IN THE MATTER OF SYSTEMIC INTEGRATION OF INTERNATIONAL LAW BY THE INTERNATIONAL SEABED AUTHORITY

OPINION

INTRODUCTION

1. The International Seabed Authority ('**the Authority**' or '**the ISA**') is the organization through which States Parties to the United Nations Convention on the Law of the Sea ('**UNCLOS**') organize and control activities in the Area, particularly with a view to administering the resources of the Area.[1]

2. The Authority is currently engaged in the negotiation of rules, regulations and procedures ('**RRPs**') to govern the exploitation of the mineral resources of the Area. In the context of those negotiations, and in wider discussions within the Authority's Council and Assembly, we are instructed that some States Parties resist reference to principles or rules of international law that do not derive from the text of UNCLOS. Further, we are instructed that there is disagreement as to whether States Parties are entitled to raise or address matters relating to the exploration and exploitation of the Area within other relevant international and regional organizations.

3. We are asked for our opinion on two issues:

    a. The extent to which other legal obligations applicable in the relations between States Parties to UNCLOS are relevant to the interpretation and application of Part XI UNCLOS.

    b. The extent to which States Parties to UNCLOS are entitled to raise matters relating to the resources of the Area in other international fora.

[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 ('UNCLOS'), art 157.

4. These two issues are separate but related. They both require consideration of the extent to which international law is to be interpreted and applied as a coherent whole. They engage the principle of systemic integration and the duty to cooperate under international law.

5. In Part One of this opinion, we discuss the principle of systemic integration in general terms, before reviewing its specific application to UNCLOS. We conclude that other legal rules applicable in the relations between States Parties to UNCLOS are relevant to the interpretation and application of Part XI and should be taken into account and (where appropriate) incorporated in RRPs, save where they are inconsistent with Part XI.

6. In Part Two of this opinion, we discuss the respective competence of the Authority and how it relates to that of other relevant regional and international bodies. We address the duty to cooperate under UNCLOS. We conclude that, where overlapping institutional competences arise, the duty to cooperate applies.

PART ONE: SYSTEMIC INTEGRATION IN THE WORK OF THE AUTHORITY

1.1 The general principle

7. Article 31 of the Vienna Convention on the Law of Treaties ('**VCLT**') provides the general rule of treaty interpretation, structured to follow a logical chain when interpreting a provision. To begin with, a treaty '*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'.[2] Context comprises, in addition to the text with its preamble and annexes, supplementary agreements '*relating to the treaty*' and made in connection with the conclusion of the treaty.[3]

8. Then, art 31(3) provides:

> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of parties regarding its interpretation;

[2] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), art 31(1).

[3] ibid, art 31(2).

(c) any relevant rules of international law applicable in the relations between the parties.

9. It is art 31(3)(c) which embodies the principle of systemic integration. The provision sits hierarchically on the same level as art 31(2). Relevant rules of international law applicable in relations between the parties are required to be taken into account '*together with the context*', rather than being subsidiary or secondary to the context. Art 31(3) is accordingly sometimes classified as describing the '*external context*' of a treaty.[4]

10. As has been confirmed by the International Court of Justice ('**ICJ**'), the rules of treaty interpretation contained in art 31 are of a customary character and accordingly are applicable in disputes whether or not both concerned States are parties to the VCLT.[5]

International Law Commission (ILC) Report on Fragmentation

11. A clear early exposition of the principle can be found in the 2006 report of the International Law Commission ('**ILC**') Study Group on *Fragmentation of International Law*.[6] The Report summarizes the work of the Study Group in explaining and addressing the concept of fragmentation, described as '*the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice.*'[7] The effect, the report continues, is a loss of coherence in international law:[8]

> What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", the "law of the sea", "European law" and even such exotic and highly specialized knowledge as "investment law" or "international refugee law", etc., each possessing its own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to

[4] Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31: General Rule of Interpretation' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) para 8.

[5] *Oil Platforms (Iran v United States of America)* (Preliminary Objections) [1996] ICJ Rep 803, [23]; and *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, [18].

[6] International Law Commission (Martti Koskenniemi, Study Group Chair), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' (UN Doc A/CN.4/L.682 and Add.1, 13 April 2006) [2006] II(1) YB ILC 1 ('ILC Fragmentation Report'); and see 'Conclusions of the work of the Study Group' [2006] II(2) YB ILC 177 ('ILC Fragmentation Conclusions').

[7] ILC Fragmentation Report, para 8.

[8] ibid.

> take place with relative ignorance of legislative and institutional activities in adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.

12. It is against this backdrop that the Study Group identified the rule in art 31(3)(c) VCLT as embodying a more general principle, namely the principle of systemic integration. That principle provides a practical method for addressing normative conflicts and a principle of interpretation that may vitiate the notion of a conflict between disparate legal rules.[9] The principle is defined, shortly, as the process '*whereby international obligations are interpreted by reference to their normative environment*'.[10]

13. Turning to art 31(3)(c) specifically, the report makes a number of textual points:

    a. For interpretation purposes, the provision is concerned with rules of international law rather than broader considerations not yet having the firm status of rules.

    b. Subject to that proviso, the reference is to rules generally, encompassing applicable treaties, custom, and general principles of international law.

    c. The rules must be relevant and '*applicable in the relations between the parties*'.

    d. There is no temporal provision to art 31(3)(c), leaving open the prospect of applicable rules of international law encompassing those which postdate the conclusion of the treaty being interpreted.[11]

14. The report points out that taking into account the surrounding normative environment – the system of international law of which the treaty being interpreted

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[9] ibid, para 412: '*contrary to what is sometimes suggested, conflict resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with prima facie conflicts depends on the way the relevant rules are interpreted. This cannot be stressed too much. Interpretation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict as a result of interpretation. Sometimes it may be useful to stress the conflicting nature of two rules or sets of rules so as to point to the need for legislative intervention. Often, however, it seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared—"systemic"—objective.*'

[10] ibid, para 413.

[11] ibid, para 426.

forms part – is a core component of the interpretive exercise.[12] Unlike *travaux*, other relevant rules of international law applicable in relations between the parties are not relegated to a supplementary means of interpretation.[13] This must be so, in light of the ubiquity of recourse to other rules of international law in the day-to-day practice of interpretation: '*[r]eference to general rules of international law in the course of interpreting a treaty is an everyday, often unconscious part of the interpretation process*'.[14] Nor is it limited to general international law or to processes of interpretation; instead, '*systemic thinking penetrates all legal reasoning, including the practice of applying the law by judges and administrators*.'[15]

15. Systemic integration remains an important principle in the work of the ILC, including when elaborating upon guidelines in complicated or contested areas of law. For instance, the ILC's 2021 Draft Guidelines on the Protection of the Atmosphere include explicit provision for the interrelationship among relevant rules, providing that the rules relating to atmospheric protection and other relevant rules of international law '*should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts.*'[16]

Judicial decisions on systemic integration

16. In its 2006 report, the Study Group noted that judicial references to art 31(3)(c) were a relatively recent phenomenon.[17] Yet the principle that underlies that provision has long formed part of international law. In *Georges Pinson,* Verzijl held: '*Every international convention must be deemed tacitly to refer general principles of international law for all questions which it does not itself resolve in express terms and in a different way*.'[18] In its *Namibia Advisory Opinion*, the ICJ determined that

[12] ibid, para 425.

[13] See VCLT (n 2) art 32.

[14] ILC Fragmentation Report (n 6) para 414.

[15] ibid, para 35.

[16] International Law Commission, 'Draft Guidelines on the Protection of the Atmosphere' (2021), Guideline 9(1).

[17] ILC Fragmentation Report (n 6) para 433.

[18] *Georges Pinson (France) v United Mexican States* (1928) V UNRIAA 327, 422.

'*an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*.'[19]

17. In the present century, a wide and consistent body of case law applying the principle by reference to art 31(3)(c) has emerged.[20] In *Oil Platforms (Iran v United States of America),*[21] the ICJ was called upon to interpret a provision in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran, which preserved the ability of the parties to apply measures '*necessary to protect its essential security interests*'. The Court interpreted that provision, taking into account the customary international law rules regulating the use of force and lawful self-defence. It held:[22]

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 *(c)*). The Court cannot accept that Article XX, paragraph 1 *(d)*, of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.

18. The principle has also been applied in the jurisprudence of specialist courts and tribunals. For instance, in *Shrimp-Turtle*,[23] the Appellate Body of the World Trade Organization (WTO) was called upon to interpret provisions in the General Agreement on Tariffs and Trade (GATT) conditionally preserving the ability of contracting parties to adopt measures '*necessary to protect human, animal or plant life or health*',[24] or '*relating to the conservation of exhaustible natural resources*'.[25]

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[19] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53 ('Namibia Advisory Opinion').

[20] For detailed citation of state practice and judicial decisions see: Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024) ('McLachlan 2024').

[21] *Oil Platforms (Iran v United States of America) (Merits)* [2003] ICJ Rep 161.

[22] ibid, [41].

[23] *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body* (WT/DS58/AB/R, 12 October 1998) ('*Shrimp-Turtle*').

[24] General Agreement on Tariffs and Trade (opened for signature 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 ('GATT'), art XX(b).

[25] ibid, art XX(g).

The Appellate Body took an evolutionary approach to construing the terms 'exhaustible' and 'natural resources', drawing on art 56 UNCLOS and other relevant international legal rules on conservation in finding that 'natural resources' includes living and non-living resources.[26] '*Our task here*', the Appellate Body summarized, in reliance on art 31(3)(c) VCLT, '*is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.*'[27] In *Large Civil Aircraft,*[28] the Appellate Body added that article 31(3)(c) is '*considered an expression of the "principle of systemic integration"*'.

19. The principle is a constant part of the practice of international human rights courts and tribunals. In *McElhinney,* the European Court of Human Rights held, citing art 31(3)(c), that the European Convention on Human Rights '*cannot be interpreted in a vacuum*.'[29] Rather, it considered that '*The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part*'.[30] In *Billy v Australia*,[31] the complainant alleged an infringement of the right to private, family and home life based on the adverse effects of climate change and sought to rely on Australia's obligations under climate change treaties. Australia submitted that this complaint was inadmissible on the basis that the principle of systemic integration under art 31(3)(c) did not apply, since the climate change treaties did not concern the subject matter of the International Covenant on Civil and Political Rights.[32] The Committee held that, while it was not competent to determine breaches of other international treaties, it was entitled to '*refer to them in interpreting the State party's obligations under the Covenant*'.[33]

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[26] *Shrimp-Turtle* (n 23) [130]–[131].

[27] ibid, [158].

[28] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (United States v European Communities): Report of the Appellate Body* (WT/DS316/AB/R, 18 May 2011), [845].

[29] *McElhinney v Ireland* (App No 31253/96, 21 November 2001) 34 EHRR 13 [36].

[30] ibid.

[31] *Billy v Australia* (UNHRC, 21 July 2022) UN Doc CCPR/C/135/D/3624/2019.

[32] ibid, [6.5].

[33] ibid, [7.5]. See also the approach adopted by the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz v Switzerland* (App No 53600/20, 9 April 2024).

20. The principle has also been applied in domestic courts and tribunals. In *Basfar v Wong*,[34] the Supreme Court of the United Kingdom had to construe the scope of the exception to diplomatic immunity for '*professional or commercial activity exercised by the diplomatic agent … outside his official functions*'.[35] The Court concluded that the trafficking and employment of a domestic servant in conditions of modern slavery fell within the scope of the 'professional or commercial activities' exception, interpreting the Vienna Convention on Diplomatic Relations in light of relevant rules of international law on modern slavery such as the Palermo Protocol.[36] In reaching this conclusion, Lord Briggs and Lord Leggatt emphasized:[37]

> The principle that developments in international law since the conclusion of a treaty should be taken into account in interpreting its terms is not only supported by the general presumption in favour of evolutionary interpretation; it is also required by article 31(3)(c) of the [VCLT]. In terms of structure, article 31 progresses from terms to context, through any agreements at the time of conclusion of a treaty, to subsequent agreements, subsequent practice, and thence to relevant rules of international law. The juxtaposition, in particular, in article 31(3) of the obligations to take into account (a) subsequent agreements, (b) subsequent practice and (c) any relevant rules of international law applicable in the relations between the parties logically indicates that developments in international law subsequent to the conclusion of the treaty are included[.]

1.2 Systemic integration and UNCLOS

UNCLOS and General International Law

21. While providing 'a legal order for the seas',[38] by its own provisions UNCLOS is not isolated from other parts of the international legal system. Its preamble reaffirms that '*matters not regulated by this Convention continue to be governed by the rules and principles of general international law*'. A court or tribunal having jurisdiction under its compulsory dispute settlement provisions will apply UNCLOS '*and other rules of international law not incompatible with this Convention*'.[39]

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[34] *Basfar v Wong* [2022] UKSC 20, [2023] AC 33, [67].

[35] Vienna Convention on Diplomatic Relations (adopted 14 April 1961, entered into force 24 April 1964) 500 UNTS 95, art 31(1)(c).

[36] *Basfar v Wong* (n 34) [68]–[72] and [107].

[37] ibid, [67].

[38] UNCLOS, preamble: '*Recognizing the desirability of establishing through this Convention, … a legal order for the seas and oceans*'.

[39] UNCLOS, art 293(1); McLachlan 2024 (n 20) para 5.81.

22. The provisions of UNCLOS Part XII, concerning protection and preservation of the marine environment, go further. In a number of instances they directly refer to '*applicable international rules and standards*' established through competent international organizations.[40] In many cases they oblige States Parties to conform with or ensure their national measures are no less effective than those referenced rules and standards developed outside UNCLOS.[41] Similarly, art 237 indicates that States may already have, or will enter into, more specific agreements relating to the protection and preservation of the marine environment. The provisions of Part XII of UNCLOS are without prejudice to the obligations under those specific agreements,[42] while also providing that those specific obligations '*should be carried out in a manner consistent with the general principles and objectives of this Convention.*'[43]

23. Part XII applies to the marine environment generally. It applies to all maritime zones and areas, including the high seas and the Area.[44] To that end, art 145 requires that '*necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment*'. It specifically requires the Authority '*to adopt appropriate rules, regulations and procedures*' in order to prevent and control pollution and to prevent damage to the marine environment. Measures to be taken in accordance with Part XII are not limited to the control of pollution.[45] Importantly they include under art 194(5) '*those necessary to protect and preserve rare or fragile ecosystems*'.

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[40] McLachlan 2024 (n 20) para 5.84, citing UNCLOS arts 213 (pollution from land-based sources), 214 (pollution from seabed activities), 216(1) (pollution by dumping), 217(1) (enforcement by flag States), 218(1) (enforcement by port States), 219 (measures relating to seaworthiness of vessels to avoid pollution), 220 (enforcement by coastal States), 222 (enforcement with respect to atmospheric pollution), 226(1)(c) (investigation of foreign vessels), 228(1) (restrictions on institution of proceedings) and 230(1)–(2) (monetary penalties and recognised rights of the accused).

[41] ibid, citing UNCLOS arts 210(6) (pollution by dumping), 208(3) (pollution from seabed activities subject to national jurisdiction), and 211(5) (pollution from vessels).

[42] UNCLOS, art 237(1).

[43] ibid, art 237(2).

[44] Detlef Czybulka, 'Article 192' in Alexander Prölß (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) paras 5–7 ('Prölß Commentary').

[45] *Chagos Marine Protected Area (Mauritius v United Kingdom)* (Award) PCA Case No 2011-03 (18 March 2015) XXXI UNRIAA 359 [319]–[320].

24. Article 311(2) UNCLOS contains a general provision on the Convention's relationship to other rules of international law in the following terms:

> This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

25. Four important considerations arise out of this provision:

    a. It is not temporally limited, applying equally to other agreements which pre- and postdate the conclusion and entry into force of UNCLOS.[46]

    b. The requirement that such other agreements be 'compatible' with UNCLOS and not affect other States Parties' enjoyment of their convention rights, in order for the provision to apply, is a common formula for managing compatibility in international environmental agreements.[47]

    c. Compatibility does not mean the external (non-UNCLOS) treaty automatically takes precedence over UNCLOS to the extent of its overlapping application: instead it reflects the notion of treaty parallelism, in which the two sets of rights and obligations are both preserved (subject to compatibility of the external treaty with UNCLOS).[48]

    d. Drawing on the concept of parallelism, including the parallelism of framework conventions with implementing agreements, this notion of compatibility has been used successfully in the UNCLOS context to conclude subsequent agreements that have progressively developed Part XII. These agreements – notably the Fish Stocks[49] and Biodiversity Beyond

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[46] McLachlan 2024 (n 20) para 5.91.

[47] ibid, para 5.92.

[48] ibid, para 5.93, citing *Southern Bluefin Tuna (New Zealand v Japan)* (2000) XXIII UNRIAA 1 [52]: '*The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.*'

[49] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 ('Fish Stocks Agreement').

National Jurisdiction ('**BBNJ**')[50] Agreements – have shifted the operation of certain legal regimes within the UNCLOS framework towards a more prescriptive and conservation-oriented approach, without explicitly creating treaty conflict.[51]

Judicial decisions

26. Decisions rendered by the International Tribunal for the Law of the Sea ('**ITLOS**') and of arbitral tribunals appointed under Annex VII of the Convention have confirmed the necessity to have regard to other rules of international law in the interpretation of UNCLOS.

27. As the Tribunal tasked with determining the maritime delimitation dispute between Barbados and Trinidad and Tobago observed, the Convention's applicable law provisions allow for:[52]

> a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.

28. This approach has commonly been applied in proceedings under Part XV (Settlement of Disputes). In the *Arctic Sunrise* arbitration, concerning the lawfulness of enforcement action taken by Russia (as the coastal State) against a Dutch-flagged vessel, the Tribunal considered that, while its jurisdiction was limited to the determination of claims under UNCLOS, '*it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate*.'[53]

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[50] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (adopted 20 July 2023) ('BBNJ Agreement').

[51] McLachlan (n 20) para 5.94.

[52] *Delimitation of the Exclusive Economic Zone and Continental Shelf (Barbados v Trinidad and Tobago)* (11 April 2006) XXVII UNRIAA 147, [222].

[53] *Arctic Sunrise (Netherlands v Russia)* (Award) (2015) XXXII UNRIAA 183, [197].

29. The incorporation and integration of other relevant rules of international law is particularly pronounced in case law relating to the protection and preservation of the marine environment, in light of Part XII's direct incorporation of other extra-UNCLOS rules and standards.

30. In the 2011 *Area Advisory Opinion*,[54] the Seabed Disputes Chamber of ITLOS was invited by the Authority to provide its opinion on a number of questions relating to the responsibilities and liabilities of sponsoring States in relation to activities in the Area. The Tribunal commenced its analysis by citing the applicable law provisions in art 293 UNCLOS which required it to '*apply th[e] Convention and other rules of international law not incompatible with th[e] Convention.*'[55] It then referenced the rules of treaty interpretation provided by arts 31–33 of the VCLT, observing that they reflected customary international law.[56] It relied on art 31(3)(c) when holding that the precautionary approach was relevant to the interpretation of the obligations on sponsoring States.[57] The Tribunal then held that the Nodules Regulations adopted by the Authority should be interpreted '*in light of the development of the law*' as reflected in subsequent regulations to include an obligation to apply best environmental practices.[58]

31. The Arbitral Tribunal in *South China Sea* said in respect of the applicable legal framework that Article 192 [the duty to protect and preserve the marine environment] '*does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII <u>and other applicable rules of international law</u>*' (emphasis added).[59] The Tribunal then applied rules of other environmental treaties in interpreting the provisions of Part XII. It defined the reference in art 194 to 'ecosystems', by reference to the definition of 'ecosystem' contained in the Convention on Biological Diversity ('**CBD**').[60] It found that the

[54] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 ('Area Advisory Opinion').
[55] ibid, [52].
[56] ibid, [57].
[57] ibid, [135].
[58] ibid, [137].
[59] *South China Sea (Philippines v China)* (Award) (2016) XXXIII UNRIAA 153, [941].
[60] ibid, [945].

general obligation of environmental protection in art 192 of UNCLOS '*includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection*', with such international recognition determined according to the Convention on International Trade in Endangered Species of Wild Flora and Fauna, a convention that '*is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part of the general corpus of international law that informs the content of Article 192*'.[61]

32. In May 2024, ITLOS delivered its advisory opinion on the obligations of States Parties to UNCLOS under Part XII in the context of climate change-related harm to the marine environment.[62] In respect of the applicable law, the Tribunal noted the open and receptive character of UNCLOS, including its direct reference to external rules in Part XII, and stated '*coordination and harmonization between the Convention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument.*'[63] In addition to the rules of reference contained in Part XII itself, the Tribunal also referred to art 31(3)(c) VCLT. It held: '*This method of interpretation ensures, as observed by the International Court of Justice … that treaties do not operate in isolation but are "interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".*'[64]

33. In providing its opinion on the question before it, the Tribunal found the instruments of international climate change law to be particularly relevant.[65] The Tribunal integrated substantive rules and principles of international climate change law into the obligations contained in Part XII UNCLOS. Art 194(1) requires States to take all

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[61] ibid, [956].

[62] *Climate Change and International Law (Advisory Opinion)* ITLOS List No 31, 21 May 2024 ('Climate Change Advisory Opinion').

[63] ibid, [130].

[64] ibid, [135], citing Namibia Advisory Opinion (n 19) [53].

[65] ibid, [137]: '*there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment. The Tribunal considers that, in the present case, relevant external rules may be found, in particular, in those agreements.*'

measures 'necessary' to prevent, reduce and control pollution of the marine environment. Having found earlier in its decision that anthropogenic greenhouse gas (**'GHG'**) emissions constitute '*pollution of the marine environment*' under UNCLOS, the Tribunal considered that a necessary measure under art 194(1) includes GHG mitigation measures.[66] While it is up to each State to determine what measures are necessary in a given context, this assessment is objective and should include consideration of both the best available science (as found in the work of the Intergovernmental Panel on Climate Change) and other international rules and standards on climate change.[67] Particular emphasis is placed on the Paris Agreement as relevant to the identification of what measures are 'necessary', noting that most (though not all) UNCLOS States Parties are parties to the Paris Agreement.[68] As the Tribunal summarized:[69]

> the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions. In particular, the temperature goal and the timeline for emission pathways set out in the Paris Agreement inform the content of necessary measures to be taken under article 194, paragraph 1, of the Convention.

34. We consider this reflects a conventional approach to treaty interpretation, applying art 31(3)(c) VCLT.

1.3 Systemic integration in the practice of the Authority

35. There is considerable precedent in the Authority's practice for the integration of extra-UNCLOS rules applicable between the States Parties to UNCLOS into the regulatory framework applicable to exploration and exploitation of the Area. Indeed, the Authority's Strategic Plan 2019 – 2023 acknowledges that the strategic direction and priorities for the Authority are directed not only by UNCLOS and the 1994 Implementing Agreement but also by '*other relevant international agreements, principles and objectives, including the 2030 Agenda for Sustainable*

[66] ibid, [205].
[67] ibid, [207]ff.
[68] ibid, [215]ff.
[69] ibid, [222].

Development.'[70] As regards environmental protection, the plan notes that the necessary regulatory framework for exploitation activities '*must satisfy the extensive marine environmental protection requirements of [UNCLOS], as well as take into account relevant aspects of the Sustainable Development Goals and other international environmental targets, such as the Aichi Biodiversity Targets.*'[71]

36. Further, both the Authority's adopted exploration regulations ('**the Exploration Regulations**')[72] and the current draft of its exploitation regulations ('**the Draft Exploitation Regulations**')[73] explicitly state they are *'subject to the provisions of the Convention and the Agreement and other rules of international law not incompatible with the Convention'* (emphasis added).[74]

37. This integrative approach has long been supported by UN organs.[75] In 2003, the General Assembly invited the Authority, amongst other relevant global and regional bodies to:[76]

> investigate urgently how to better address, on a scientific basis, including the application of precaution, the threats and risks to vulnerable and threatened marine ecosystems and biodiversity in areas beyond national jurisdiction; how existing treaties and other relevant instruments can be used in this process consistent with international law, in particular with the Convention, and with the principles of an integrated ecosystem-based approach to management, including the identification of those marine ecosystem types that warrant priority attention[.]

38. In the discussion that follows, we identify (non-exhaustively) some of the extra-UNCLOS rules of international law that have been incorporated into the legal framework of the Authority, and precedent for the Authority's receptivity to the application of externally derived standards.

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[70] ISA, 'Strategic plan of the International Seabed Authority for the period 2019–2023' (ISBA/24/A/10, 27 July 2018) para 6(c) ('ISA Strategic Plan 2019-2023').

[71] ibid, para 14.

[72] Made up of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (ISBA/19/C/17, 22 July 2013); the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (ISBA/16/A/12/Rev.1, 7 May 2010); and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11, 27 July 2012).

[73] Draft Regulations on Exploitation of Mineral Resources in the Area: Consolidated Text (ISBA/29/C/CRP.1, 16 February 2024) ('Draft Exploitation Regulations').

[74] Exploration Regulations (n 72) reg 1(5); Draft Exploitation Regulations (n 73) reg 1(8).

[75] Aline Jaeckel, 'The Implementation of the Precautionary Approach by the International Seabed Authority' (ISA Discussion Paper No 5, March 2017) 1 ('Jaeckel Discussion Paper').

[76] Oceans and the Law of the Sea, UNGA Res 58/240 (23 December 2003), para 52.

The precautionary approach

39. The precautionary approach, as a principle of international environmental law, provides at a high level that: '*Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*.'[77]

40. The precautionary approach does not appear in UNCLOS but was first adopted in an implementing agreement to UNCLOS through art 6 of the Fish Stocks Agreement.[78] It is also a general principle in art 7 of the BBNJ Agreement. Of the extra-UNCLOS principles relevant to the work of the Authority, precaution is the most firmly embedded in the Authority's practice. A goal of the Authority's current strategic plan is to '*require the application of the precautionary approach, as reflected in Principle 15 of the Rio Declaration on Environment and Development, best available techniques and best environmental practices'*.[79]

41. The use of a precautionary approach is widespread across the Exploration Regulations promulgated by the ISA. Specifically, these Regulations provide generally that both prospectors in the Area and the Authority shall apply the precautionary approach, with explicit reference to Principle 15 of the Rio Declaration,[80] and provide for the application of a precautionary approach by the Authority, by prospectors, and by sponsoring States in order to ensure effective protection of the marine environment.[81]

42. The references to precaution in the Exploration Regulations have contributed significantly to the crystallization of precaution as a binding legal rule within the law of the sea.[82] As the Seabed Disputes Chamber of ITLOS confirmed in the *Area*

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[77] Rio Declaration on Environment and Development (1992), Annex I to Report of the United Nations Conference on Environment and Development (UN Doc A/CONF.151/26, 12 August 1992), Principle 15.

[78] Fish Stocks Agreement (n 49) arts 5(c) and 6.

[79] ISA Strategic Plan 2019-2023 (n 70) para 4(i). This provision also appears in the current draft 2024–2028 strategic plan.

[80] Exploration Regulations (n 72) reg 2(2).

[81] ibid, regs 2(2) (all regs), 5(1) (all regs), 31(5) (polymetallic nodules) and 33(5) (polymetallic sulphides and cobalt rich ferromanganese crusts).

[82] Irina Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 63.

Advisory Opinion, the provisions of the Exploration Regulations requiring the ISA and sponsoring States to apply the precautionary approach '*transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation.*'[83] The references to precaution in the Exploration Regulations more generally are also taken as reinforcing '*a trend towards making this approach part of customary international law.*'[84]

43. The precautionary approach has also been incorporated into subsidiary instruments and policies of the ISA. The foremost among these is the Regional Environmental Management Plan ('**REMP**') for the Clarion-Clipperton Zone, part of the Area within the Pacific Ocean. The creation of the REMP for the Clarion-Clipperton Zone was recommended by the ISA's Legal and Technical Commission ('**LTC**') pursuant to its duty to make recommendations to the ISA Council on how to apply the precautionary approach in respect of protection of the marine environment.[85] The REMP outlines a list of guiding principles, relevantly including: [86]

> **Precautionary approach**. Principle 15 of the Rio Declaration on Environment and Development specifies that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation[.]

Best Available Technology / Best Environmental Practices

44. In international environmental law, the requirement to use best available technology / best environmental practices derives from, and is arguably an aspect of, the precautionary approach.[87] The first international reference to the substantive content of the precautionary principle can be traced to Principle 11 of the World Charter for Nature,[88] which also provided that '*[a]ctivities which might have an*

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[83] Area Advisory Opinion (n 54) [127].

[84] ibid, [135].

[85] Exploration Regulations (n 72) reg 31(3) (polymetallic nodules) and reg 33(3) (polymetallic sulphides and cobalt rich ferromanganese crusts).

[86] ISA LTC, 'Environmental Management Plan for the Clarion-Clipperton Zone' (ISBA/17/LTC/7, 13 July 2011) para 13(b) ('CCZ REMP').

[87] Jaeckel Discussion Paper (n 75) 4.

[88] World Charter for Nature, UNGA Res 37/7 (28 October 1982) Principle 11(b): *'Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination … and where potential adverse effects are not fully understood, the activities shall not proceed'*. On the World Charter for Nature as an early international embodiment of the precautionary principle see Antônio Augusto Cançado

impact on nature shall be controlled, and the best available technologies that minimise significant risks to nature or other adverse effects shall be used'. While the terminology differs from treaty to treaty, some variation on usage of 'best available technology' is a common regulatory technique adopted in furtherance of the precautionary principle, particularly in instruments arising from the UN Economic Commission for Europe area owing to the existence of an equivalent concept in European law.[89]

45. As described above, the application of best available techniques and best environmental practices are a goal of the Authority's current strategic plan,[90] and a requirement of the Exploration Regulations.[91] The LTC is also required to use the '*best available scientific and technical information*' in developing and implementing procedures for determining whether a proposed exploration activity in the Area would have serious harmful effects on vulnerable marine ecosystems, and for managing activities to prevent such effects or preventing their authorization.[92] In carrying out this function, the LTC is able to use data and information submitted by applicants for approval of a plan of work for exploration in the Area, which includes baseline studies and preliminary environmental impact assessments. Accordingly, the recommendations and guidelines issued by the LTC for contractors carrying out impact assessments advise the use of best available technology and methodology in baseline studies and data collection.[93]

Transparency / public participation in decision making

46. The precautionary approach also contains a procedural dimension, demanding public participation and transparency in decision making to ensure that decision

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Trindade, 'Principle 15: Precaution' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 404.

[89] Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 JEL 221, 237; and Daniel Bodansky and Harro van Asselt, *The Art and Craft of International Environmental Law* (2nd edn, OUP 2024) 228–229.

[90] See *infra*, para 40.

[91] Exploration Regulations (n 72) reg 5(1).

[92] ibid, reg 31(4) (polymetallic nodules) and reg 33(4) (polymetallic sulphides and cobalt rich ferromanganese crusts).

[93] ISA LTC, 'Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area' (ISBA/25/LTC/6/Rev.1, 30 March 2020) paras 13–14 and 19.

makers '*capture the various concerns and viewpoints on perceptions of risk and acceptability of harm.*'[94] Regional agreements such as the Aarhus Convention[95] and Escazú Agreement[96] set out the content of those obligations for relevant contracting parties.

47. The REMP for the Clarion-Clipperton Zone reflects these requirements, noting that the Authority '*shall enable public participation in environmental decision-making procedures in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [the Aarhus Convention], 1998, and its own rules and procedures.*'[97]

Ecosystem approach

48. As summarized by the Conference of the Parties to the CBD, the ecosystem approach '*is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.*'[98] It is '*based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment*',[99] requiring adaptive management owing to the complex, uncertain, and often non-linear nature of ecosystem processes.[100]

49. General obligations to protect and preserve marine ecosystems are found in UNCLOS but those obligations do not expressly embed the ecosystem approach: art 194 UNCLOS, which provides for '*Measures to prevent, reduce and control pollution of the marine environment*', includes the requirement to take such

[94] Jaeckel Discussion Paper (n 75) 2.

[95] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (opened for signature 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

[96] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) 3388 UNTS I-56654.

[97] CCZ REMP (n 86) para 13(f).

[98] 'Decision V/6: Ecosystem approach' (Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 15 - 26 May 2000 - Nairobi, Kenya) annex para 1.

[99] ibid para 2.

[100] ibid para 4.

measures as are '*necessary to protect and preserve rare or fragile ecosystems*'; art 145 UNCLOS requires the Authority to adopt RRPs to prevent, reduce and control '*interference with the ecological balance of the marine environment*'. General principles (d) and (e) of art 5 of the Fish Stocks Agreement contain obligations that more closely reflect the ecosystem approach without explicitly referencing the approach. By Article 7(f) of the BBNJ Agreement, the Parties agree to be guided by '*[a]n ecosystem approach*'.

50. Accordingly, it is possible to identify an evolution in States Parties' collective understanding of how to operationalize the general duty in UNCLOS to protect and preserve marine ecosystems. That evolution has been reflected in the work of the Authority. It can be seen from the compendious definition of 'marine environment' contained within the Exploration Regulations, which:[101]

> … includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof[.]

Receptivity to externally derived standards

51. Consistent with the recognition in Article 311(2) UNCLOS that the Convention exists in a wider legal system, the Exploration Regulations define the concept of '*serious harm to the marine environment*' by reference to externally defined standards. 'Serious harm' is defined as '*any effect from activities in the Area on the marine environment which represents a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices'* (emphasis added).[102] The reference to other international standards is notable for its inclusion when defining a central term of the regulations: exploration cannot be undertaken where substantial evidence indicates a risk of serious harm

[101] Exploration Regulations (n 72) reg 1(3)(c) (polymetallic nodules and polymetallic sulphides) and reg 1(3)(d) (cobalt rich ferromanganese crusts).

[102] Exploration Regulations (n 72) reg 1(3)(f).

to the marine environment,[103] and the ISA Council is entitled to make emergency orders for the suspension or adjustment of exploitation activities to prevent serious harm to the marine environment.[104]

1.4 The Draft Exploitation Regulations

52. Accordingly, the inclusion of references to other relevant rules of international law in the Draft Exploitation Regulations are consistent with: the requirements of UNCLOS; the general rules of interpretation applicable to it; and the Authority's prior practice as evidenced by its Exploration Regulations, Strategic Plan, and the Clarion-Clipperton Zone REMP.

53. The Draft Exploitation Regulations are proposed to be subject to UNCLOS, the 1994 Implementing Agreement, and '*other rules of international law not incompatible with the Convention*'.[105] The same definitions of 'Marine Environment' and 'Serious Harm' as used in the Exploration Regulations are retained.[106]

54. The Draft Exploitation Regulations deepen and consolidate the integration of extra-UNCLOS legal principles into the substantive law of the ISA, particularly through the role given, in regulation 2, to an enumerated list of principles and approaches that '*shall guide the application of these Regulations*'.[107] This general guiding provision is supplemented by a specific obligation on the LTC, in assessing a proposed Plan of Work by an applicant for exploitation activities, to determine whether the proposed Plan of Work is '*consistent with the fundamental policies and principles contained in Regulation 2*'.[108]

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[103] ibid, reg 2(2) (polymetallic nodules and polymetallic sulphides) and reg 2(3) (cobalt rich ferromanganese crusts).

[104] UNCLOS, art 162(2)(w).

[105] Draft Exploitation Regulations (n 73) reg 1(8). The expression is contained within square brackets, denoting '*proposals for which conceptual discussion are expected and where further work might be requested by the Council*': see the explanatory note to the Draft Exploitation Regulations, para 3(f).

[106] ibid, Schedule 1. The definition of 'serious harm' is also enclosed in square brackets to indicate potential further discussion, alongside an alternative definition that does not refer to internationally recognised standards, but provides as one prong of the definition an effect that causes non-temporary *'loss of species richness or biological diversity, including community structure, genetic connectivity among populations, ecosystem functioning and ecosystem services on the seabed'*.

[107] ibid, reg 2(4).

[108] ibid, reg 13(4).

55. Draft Regulation 2 identifies the following fundamental policies and principles:

    a. Intergenerational equity.[109]

    b. The precautionary principle or precautionary approach as appropriate.[110]

    c. An ecosystem-based management approach.[111]

    d. An integrated approach to oceans management.[112]

    e. Application of the polluter pays principle.[113]

    f. Access to non-confidential data and information.[114]

    g. Accountable and transparent decision-making, including stakeholder involvement and public participation.[115]

    h. Best Available Scientific Information in decision-making processes.[116]

    i. Use of relevant traditional knowledge of Indigenous Peoples and local communities.[117]

56. Some of those principles are also expressed in draft regulation 44 as general obligations in relation to the protection of the marine environment, applicable to the Authority, the Enterprise, sponsoring States, flag States and contractors.[118]

57. The draft reg 2/reg 44 list proposes to incorporate express reference to a wider range of extra-UNCLOS rules and principles into the legal framework of the ISA than hitherto applied in the Exploration Regulations. However, to a large extent, these

[109] ibid, reg 2(4)(a). Intergenerational equity is arguably an element of the common heritage of humankind: see Zachary Douglas et al, *In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction* (legal opinion, 10 February 2023), para 30.

[110] ibid, reg 2(4)(b).

[111] ibid, reg 2(4(c).

[112] ibid, reg 2(4)(c)*bis*.

[113] ibid, reg 2(4)(d).

[114] ibid, reg 2(4)(e).

[115] ibid, reg 2(4)(f).

[116] ibid, reg 2(4)(g).

[117] ibid, reg 2(4)(h).

[118] ibid, reg 44.

principles mirror those found in Article 7 of the BBNJ Agreement and reflect a more detailed elaboration of obligations that already appear in general terms in UNCLOS.

1.5 Discussion

58. We are asked for our opinion on the extent to which extra-UNCLOS legal obligations must or may be integrated into the work of the Authority.

59. The interpretation and application of UNCLOS does not exclude the operation of other rules of international law applicable between States Parties. Rather, reference to such rules is required:

    a. Article 311(2) UNCLOS expressly preserves the rights and obligations of States Parties which arise (prior to or after the ratification of UNCLOS) from other agreements compatible with the Convention.

    b. Article 293 UNCLOS requires a competent tribunal, when resolving a dispute under UNCLOS, to apply the Convention and other rules of international law not incompatible with the Convention.

    c. Part XII UNCLOS directly incorporates applicable international rules and standards established through competent international organizations and obliges States Parties to conform with or ensure their national measures are no less effective than those referenced rules and standards developed outside UNCLOS.

    d. The obligation to protect the marine environment also applies to the Area and obliges the Authority to adopt appropriate rules and regulations in order to achieve that objective: arts 145 and 194.

60. These provisions are all consistent with the principle of systemic integration, which is reflected in art 31(3)(c) VCLT, itself an element in the general rule of treaty interpretation, which requires any treaty to be read in light of the rules of international law applicable in the relations between the parties. Those rules may arise under treaty or under customary international law. The effect is that when States and the Authority interpret or apply UNCLOS, they are <u>required</u> to have regard to relevant extra-UNCLOS rules that are binding between them. While there

is clear precedent in the Authority's practice for the incorporation of extra-UNCLOS rules relating to environmental protection, the obligation on States and the Authority to have regard to relevant extra-UNCLOS rules extends beyond that context and may require consideration of, where relevant, obligations arising under international human rights law, labour law, maritime and shipping law, and criminal law.[119]

61. Further, the exercise of interpreting obligations arising under UNCLOS may require reference to other rules of international law, whether or not they are at present binding on all States Parties to UNCLOS. For example, the obligations on States Parties to '*protect and preserve the marine environment*',[120] to take measures '*that are necessary to prevent, reduce and control pollution of the marine environment from any source … [including those] necessary to protect and preserve rare or fragile ecosystems*',[121] and '*to ensure effective protection for the marine environment*',[122] as well as the obligation on the Authority to adopt appropriate rules and regulations to that end must, pursuant to Art 31(1) VCLT, be determined by reference to the ordinary meaning of the terms used '*in their context and in the light of [the treaty's] object and purpose*'. Each of these obligations is framed in terms that are both broad and open-textured. Their meaning is informed by context, including by reference to a contemporary understanding of environmental protection, as elaborated through other international law instruments.[123]

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[119] Art 138 UNCLOS requires that '*[t]he general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding.*' (emphasis added). Art 146 provides: '*With respect to activities in the Area, necessary measures shall be taken to ensure effective protection of human life. To this end the Authority shall adopt appropriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties*.' [emphasis added]. The existing international law includes treaties on maritime safety and the protection of human life adopted under the aegis of the IMO and ILO: Silja Vöneky and Felix Beck, 'Article 146' in Prölß Commentary (n 44) paras 13–16.

[120] UNCLOS art 192.

[121] ibid art 194.

[122] ibid art 145.

[123] For example, relevant parts of the recently concluded BBNJ Agreement (which is itself an implementing agreement under UNCLOS) reflect a contemporary application of the broad and open-textured obligation in UNCLOS to protect and preserve the marine environment, and thereby inform a contemporary understanding of that obligation as it appears in Parts XI and XII UNCLOS; see Climate Change Advisory Opinion (n.62) [440].

62. In *Gabčíkovo-Nagymaros*,[124] the ICJ was called upon to interpret a treaty for the construction of a dam, which required the parties to '*ensure … the quality of the water*' and to '*ensure compliance with the obligations for the protection of nature*'.[125] The Court held that '*these articles impose a continuing — and thus necessarily evolving — obligation on the parties*'.[126] It continued:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. *Such new norms and developments have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.*[127]

63. In *Shrimp-Turtle,*[128] the WTO Appellate Body referred to treaties that were not in force between all the disputing parties,[129] and to the non-binding environmental declaration Agenda 21,[130] in order to determine the contemporary content of the term '*exhaustible natural resources*' used in the GATT.

64. As discussed above, ITLOS and Annex VII arbitral tribunals have taken a similar approach when interpreting the content of the environmental protection provisions of UNCLOS.

65. The principle of systemic integration also requires that, in their interpretation and application of other treaties, States are required to have regard to their obligations under UNCLOS. The ICJ expressly so held by reference to art 31(3)(c) VCLT in

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[124] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

[125] Treaty concerning the construction of the Gabčíkovo-Nagymaros system of locks (signed 16 September 1977, entered into force 30 June 1978) arts 15 and 19.

[126] *Gabčíkovo-Nagymaros Project* (n 124) [140].

[127] ibid, emphasis added.

[128] *Shrimp-Turtle* (n 23) [127]–[145]

[129] Convention on the Conservation of Migratory Species of Wild Animals (opened for signature 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333; Convention on International Trade in Endangered Species of Wild Flora and Fauna (opened for signature 3 March 1973, entered into force 1 July 1975) 983 UNTS 243.

[130] 'Agenda 21', Annex II to Report of the United Nations Conference on Environment and Development (UN Doc A/CONF.151/26, 13 June 1992).

Somalia v Kenya.[131] Accordingly, where relevant, States Parties to UNCLOS are required to integrate their UNCLOS obligations in the interpretation and application of other treaties.

PART TWO: OVERLAPPING INSTITUTIONAL COMPETENCE

2.1 The issue

66. The second set of issues on which we are instructed to advise concerns the relation between the competence of the Authority over deep sea-bed mining in the Area and the competence of States to raise related issues in other international organizations.

67. Part XI UNCLOS establishes the competence for the Authority in '*organis[ing] and control[ling] activities in the Area*.' Pursuant to art 157(1): '*The Authority is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area, particularly with a view to administering the resources of the Area*'.[132]

68. How is this competence to be reconciled with the powers accorded by States to the organs of other international organizations under their constituent instruments? In our view, this issue is answered by: (a) interpretation of art 157 in light of its object and purpose; and (b) the coordinated relationship between the Authority and the rights of States and international organizations under other treaties specifically contemplated in UNCLOS itself.

2.2 Sphere of competence of the Authority

69. By Article 157, States agree to confer competence on the Authority in respect of '*activities in the Area, particularly with a view to administering the resources of the Area*.'

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[131] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [89].

[132] See also UNCLOS, art 153(1): '*Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole in accordance with this article as well as other relevant provisions of this Part and the relevant Annexes, and the rules, regulations and procedures of the Authority.*'

a. Art 1(3) UNCLOS defines such '*activities in the Area*' as '*all activities of exploration for, and exploitation of, the resources of the Area*'.

b. Art 133(a) UNCLOS provides that *'resources*' means '*all solid, liquid or gaseous mineral resources* in situ *in the Area at or beneath the seabed, including polymetallic nodules*'.

70. The object of the competence conferred upon the Authority in respect of exploration and exploitation of the resources of the Area may be ascertained by reference to the scheme of Part XI as a whole:

a. The Area and its resources are to be the common heritage of [hu]mankind;[133]

b. No State is entitled to claim or exercise sovereign rights over any part of the Area or its resources;[134]

c. Rather, '*[a]ll rights in the resources of the Area are vested in [hu]mankind as a whole, on whose behalf the Authority shall act*';[135]

d. Accordingly, activities in the Area are to be carried out '*for the benefit of [hu]mankind as a whole, irrespective of the geographical location of States*';[136] and

e. The Authority '*shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area*'.[137]

71. The conclusion that we draw from this scheme is that, by virtue of Part XI, Contracting States agree to relinquish any claim to unilateral exploitation of the resources of the Area. Instead, they confer upon the Authority the competence to do so for the common benefit of humankind. In other words, the scope of the competence conferred upon the Authority is:

[133] UNCLOS art 136.
[134] ibid art 137(1).
[135] ibid art 137(2).
[136] ibid art 140(1).
[137] ibid art 140(2).

a. Limited to the exploration and exploitation of the resources of the Area; and

b. Excludes the power of States to assert sovereign claims in respect of those resources or to authorise or carry out activities in the Area outside the framework of the Convention.

72. In pursuance of the exercise of that power, the Authority is charged by Contracting States, inter alia, with the responsibility of preparing RRPs to regulate the exploration and exploitation of the resources of the Area, including under art 145 the obligation to promulgate appropriate rules and regulations in order '*to ensure effective protection for the marine environment from harmful effects which may arise from such activities*.'

73. It does not follow from this conclusion that:

a. the Authority has exclusive competence in the Area otherwise than in respect of activities for the exploration and exploitation of its resources; or

b. the Authority has exclusive competence in respect of the protection of the marine environment in the Area.

74. As to the first point, for example, the competence of the Authority in respect of activities excludes processing and *ex situ* transportation.[138] Additionally, flag states retain their obligations to ensure that contractors comply with relevant criminal, maritime, labour or human rights law[139] while carrying out activities in the Area.

75. The second point requires consideration of the operation of shared competence between international organizations on the protection of the marine environment.

[138] Area Advisory Opinion (n 54) [82]–[97]; and see ISA, 'Competencies of the International Seabed Authority and the International Maritime Authority in the context of activities in the Area' (ISA Technical Study No 25, 2019) 53.

[139] See the recent judgment in *Nauru Ocean Resources Inc (NORI) v Greenpeace & Phoenix* (Gerechtshof Amsterdam, 12 November 2024, ECLI:NL:GHAMS:2024:3127), affirming the application of international maritime law, read in light of the ICCPR and the European Convention on Human Rights, in relation to a protest action on the high seas against a Danish-flagged vessel engaged in deep sea mining.

2.3 Shared competence in protection of the marine environment

76. In general, international law imposes no *a priori* hierarchy or coordination between the respective competencies of international organizations. When the *Institut de Droit International* considered the matter in 2021, the most that could be said was that '*[i]n exercising their competence to interpret their constituent instruments, international organizations shall pay due regard to the functions of other international organizations.*'[140]

77. As discussed above, Article 311(2) UNCLOS adopts a general approach of mutual compatibility between the rights and obligations of States assumed under other treaties with their obligations under UNCLOS.

78. Article 237 UNCLOS makes more specific provision in relation to obligations under other conventions on the protection and preservation of the marine environment. It provides:

> 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special convention and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.
>
> 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

79. This specific treaty coordination clause is complemented by the obligation of States to cooperate enshrined in art 197, which provides:

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

80. ITLOS has found that '*the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention*

[140] IDI 7th Commission, 'Resolution: Limits to evolutive interpretation of the constituent instruments of the organizations within the United Nations system by their internal organs' (4 September 2021), para 6.

and general international law' and has emphasized that States are to act in good faith and with 'due diligence' to achieve that end.[141]

81. Taken together, these provisions establish that the contracting States contemplated that the new institutions and mechanisms established under UNCLOS would take their place alongside their existing and future obligations under other treaties. This was to be particularly so in the case of protection of the marine environment.

82. Similarly, reference to Part XII and Annex III UNCLOS establishes that the duty to protect and preserve the marine environment, even in the context of activities in the Area, is to be discharged cooperatively at a global, regional and state level, through appropriate institutions.

83. Article 145 UNCLOS requires the Authority to adopt RRPs to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area. Annex III, art 3(3) requires a plan of work to be in conformity with those RRPs in order to secure approval.[142] Annex III, art 21(3) prohibits States Parties from imposing conditions on a contractor that are inconsistent with Part XI, but permits States Parties to impose on sponsored contractors, or ships flying their flag, environmental laws and regulations that are more stringent than those in the RRPs of the Authority. That is, the Authority's RRPs are a mandatory benchmark but not the exclusive framework for environmental protection in the context of activities in the Area. UNCLOS does not, therefore, prevent States from exercising competence, individually or collectively through regional bodies, to regulate activities in the Area for the purpose of protecting and preserving the marine environment, provided they do not purport to lower the standard of protection imposed by the RRPs of the Authority.[143]

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[141] Climate Change Advisory Opinion (n 62) [296] and [309]; *MOX Plant (Ireland v United Kingdom)* (Provisional Measures) [2001] ITLOS Rep 95 [82].

[142] See also UNCLOS, arts 160(2)(f)(ii) and 162(2)(o)(ii), and Annex III, art 17(1)(b)(xii) and 2(f).

[143] See also UNCLOS art 216 which requires the enforcement of '*applicable international rules and standards established through competent international organisations*' to prevent, reduce and control pollution of the marine environment by dumping. The disposal of the waste product from deep sea mining

84. Moreover, arts 200 and 201 UNCLOS specifically contemplate that the appropriate rules for the control of pollution of the marine environment shall be developed cooperatively through regional and global programmes of scientific research and '*through competent international organizations*.'

85. The conclusion that we draw from these provisions is that the framers of the Convention specifically contemplated that the preparation of rules for the protection of the marine environment would not be the exclusive preserve of the Authority, even in the narrow context of exploration and exploitation of the resources in the Area. Rather, such rules would be developed in light of a cooperative exercise to which other competent international organizations would also contribute.

86. The relation between the exclusive competence of the Authority to organize and control activities in the Area and the shared competence of the Authority and other institutions to protect and preserve the marine environment has given rise to institutional conflict, most recently between the Authority and the OSPAR Commission ('**the Commission**').[144] The Commission considers it has competence to require its Contracting States, as sponsoring States, to impose requirements on contractors undertaking exploitation activities in the Area, provided those requirements are: i) aimed at the control of pollution or the protection of the marine environment; ii) not inconsistent with Part XI UNCLOS; iii) more stringent than the Authority's RRPs; and iv) applicable only within the OSPAR maritime area. The Authority has contested that competence.

87. It is not necessary for the purpose of this opinion to express a firm view on whether the Authority's contest to the Commission's competence is valid, but the analysis above certainly suggests the answer may not be as simple as the Authority has suggested: the Authority's competence to organize and control activities in the Area

appears to fall within the definition of 'dumping' in UNCLOS art 1(5), implying overlapping competence for the Authority and the IMO under the London Convention and London Protocol.

[144] See OSPAR Commission, 'OSPAR's competence with regard to deep seabed mining within the OSPAR maritime area' (OSPAR 23/11/Info.1 Add.1, 30 November 2022); ISA, 'Status of consultations between the International Seabed Authority and the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic: Report of the Secretary-General' (ISBA/29/C/6, 29 February 2024).

does not obviously exclude the competence claimed by the Commission. Either way, the institutional conflict highlights the need for cooperation between institutions in the protection and preservation of the marine environment, which is required by art 197 UNCLOS.

88. The Authority has well-established precedent for discharging its duty to cooperate with other global and regional institutions. Indeed, one of the Authority's strategic directions in its latest strategic plan is to:[145]

> Strengthen cooperation and coordination with other relevant international organizations and stakeholders in order to promote mutual "reasonable regard" between activities in the Area and other activities in the marine environment and to effectively safeguard the legitimate interests of members of the Authority and contractors, as well as other users of the marine environment.

89. A goal of the strategic plan is to '*establish and strengthen strategic alliances and partnerships with relevant subregional, regional and global organizations with a view to more effective cooperation in the conservation and sustainable use of ocean resources, consistent with [UNCLOS] and international law [...].*'[146]

90. Article 169 UNCLOS provides for the Secretary-General of ISA to make arrangements, with the approval of the Council, for consultation and cooperation with international and non-governmental organizations recognized by the United Nations Economic and Social Council. Pursuant to that provision, the Authority has admitted 32 intergovernmental organizations as observers to its meetings. It has also entered into formal agreements or memoranda of understanding with nine of these institutions with overlapping competence.[147]

91. The Authority has undertaken research into the potential for overlap in spatial dimensions of regulation, particularly with regard to deep sea fishing and areas either allocated for exploitation or reserved for marine environmental protection by the ISA.[148] It has published a paper on the interaction of the Authority with the treaty

[145] ISA Strategic Plan 2019-2023 (n 70) para 26, strategic direction 1.5.

[146] ibid, para 26, strategic direction 1.2.

[147] All available on the Authority's website: https://www.isa.org.jm/legal-documents/.

[148] ISA, 'Potential interactions between fishing and mineral resource-related activities in areas beyond national jurisdiction: a spatial analysis' (ISA Technical Study No 33, 2023).

bodies to be established under the BBNJ Agreement,[149] emphasising the need identified in that Agreement for cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.[150]

92. That is why a range of international and regional organizations have recently seen fit to engage on, and take decisions or make recommendations relating to, the exploitation of the Area. For example (and non-exhaustively):

    a. The UN Environment Programme has engaged on the issue of deep-sea mining, making a series of recommendations to support environmental protection.[151]

    b. The UN Office of the High Commissioner for Human Rights has supported the publication of a note on the key human rights considerations on the impact of seabed mining.[152]

    c. The Working Group on the issue of human rights and transnational corporations and other business enterprises, together with the UN Special Rapporteurs on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment have engaged directly with the Authority to encourage the embedding of sound human rights principles in the Draft Exploitation RRPs.[153]

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[149] ISA, 'A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions', May 2024.

[150] BBNJ Agreement (n 50) art 47(6)(c).

[151] UNEP Issues Note, 'Deep-Sea Mining: The environmental implications of deep-sea mining need to be comprehensively assessed', 6 May 2024.

[152] UN Office of the High Commissioner for Human Rights, 'Key Human Rights Considerations on the Impact of Seabed Mining', 10 July 2023.

[153] Open Letter by the Working Group on the issue of human rights and transnational corporations and other business enterprises, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the International Seabed Authority, 15 March 2024.

d. The CBD Conference of the Parties in 2022 took a decision on the conservation and sustainable use of marine and coastal biodiversity, encouraging States Parties to ensure that:[154]

> before deep seabed mineral exploitation activities take place, the impacts on the marine environment and biodiversity are sufficiently researched and the risks understood, the technologies and operational practices do not cause harmful effects to the marine environment and biodiversity, and appropriate rules, regulations and procedures are put in place by the International Seabed Authority, in accordance with the best available science and the traditional knowledge of indigenous peoples and local communities with their free, prior and informed consent, and the precautionary and ecosystem approaches, and in a manner that is consistent with United Nations Convention on the Law of the Sea and other relevant international law[.]

e. The Convention on Migratory Species Conference of the Parties in February 2024 adopted a resolution on deep seabed mineral exploitation activities and migratory species urging Parties:[155]

> not to engage in, or support, deep-seabed mineral exploitation activities until sufficient and robust scientific information has been obtained to ensure that deep seabed mineral exploitation activities do not cause harmful effects to migratory species, their prey and their ecosystems[.]

93. The engagement of these bodies on the issue of deep-sea mining is not, in our view, a transgression on the competence of the Authority to organize and control activities in the Area. It is, instead, a consequence of overlapping competence between international organizations, in particular as regards the protection and preservation of the marine environment, which UNCLOS specifically contemplates.

94. The Authority retains the responsibility to organize and control activities in the Area, including by promulgating and applying the regulatory framework of rules to govern the exploitation of the resources of the Area, and in ensuring protection of the marine environment.[156] In the preparation of such rules, it is obliged to coordinate

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[154] 'Decision 15/24: Conservation and Sustainable Use of Marine and Coastal Biodiversity' Fifteenth Conference of the Parties to the Convention on Biological Diversity Part II (Montreal 7–19 December 2022) (19 December 2022) UN Doc CBD/COP/DEC/15/24, para 16.

[155] 'Deep-Seabed Mineral Exploitation Activities and Migratory Species' Fourteenth Conference of the Parties to the Convention on Migratory Species (Samarkand, February 2024) UN Doc UNEP/CMS/Resolution 14.6, para 3.

[156] Such rules are to be prepared by the LTC (art 165(2)(f)); submitted as recommendations to the Council for provisional adoption (art 162(o)(ii)); and approved by the Assembly (art 160(2)(f)(ii)).

and cooperate with other competent international organizations, consistent with the express provisions of UNCLOS to that effect, the long-standing practice of the Authority, and the duty to cooperate under general international law.

95. The duty to cooperate also applies in coordinating, and resolving conflicts that may arise out of, the exercise of overlapping competences of international organizations to designate areas of the high seas for protection. For example, where activities in the Area are likely to affect an ecologically or biologically significant marine area (EBSA) designated by the CBD COP, or a vulnerable marine ecosystem (VME) protected by a no-fishing zone declared by a regional fisheries management organization, or a particularly sensitive sea area (PSSA) designated by the IMO, or a marine protected area established (in future) by the BBNJ COP, the Authority should have regard to these designations when exercising its functions, and seek to cooperate with relevant bodies to ensure a coordinated approach that delivers on the duty on all States Parties and the Authority to ensure the effective protection of the marine environment. This duty of cooperation is mutual and requires other relevant international organizations to cooperate with the Authority where their decisions may affect matters within the Authority's competence.[157]

CONCLUSION

96. In light of the above analysis, we have arrived at the following conclusions.

97. **On Issue One (reference to external sources in the interpretation of UNCLOS)**:

    a. In the interpretation of UNCLOS, there shall be taken into account 'any relevant rules of international law applicable in the relations between the parties': art 31(3)(c) VCLT.

[157] See, for example: Art 22(3) of the BBNJ Agreement requires the COP, when taking decisions in relation to area-based management tools, to make arrangements for cooperation and coordination with '*relevant global, regional, subregional and sectoral bodies*'; the preamble to the CBD emphasises '*the importance of, and the need to promote, international, regional and global cooperation among States and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity*'; Article 65 of the IMO Convention requires the IMO to cooperate with any specialised agency of the United Nations in matters which may be the common concern of the IMO and of such specialised agency; RFMOs derive their legal basis from UNCLOS and the Fish Stocks Agreement and are subject to duties to cooperate under Article 118 and 197 UNCLOS.

b. Further, where the Contracting States have used open-textured terms such as 'the protection of the marine environment' the general rule of interpretation under art 31(1) VCLT requires the interpreter to take into account the evolutionary development of standards of environmental protection, for which purpose it is both necessary and appropriate to refer to other international conventions (even where they are not in force as between all UNCLOS Contracting States).

98. **On Issue Two (institutional competence):**

a. The Authority has power to make rules concerning the exploitation of the resources of the Area, including as to the protection of the marine environment, and in the exercise of that power, it is entitled and obliged to cooperate with other competent international organizations.

b. The competence of the Authority to control all activities of exploitation of the resources of the Area does not exclude the competence of other international organizations to make decisions within their own respective mandates in relation to the Area.

19 December 2024

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