercial arbitration by either
party ‘unless both parties agree to settle the dispute by other means, in accordance with article 188 (2).’

K. Ratione Materiae Jurisdiction

From a ratione materiae perspective the dispute settlement system is structured in a manner that relates the subject-matter of a dispute with the entities entitled to appear before the disputes settlement procedure. This adds complexity to the systematization of the types of situations subject to the procedures envisaged in the Convention, which fundamentally are the following:

- Disputes related to the interpretation or application of the Convention, its Annexes, as well as rules, regulations and procedures of the Authority,

- Disputes regarding a violation of the Convention either by the Authority or by a State Party. The case of a claim against the Authority needs further consideration as it may encompass questions related to the exercise of its powers,

- Disputes related to the interpretation or application of a contract or a plan of work between the parties to a contract, be it the Authority, States Parties, the Enterprise, state enterprises, juridical, or natural persons,

- Acts or omissions of a party to a contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests,

- Disputes concerning the refusal of a contract or a legal issue arising in the negotiation of a contract between a prospective contractor (sponsored by a State) and the Authority.

- Cases of responsibility or liability of the Authority or of a contractor for damages arising out of a wrongful act in the conduct of operations. Account must be taken of contributory acts or omission by the Authority or by the contractor in any given case, as provided by Article 22 of Annex III.

- The 1994 Agreement specifies that the following categories of disputes related to matters covered by it, are to be submitted to the dispute settlement procedures set out in the Convention:

  - disputes relating to a disapproval of a plan of work by the Authority. In section 3 (12) on Decision Making;
  
  - disputes relating to a breach of requirements regarding the production policy of the regime. In section 6 (4) on Production Policy;
  
  - disputes concerning the interpretation or application of the rules and regulations relating to financial terms of contracts. In section 8 (1) (f) on Financial Terms of Contracts.

L. Disputes Consisting of Acts or Omissions of a State Party or of the Authority
According to Article 187 (b) of the Convention, compulsory jurisdiction is the general rule for these type of disputes. They may consist of:

— acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations, and procedures of the Authority adopted in accordance therewith; or

— acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.

The subject-matter of the dispute encompasses the question of the legality of the exercise of jurisdiction by the Authority and allegations that it may have acted in excess of jurisdiction or misused its power. Excepting contractual disputes, all sorts of disputes defined in these terms between State Parties and the Authority are subject to the Chamber.

For alleged wrongful acts of the Authority, reference should be made to Part XI of the Convention and its Annexes III and IV, or to the implementing rules, regulations, and procedures of the Authority. Wrongful acts may consist of a breach of a fundamental rule of procedure, which are infringements to the decision-making process rules, or to the voting majorities required and violations to provisions regarding the external format of binding decrees or acts (Seeberg-Elverfeldt, 1998, 107–9).

The general rule embedded in the Convention allows States Parties to submit claims against the Authority for acts alleged to be in excess of jurisdiction or a misuse of power (Art 187 (b) (ii) of the Convention).

For excess of jurisdiction or misuse of powers, examples of such allegations are varied since the Authority (the Assembly or the Council) is endowed with powers and functions regarding the activities in the Area as well as with an internal administration power. The law-enactment power of the Authority, exercised through the competences of the Assembly and the Council, is regulated in Articles 160 (Assembly) and 162 (Council).

This matter also entails the issue of the grounds on which any judicial review of resolutions and decisions adopted under the Seabed regime can operate, taking into account the mixed nature of the system that depends on the emergence of a dispute between a State Party and the Authority (Paolillo, 1981, 504).

The Convention also envisions cases of disputes for acts of omission of the Authority or a State Party alleged to be in violation of Part XI and Annexes relating thereto or of rules, regulations, and procedures of the Authority adopted in accordance therewith (Art 187 (b) (i) of the Convention). This ex post control or judicial review remains confined to an individual decision or measure based on said rules, regulations, and procedures.

As the Convention provides, the powers of the Authority (as well as those of the Enterprise) are subject to the rule contained in Article 158 (4) of the Convention that states that in exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.

Regarding the misuse of power, the notion entails both the concept of misuse of discretion and excess of discretion (Seeberg-Elverfeldt, 1998, 105).

It is noted hereto that provisions related to the transfer of technology originally subject to Article 5 of Annex III of the Convention, have been derogated by the 1994 Agreement.
Likewise, other possible disputes arising from provisions amended by the 1994 Agreement, such as those contained in section 5 on Transfer of Technology of its Annex, regarding the nature and scope of cooperation for obtaining technology by the Enterprise and developing countries, are worth mentioning. This is mainly due to the effect of section 5 of Annex 1994 Agreement regarding cooperation under Article 144 of the Convention on matters of acquisition, promotion, and encouragement of the transfer of technology.

M. Disputes (Between States Parties) Concerning the Interpretation or Application of Part XI and the Annexes Thereto

The contentious jurisdiction of the special chambers as referred to in Article 188 of the Convention may be activated in cases of disputes between States Parties regarding the interpretation or application of such norms. The tribunal to be chosen may consist of:

- a special chamber of the International Tribunal for the Law of the Sea can be formed in accordance with Annex VI, Articles 15 and 17;
- an ad hoc chamber of the Chamber can be formed in accordance with Annex VI, Article 36;

N. Disputes Concerning the Interpretation of Application of Contractual Disputes

At the request of any party to the dispute, disputes concerning the interpretation or application of a contract referred to in Article 187, subpara (c) (i), can be submitted to binding commercial arbitration, unless the parties otherwise agree.

The commercial arbitration tribunal to which a dispute may be submitted pursuant to this provision shall have to consider the following situations:

- It will have no jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of an interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, this question will be submitted to the Chamber for a ruling.

- If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or proprio motu, that its decision depends upon a ruling of the Chamber, the arbitral tribunal shall refer such question to the Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Chamber.

In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree.

O. Disputes Concerning the Responsibility or Liability of the Authority
This is the case identified in Article 187 (e) of the Convention which may arise between the Authority and a State Party, a State enterprise or a natural or juridical person sponsored by a State Party. The basis for this claim is a dispute on the responsibility or liability incurred by the Authority for wrongful acts, as referred to by Article 22 of Annex III of the Convention. The Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its functions including violations under Article 168 (2) of the Convention (disclosure of industrial secret, proprietary data or any other confidential information), account being taken of contributory acts or omissions by the contractor.

**P. Disputes Concerning the Responsibility or Liability of a Contractor**

This is the case whenever a sponsored contractor incurs responsibility for wrongful acts, as referred to by Article 22 of Annex III of the Convention, and in the conduct of its operation damage occurs. In that case, the contractor shall have responsibility account being taken of contributory acts or omissions by the Authority.

In both cases, be it liability of the Authority or liability of the contractor, it shall be for the actual amount of damage (Art 22, Annex III of the Convention).

**Q. Questions Relative to the Suspension of Exercise of Rights and Privileges of Membership in the Authority**

Acts or omissions of a State Party judged as gross and persistent violations of Part XI by the Chamber may lead to the suspension of such State Party from the exercise of the rights and privileges of membership of the Authority by the Assembly upon a recommendation of the Council, in accordance with Article 185 of the Convention.

In this case, the Convention envisages a two-step procedure and sets forth a judicial protection recourse in case of allegations of breach of Part XI by a State Party only when the Chamber has found that such a gross and persistent violation has occurred, the Assembly may proceed to adopt a decision of suspension (Art 185 (2) of the Convention).

**R. Powers of the Authority and Limitations on Jurisdiction of the Seabed Disputes Chamber**

The Convention raises the question of the distinction between issues on which the Chamber will not itself pronounce and those on which it may adopt decisions. In this respect, it applies a fundamental principle by which the Chamber will refrain from questioning the manner in which the Authority has exercised its discretion when adopting rules, regulations and procedures. This means that the Chamber cannot substitute its discretion for that of the Authority.

Article 189 also strikes a distinction between the exercise of discretionary powers of the Authority in accordance with Part XI of the Convention and decisions on claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to a dispute or their obligations under the Convention, and other claims identified therein.

Furthermore according to Article 189 of the Convention, the Chamber cannot substitute its discretion for that of the Authority to pronounce itself on the question of whether any
rules, regulations and procedures of the Authority are in conformity with the Convention, nor declare invalid any such rules, regulations and procedures.

81 The Chamber’s jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.

82 Whether a claim before the Chamber amounts to a review of a discretionary decision or to a determination of an existing abuse or misuse of power on its part may need an assessment by the Chamber to distinguish between the two contended situations.

83 Another issue regarding the limitation of the Chamber’s power relates to damages or other remedies to be decided by it. This matter raises the issue of the effect of any such a decision about the validity of the act of omission that caused the situation subject to reparation. It appears logical that according to the disputes settlement system, the limitations imposed on the Chamber under Article 189 of the Convention cannot imply that the Authority enjoys discretional power to persist in the conduct causing such damaging consequences.

S. Decision-Making Process of the Authority and the Preventive Reviewing Power of the Seabed Disputes Chamber

84 Article 159 (10) of the Convention lays down that the Chamber is entrusted with the power to give an advisory opinion whenever at least one fourth of the members of the Authority requests through the President, an advisory opinion on the conformity with the Convention of a proposal before the Assembly on any matter. The effect of such submission is that voting at the Assembly will be deferred pending receipt of the advisory opinion.

85 If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.

86 This is without prejudice to the jurisdiction of the Chamber to give advisory opinions as provided in Article 191 of the Convention, at the request of the Assembly or the Council.

87 This head of jurisdiction to adopt an Advisory Opinion completely differs from the grounds invoked by the Tribunal to issue Advisory Opinions on matters unrelated to the Seabed, as was the case in 2015 regarding the request for an Advisory Opinion by the Sub Regional Fisheries Commission (Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion, 2015).

T. Disputes about Contractual and Pre-contractual Disputes

88 This matter needs further analysis, due to the actual competences granted to the Authority to deploy its contractual power for the functioning of the system. Contracts may be agreed to conduct exploration or/and exploitation by the Authority with States Parties, the Enterprise, States enterprises, or sponsored juridical or natural persons.
89 Article 187 (c) of the Convention takes into account that controversies which may arise in relation to the interpretation and execution of a contract shall have means for discussion and decision. In this respect, due regard must be paid to Annex III of the Convention regarding the basic conditions of prospecting, exploration and exploitation, and the role thereof of contracts.

90 The dispute settlement system entrusts the Chamber with powers regarding disputes arising from contracts drawn up between the above-mentioned entities.

91 The categories of contractual disputes stem from Article 187 of the Convention, which identifies the various situations relevant for the dispute settlement system within the Seabed regime.

92 The general rule is set up in Article 187 (c) of the Convention which defines the scope of the power of the Chamber with regard to the interpretation or application of a relevant contract or a plan of work; or acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interest.

93 A special provision introduces the right of a sponsoring State to participate upon notice given to it. The system provides that where 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 written and oral proceedings.

94 Moreover, when an action is brought against a State Party by a natural of juridical person sponsored by another State Party in a dispute referred to in Article 187 (c) applicable to contractual issues, the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person. If such appearance fails, the respondent State may arrange to be represented by a juridical person of its nationality.

95 Furthermore, as indicated earlier, the 1994 Agreement introduced amendments to the Convention on some governing norms of the Seabed regime, such as the transfer of technology and the financial terms of contracts. Accordingly, the *ratione materiae* of the original dispute settlement system applicable to contractual relations has also been adjusted in this respect, e.g. regarding contractual relations, disputes concerning a refusal of a contract or legal issues arising during its negotiation between the Authority and a prospective contractor sponsored by a State may be subject to the dispute settlement system of section 5 of Part XI.

96 This is the case whenever the sponsored contractor has duly fulfilled the conditions set up in Annex III, Article 4 (6) and Article 13 (2), and a dispute arises on the refusal of a contract or in the course of the negotiation of such contract.

97 There is also the case of disputes concerning the responsibility or liability incurred by the contractor or by the Authority for wrongful acts, as referred to in Article 22 of Annex III of the Convention. As has been explained earlier, a wrongful act from which damage has resulted entails the responsibility or liability of a contractor or of the Authority. In all cases, account shall be taken of contributory acts or omissions by the Authority or by the contractor, depending on each particular situation.

**U. The Choice of Dispute Settlement Procedures for Contractual Disputes**
When a contract stipulates that disputes will be submitted to the Chamber, this mechanism prevails. If there is no such agreement, the claimant may decide to have recourse to the Chamber or to a binding commercial arbitration conducted under the UNCITRAL Arbitration Rules in the absence of agreed rules.

In case of recourse to commercial arbitration, the commercial arbitral tribunal ‘shall have no jurisdiction to decide any question of interpretation of this Convention’. When the dispute involves a question of interpretation of Part XI and Annexes related thereto, with respect to activities in the Area, the question shall be referred to the Chamber. The referral may proceed by determination of the arbitral tribunal itself either at the request of any party to the dispute or proprio motu.

Similarities have been highlighted between this formula and the one contained in Article 267 Treaty on the Functioning of the European Union (2007). According to this, the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty; the validity and interpretation of acts of the institutions; the interpretation of the statutes of bodies established by an act of the Council of the European Union, where those statutes so provide. Whenever such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the European Court of Justice to give a ruling thereon. Moreover, where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under the national law, that court or tribunal shall bring the matter before the Court of Justice (Paolillo, 1984, 270–74).

The introduction of this formula in the Convention was the result of a compromise between various approaches defined according to the economic and political position of the negotiators during the Third United Nations Conference of the Law of the Sea (Adede, 1987, 273). The mechanism established by Article 188 (2) (b) was crafted in a way that acknowledges the primacy of the Convention and of the Chamber over such matters.

The Chamber may give an opinion on legal questions upon request of the Assembly or the Council of the Authority, if the necessary majority has been met in each of these organs. The general norm applicable to this function is laid down in Article 191 of the Convention.

The Chamber’s advisory jurisdiction under Article 191 of the Convention concerns ‘legal questions arising within the scope’ of the activities of either the Assembly or the Council.

The Assembly is also empowered to request an advisory opinion under Article 159, para 10 of the Convention, ‘on the conformity with this Convention of a proposal before the Assembly on any matter’. This power is conceptually aimed to assist the Assembly during its decision-making process.

A request for an advisory opinion may concern the interpretation of the provisions of the Convention and also raise issues of general international law. In this sense, the system is similar to the one appertaining to the International Court of Justice regarding questions ‘framed in terms of law and rais[ing] problems of international law’ (Western Sahara, 1975, para 15). According to the Chamber in its 2011 Advisory Opinion (para 47), once the
jurisdiction of the tribunal has been established it has no discretion to decline a request for an advisory opinion on a legal issue whenever it is requested to do this.

106 A significant contribution to the study of the advisory competence was made in the 2011 Advisory Opinion. Questions put to the Chamber were the following:


2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

107 In its Advisory Opinion, the Chamber highlighted the concepts of liability of the sponsoring State and the status of the precautionary approach. In this respect, the Chamber considered relevant rules of international environmental law enshrined in the obligation of due diligence. These are novel contributions of the Seabed disputes system established by the Convention which so far, has not been tested through contentious proceedings. New developments in the sphere of international environmental law may also be relevant in future seabed cases, as has already been in other international disputes (Maljean-Dubois, 2011, 25–54).

108 The Seabed disputes system remains a cornerstone of the legal edifice of the Convention. Throughout its provisions, the substantive set of rights and obligations related to the common heritage of mankind principle can be enforced and rendered effective. The system is also a guarantee for the exercise of the powers by the Authority in accordance with international law.

Cited Bibliography


Further Bibliography


**Cited Documents**


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Further Cases