

STATEMENT MADE BY THE ADVISORY COMMITTEE ON PROTECTION OF THE SEA

In the context of Draft Regulation 44

ISA COUNCIL Session 29 Part II

16 July 2024

Mr. President, Excellencies, distinguished delegates,

As it is the first time ACOPS takes the floor at this session, we would like to express our great appreciation to our host country, Jamaica, for its warm welcome to our meetings, to which we always look forward. We also extend our condolences and sympathy to those affected by Hurricane Beryl here in our host country and elsewhere in the region. Our heart goes out to them.

In the opening statements many delegations referred to the need to ensure compatibility of the draft exploitation regulations with the Law of the Sea Convention and the 1994 Implementing Agreement, which are our legally binding governing instruments.

In this context ACOPS wishes to commend to the particular attention of the distinguished delegates the ITLOS Advisory Opinion in Case 31 issued on 21 May 2024, to which Case ACOPS submitted an *amicus curiae* brief, as did many others, including many countries and organizations represented here.

The Tribunal was charged with interpreting the Convention in the context of climate change, but its opinion is also highly relevant to our work here, Mr. President, as we explain below, to set the scene for our proposal for DR 44.

The Tribunal engaged in a detailed, word-by-word, reading of the parts of the Convention relevant to its task, which included the requirements for marine environmental protection from a variety of aspects, including under Part XI Article 145. We give two examples.

First, in its long and rich analysis of the meaning and scope of the “marine environment” under the Convention, in paragraph 168 the Tribunal states in relevant part: “Article 1, paragraph 1, subparagraph 4, of the Convention refers to “the marine environment, including estuaries”. Articles 145, paragraph (a), and 211, paragraph 1, refer to “the marine environment, including the coastline”. This indicates that the marine environment under the Convention encompasses certain spaces beyond maritime zones established thereunder.” We note that all three examples involve areas within national jurisdiction.

This ITLOS interpretation has many implications for our work here. We give only three examples, in no particular order.

1. For the ongoing work of the ISA on REMPS, such as, e.g., defining their geographic scope, as discussed by the LTC in the present session and presented to last night.
2. On the rights and interests of coastal states, to be discussed later in this session. ACOPS notes in this latter regard that this aspect is not raised in the otherwise very helpful eponymous background note from the Secretariat of 10 June 2024, ISBA/29/C/CRP.4.
3. Environmental impact assessment in all its aspects. The brevity of this last example is inversely proportional to its complexity of implementation.

Our second example derives from paragraph 253 of the Advisory Opinion. This paragraph provides in relevant part:

“The Tribunal is also not convinced by the argument that the obligation under article 194, paragraph 2, of the Convention can be satisfied by meeting the obligation under paragraph 1. Such a view would have the consequence of depriving the obligation under paragraph 2 of any effect with respect to marine pollution from anthropogenic GHG emissions.”

Mr. President, it would seem reasonable to conclude at the very least that the Tribunal considers that all provisions set out in the Convention with regard to marine environmental protection must be addressed.

In the context of Article 145, one provision within that Article is not addressed in the Draft Regulations, namely, the “adoption of appropriate rules, regulations and procedures for, *inter alia*, the prevention, reduction and control ... of interference with the ecological balance of the marine environment,

ACOPS has proposed addressing this provision before in this forum. Given the Advisory Opinion, we reiterate this proposal. We note that the Tribunal addresses ecological balance in two further paragraphs.

First in para 386, where it states in the context of Article 192 in relevant part that: “The term “restoration” ... flows from the obligation to preserve the marine environment where the process of reversing degraded ecosystems is necessary in order to regain ecological balance.”

Next, in para 432, in the context of Article 196, “this provision is designed to address the disturbance of the ecological balance of the marine environment”

We note for the sake of completeness that the concept of ecological balance is not unique to Art 145, but is also required to be addressed in Article 234 on ice-covered areas where irreversible disturbance of that balance may otherwise occur. It is not an unknown concept in international law. The International Court of Justice also addressed it in the Pulp Mills Case (2010), Argentina vs Uruguay.

Mr. President, to omit addressing this Article 145 requirement from the marine environmental provisions in the Draft Exploitation Regulations risks exposing the Authority to legal challenge, with all the complexities, uncertainties, financial implications, delays and other consequences for activities in the Area that legal challenges usually entail. Part 15 of the Convention, on Dispute Resolution, sets out various avenues under which this challenge can occur in international law, including through the request of an Advisory Opinion from the Tribunal. National options may also be available but that is beyond our scope.

Therefore, Mr. President, ACOPS suggests adding to either:

Draft Regulation 44 [IWG ENV]: General Obligations

1. [(f) Elaborate and implement measures another one **and to prevent, reduce and control interference with the ecological balance of the marine environment....** ; and]

or

Draft Regulation 44 ter, paragraph 7, in the list of the Authority's strategic Environmental Objectives a new sub-paragraph (n):

7. (n). prevent, reduce and control ... interference with the ecological balance of the marine environment.

We note, Mr. President, that other amendments to the Draft Regulations will be needed to achieve this objective if this suggestion is accepted. ACOPS stands ready to assist.

We will provide the text of this intervention to the Secretariat and submit a template with the textual proposal for DR 44.

Thank you.