**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

# The Tribunal and the International Seabed Authority: the future of the advisory and contentious jurisdiction of the Tribunal

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According to the programme, I have been asked to speak about the future of the advisory and contentious jurisdiction of the Tribunal. Lest I be accused of exercising 'creeping jurisdiction', I want to explain at the outset that my remarks will focus on the advisory and contentious jurisdiction of the Seabed Disputes Chamber.

As you know, the relationship between the Authority and the Tribunal is unique and may be traced back to the beginning of the negotiations at the Third Law of the Sea Conference. Although the initial idea was to establish a tribunal for the seabed as an organ of the Authority, in the end the decision was taken to create a single, unified International Tribunal for the Law of the Sea with a special dispute settlement mechanism to deal with disputes concerning seabed related activities. In this way, it was possible to avoid the consequence of creating two new tribunals, one dealing with general disputes concerning the Law of the Sea and the other dealing with disputes relating to the deep seabed.

The relevant provisions of Part XI of the Convention that set out the jurisdiction of the Seabed Disputes Chamber are relatively short. They give the Chamber extensive, in some respects exclusive, but not exhaustive, jurisdiction over a wide

range of potential disputes arising from ‘activities in the Area’. I should mention that ‘activities in the Area’ is a term of art used extensively in Part XI to qualify and limit the jurisdiction of both the Authority and the Chamber to activities of exploration for and exploitation of deep seabed mineral resources.

So far, no disputes have been brought to the Chamber under its contentious jurisdiction. One advisory opinion has been issued pursuant to Article 191 of the Convention on the basis of a request by the Council.

I will make some comments about the advisory opinion before discussing the future of the contentious jurisdiction of the Chamber.

**The advisory jurisdiction of the Chamber**

As is well known the first and, so far, only, advisory opinion of the Seabed Disputes Chamber was given in Case No. 17, on the responsibilities and obligations of sponsoring States. The request for the advisory opinion was made by the Council of the Authority in 2010, on the basis of a proposal made by the Republic of Nauru. The background was that in 2008 Nauru had sponsored an application for a plan of work for exploration by a company named Nauru Ocean Resources Inc. Before that application was considered, however, Nauru began to have some doubts as to its capacity to meet any potential liability arising from its sponsorship of the applicant company.

Accordingly, at the request of the applicant and the sponsoring State, consideration of that application was postponed, while Nauru sought further guidance from the Council on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability.

In a document submitted to the Council, Nauru pointed out that, in common with most other developing States, it lacked the technical and financial capacity to undertake deep seabed mining. In order to participate effectively in activities in the Area, developing States would therefore have to engage entities in the global private sector to conduct these activities on their behalf. Its sponsorship of the project was originally premised on the assumption that Nauru could effectively mitigate any potential liabilities or costs arising from its sponsorship. However, given that Nauru could not afford exposure to the legal risks potentially associated with such a project, there was a pressing need for guidance to be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States could assess whether it was within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area.

The Council considered the issues raised by Nauru, but declined to provide guidance on the relevant legal provisions itself. It also declined to request the Authority's Legal Counsel to provide an opinion. Instead, after a full debate, the Council decided to use its powers under Article 191 of the Convention to request an advisory opinion from the Chamber on the issues raised by Nauru. At the same

time, however, the Council decided to frame the questions for the Chamber in a more abstract and concise manner.

In brief, those questions were asking: What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area? What is the extent of liability of a State Party for any failure to comply with the applicable law by an entity whom the State Party has sponsored? And finally, what are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the applicable law?

The advisory opinion was issued in February 2011, six months after the request was made. I am not going to go into the content of the opinion. Much has been written on this, and I think we are all well aware of the legal issues involved. What I would like to discuss is what has been the practical effect of the Advisory Opinion for States Parties and for those entities conducting activities in the Area.

I think it is fair to say that the advisory opinion represented a significant milestone in the life of the Authority and has had a major influence on the decisions of private capital to invest in seabed mining. The importance of the advisory opinion lies not only in the content of the opinion itself but also in the fact that it demonstrates to the international community as a whole, that the system for dispute settlement set out in Part XI is both effective and efficient. Not least is the expeditious and transparent manner in which the Chamber issued the advisory opinion.

Until Nauru made its request to the Council in 2010, the only entities conducting activities in the Area under contract to the Authority were the so-called former registered pioneer investors, whose rights had been 'grandfathered' in by virtue of resolution II of the Third Conference and the provisions of the 1994 Agreement.

The advisory opinion not only encouraged Nauru to proceed with its application, which was approved in 2011, but also opened the door to many other applications from private entities sponsored both by developed and developing States. Thus, since 2011, the Authority has approved 21 plans of work for exploration, including five awarded to small island developing States. It is unlikely that any of these applications would have been made without the clarity given to investors by the advisory opinion.

The content of the advisory opinion has also changed the behaviour of States Parties. In clarifying the requirement for States Parties to adopt appropriate laws and regulations to protect themselves from liability, the advisory opinion has prompted many States Parties to enact or update such laws and regulations. In 2012, the Council of the Authority requested the Secretary-General to establish a database of existing sponsoring State legislation and to request States Parties to provide information on the status of their national legislation on an annual basis. It is now a well-established practice that the Secretary-General provides a report to the Council on the status of national legislation at each annual session. The Authority's website also contains links to national legislation provided by States

Parties and is thus a valuable resource on the matter. So far, 26 States, and one regional organization, have provided information on the status of national legislation to the Authority.

More importantly, perhaps, the practice has developed whereby every decision of the Council formally approving a plan of work for exploration contains a preambular paragraph recalling the advisory opinion. This serves as a useful reminder to contractors and sponsoring States of the need to consider the relevant provisions of Part XI in light of the guidance contained in the advisory opinion.

So I think it is beyond doubt that the advisory opinion in Case No. 17 solved a very real problem and has been of great value and assistance to States Parties, as well as potential investors in deep seabed mining. It was requested at a time when there was considerable uncertainty about the nature of the responsibilities and obligations of sponsoring States and it has helped to clarify the law. It promoted certainty in understanding the provisions of Part XI and made a valuable contribution to the rule of law.

Nevertheless, as Michael Wood has noted, advisory opinions need to be approached with great caution and prudence. Although they have no binding force, they carry considerable authority and most certainly have legal effects.

In 2016, the Council was again faced with the question of whether to request an advisory opinion under Article 191. This was in relation to a potential conflict

between exploration carried out under a contract for exploration with the Authority, with exclusive rights, and activities carried out pursuant to Articles 143 and 256 of the Convention as Marine Scientific Research in the Area. In particular, the issue arose as to the extent to which MSR carried out by one State in an area allocated to another entity under a contract with the Authority could be regarded as an unreasonable interference with the contractor's exclusive rights, and what is the meaning of the 'due regard' obligations contained within the Convention in that context.

In this case, the Council declined to request an advisory opinion, at least for the time being. It did note that advisory opinions have certain advantages, including the possibility of addressing difficult legal issues in the abstract, rather than in the context of a specific dispute between States Parties (I note that others regard this as a disadvantage). The benefit of greater transparency was also noted, as the Chamber would benefit from submissions from all States Parties, including researching States and sponsoring States, as well as relevant international organizations such as the Authority and IOC-UNESCO.

Although the Council was not obliged to, and did not, record its reasons for not requesting an advisory opinion, my impression of the debate is that the Council acknowledged the seriousness of the issues involved, but considered that the matter was not sufficiently urgent to request an advisory opinion, that the legal questions involved were not sufficiently well articulated and that more time was needed for delegations to study the issues.

In this regard, I believe that the Council demonstrated admirable prudence and caution.

**The contentious jurisdiction of the Seabed Disputes Chamber**

The Convention confers a wide contentious jurisdiction upon the Chamber over disputes arising from 'activities in the Area'.

It is important to note, however, that the Chamber's jurisdiction is neither comprehensive nor universal. A number of disputes are excluded from the Chamber's jurisdiction by implication of Article 187 and the terms in which it has been drafted. Other disputes are subject to an optional alternative jurisdiction under Article 188, and others again are excluded by Article 189. The latter provision in particular excludes disputes involving the exercise by the Authority of its discretionary power and declarations as to the conformity with the Convention or invalidity of the rules, regulations or procedures of the Authority; and those that fall to be determined under the dispute resolution procedures of the WTO.

When one considers the current status of activities in the Area, which are confined to the exploration phase, it is probably not surprising that no cases have yet arisen under the contentious jurisdiction of the Chamber. This situation may well change when exploitation begins, as significant commercial interests will then be at stake.

As you are probably well aware, the Authority is currently in the process of elaborating regulations to govern the exploitation phase, including the terms and conditions of exploitation contracts, as well as environmental and financial regulations.

In this respect, it has been noted that there are some surprising omissions from Article 187, in addition to those already mentioned under Article 189.

Article 187 excludes, for example, any disputes not concerning 'activities in the Area', such as disputes relating to transportation of minerals on the high seas and processing on land. Disputes concerning the Authority arising under other Parts of the Convention would also be excluded, such as disputes concerning interference with the rights of third parties under Parts VII, XII and XIII (a reference back, perhaps, to the MSR issue).

More importantly, perhaps, Article 187(c)(ii) limits the jurisdiction of the Chamber in respect of acts or omissions of parties to a contract to acts or omissions 'relating to activities in the Area and directed to the other party or directly affecting its legitimate interests'. This indicates quite a high bar for a complainant to satisfy the Chamber that it has jurisdiction under Article 187.

A number of possible disputes seem to be beyond the jurisdiction of the Chamber. These include:

- Disputes between a contractor and a neighbouring coastal State, for example under Article 142;

- Disputes between neighbouring contractors (collisions or encroachment)
- Disputes with third parties, for example disputes between the Authority, the Enterprise or a contractor with a third party user of the high seas or the Area (cable layers, for instance);
- Disputes involving a non-State Party.

Whilst each of these disputes may be amenable to settlement through a variety of different means, including commercial arbitration under Article 188, the question has arisen as to whether it may be desirable to seek to have as many disputes as possible heard before a single tribunal. This, it is argued, would promote consistency, avoid fragmentation and help to promote the original concept of the Seabed Disputes Chamber as the specialist tribunal concerned with disputes over matters relating to Part XI of the Convention.

There is also the point that the same incident may easily give rise to multiple separate proceedings before the Chamber and before other international and municipal courts and tribunals, leading to delays, increased costs and potentially inconsistent judgments and awards. An example of this might be a collision between two contractor vessels, which could involve a claim by one contractor against the other in respect of loss or damage; claims for damages for personal injury or death; a claim from one contractor or sponsoring State against the Authority for failure to adequately monitor the other contractor; and a claim from a neighbouring coastal State against one or both contractors, or the Authority, in respect of damage caused to its marine environment.

In this regard, the question has been raised whether it might be sensible to include relatively widely drafted dispute resolution provisions in the Exploitation Regulations and in exploitation contracts requiring any party involved in 'activities in the Area' to submit to the jurisdiction of the Chamber.

There are many counter-arguments to this of course. First, it seems unlikely that a the Authority or a contractor could compel a State Party or any other entity that is not party to a contract to accept the jurisdiction of the Chamber. Second, it might be argued that the Chamber is not necessarily the best place to deal with commercial disputes between contractors, especially those which are not States Parties. And thirdly, there may be a large category of technical and administrative disputes that could be dealt with more expeditiously than by reference to the Chamber. These would include, for example, disputes over royalty payments or minor regulatory infractions. It may be more appropriate to refer these to an independent expert panel.

**Concluding remarks**

Given the nature of the interests at stake, it may be several years before the contentious jurisdiction of the Chamber is invoked. However, in the process of developing the exploitation code, nobody has yet suggested any alternative to the dispute resolution system contained in Part XI. Indeed, the suggestion has been made that, if anything, the jurisdiction of the Seabed Disputes Chamber should be enlarged to cover certain disputes that do not seem to be covered by Article 187. Whilst it remains to be seen what is made of these suggestions, it seems that, in

general, the Authority's stakeholders have confidence in the Chamber as the preferred mechanism for dispute settlement.

This is in large part due to the effective and efficient way in which the Chamber dealt with the advisory opinion in Case No. 17. That advisory opinion clarified the law and has made a real difference to the implementation of the regime for the Area under Part XI.

Questions of interpretation will inevitably continue to arise under Part XI and Annex III of the Convention, as well as other areas of 'unfinished business' under the Convention. The possibility of seeking an advisory opinion on some of these issues has been discussed, but so far the Council has exercised prudence and caution, indicating that member States may prefer to exhaust other avenues first before resorting to the Chamber for an advisory opinion.