The Duty of Environmental Impact Assessment in the First ITLOS Chamber's Advisory Opinion: Towards the Supremacy of the General Rule to Protect and Preserve the Marine Environment as a Common Value?

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1 The Notion of Environmental Impact Assessment and Its Status in International Law

Environmental impact assessment (EIA)[1] is recognized by a number of national legislations as a fundamental environmental policy tool to ensure sustainable development. At the international level, several initiatives have been undertaken to induce States to adopt, develop, and expand EIA procedures in their mutual relations to assess the harmful impacts of certain activities on the environment of another State or of areas beyond national jurisdiction. As a result, one or more provisions on EIA have been included in various multilateral treaties. Nevertheless, no global treaty has been concluded on this subject[2] and to agree on specific undertakings has never been an easy endeavor. Only at the regional level have binding instruments for a comprehensive regulation of EIA been adopted.[3]

Different stages of development may also be noticed in the legal regimes governing activities in areas beyond national jurisdiction, i.e., the international

[1] "EIA means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development", UNEP Goals and Principles of Environmental Impact Assessment (hereinafter: UNEP Goals and Principles), Governing Council decision 14/25 (16 January 1987), UN Doc. UNEP/GC/DEC/14/25 (17 June1987), Appendix, para 1.

[2] On this gap see Knox 2003, p. 153 ff.

[3] See e.g. the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, entered into force on 10 September 1997); the Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003, entered into force on 11 July 2010); and the European Union directives concerning the assessment of the effects of certain public and private projects (or plans and programmes) on the environment.

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seabed area (hereinafter the Area), Antarctica, and outer space. A detailed regulation of EIA may be found in Annex I to the Protocol on environmental protection to the Antarctic Treaty (Madrid, 4 October 1991; hereinafter PEPAT)[4] and in other instruments of the so-called Antarctic Treaty system.[5] Less elaborated provisions are set out in Part XII of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; hereinafter UNCLOS),[6] which provides a general framework for the protection and preservation of the marine environment; in the Agreement relating to the Implementation of Part XI of the UNCLOS (New York, 28 July 1994)[7]; and—as far as deep seabed mining activities are concerned—in the so-called Mining Code, a comprehensive set of rules issued by the International Seabed Authority (hereinafter the Authority) to regulate prospecting and exploration of marine minerals in the Area.[8] No specific provisions on EIA are incorporated in the five United Nations space treaties,[9] which were adopted when "environmental considerations were not among the highest-ranking items on agendas in any field of human endeavour, definitely not in the space sector".[10]

As to general international law, EIA has always been acknowledged as a corollary of the principle of prevention, according to which States are required to use all the means at their disposal to ensure that activities which take place within their jurisdiction or control do not cause significant damage to the environment of other

[4] Entered into force on 14 January 1998.

[5] This regime originates from the Antarctic Treaty (Washington, 1 December 1959, entered into force on 23 June 1961), related conventions and recommendations by the so-called Antarctic Treaty Consultative Parties (ATCPs) adopted under Article IX of the Antarctic Treaty.

[6] Entered into force on 16 November 1994. On EIA obligations under UNCLOS see Kong 2011.

[7] Entered into force on 28 July 1996.

[8] The Mining Code (this expression may be found in the Authority's website) includes the Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts arising from Exploration for Polymetallic Nodules in the Area (hereinafter the Recommendations), UN Doc. ISBA/7/LTC/1/Rev.1 (13 February 2002); the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (RPN), UN Doc. ISBA/6/A/18 (13 July 2000); and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (RPS), UN Doc. ISBA/16/A/12/Rev.1 (7 May 2010). No specific code for the exploitation of marine minerals has been adopted so far. For a definition of the various phases of deep seabed mining, namely prospecting, exploration and exploitation, see RPN and RPS, Regulation I. On the environmental impact of seabed mining activities in general and in international law in particular, see Treves 1978, Markussen 1994, Lenoble 2000, Treves 2000, Warner 2009. On EIA and the authority see Le Gurun 2008.

[9] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (New York, 19 December, 1966, entered into force on 10 October 1967); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (New York, 19 December 1967, entered into force on 3 December 1968); Convention on International Liability for Damage Caused by Space Objects (New York, 29 November 1971, entered into force on 1st September 1972); Convention on Registration of Objects Launched into Outer Space (New York, 12 November 1974, entered into force on 15 September 1976); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (New York, 5 December 1979, entered into force on 11 July 1984).

[10] Viikari 2008 p. 272.

States or of areas beyond the limits of national jurisdiction.[11] More controversial has been the debate on the existence of a customary duty of EIA. In particular, two arguments have been emphasized in the academic literature: lack of consensus among States on the exact content of the EIA obligation and no convincing evidence of *opinion juris*.[12]

Any further discussion on this issue has become obsolete after the authoritative recognition of the customary nature of the obligation of EIA by the International Court of Justice (ICJ) in the *Pulp Mills* case[13] and by the Chamber of the International Tribunal for the Law of the Sea (the Chamber), chaired by Judge Tullio Treves, in its advisory opinion of 1 February 2011.[14]

The former pronounced in relation to industrial activities posing the risk of an adverse impact on resources shared by two States:

> (…) it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[15]

The latter confirmed the ruling of the ICJ with particular reference to the detrimental impact that certain activities in the commons can produce on the environment:

> (…) the obligation to conduct an EIA in a transboundary context is a general obligation under customary international law that covers activities having an impact on the environment of areas beyond national jurisdiction, including resources that are common heritage of mankind.[16]

In the same ruling, the Chamber also provides some basic guidelines on the scope and content of the obligation of EIA for deep seabed mining operations and its correct implementation. These guidelines deserve special consideration.

In order to better understand the Chamber's contribution to turning a myth into reality,[17] the following paragraphs will focus on three specific issues: the scope of the obligation of prior EIA *ratione materiae* (i.e.: which activities in the Area fall

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[11] The customary nature of the principle of prevention has been explicitly recognized by the International Court of Justice in 2010, in the *Pulp Mills* case, ICJ: Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment (20 April 2010), para 101. On EIA obligations and international environmental law see in particular: Bastmeijer and Koivurova 2008, Craik 2008, Birnie et al 2009, Lagshaw 2012, Sands 2012.

[12] See Bastmeijer and Koivurova 2008, pp. 355–357.

[13] Pulp Mills, supra n. 11, para 101. For a comment see Boyle 2001.

[14] ITLOS: Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Seabed Dispute Chamber, Advisory Op. (1 February 2011). On the advisory opinion see, in particular: Freestone 2011, French 2011, Plakopkefalos 2011 and Vromman 2012.

[15] Pulp Mills, supra n. 11, para 204.

[16] Activities in the Area, supra n. 14, para 148.

[17] The allusion to Knox 2002, p. 291 ff. is deliberate.

under this duty?), the scope of the obligation of prior EIA *ratione personae* (i.e.: are developing sponsoring States[18] subjected to less burdensome duties?) and the functional relationship of the EIA obligation with the duty of co-operation with potentially affected States. On a more general level, the main purpose of this chapter is to stress the unprecedented recognition by an international tribunal of the special role played by the general obligation to protect and preserve the environment when competing interests in a particularly vulnerable area beyond national jurisdiction are at stake.

2 The ITLOS Chamber's Opinion: The Scope of the Obligation of EIA *Ratione Materiae*

The definition of the threshold beyond which the EIA process should apply is one of the most controversial issues in States' practice and the academic literature. Article 206 of the UNCLOS, which deals with the "assessment of potential effects of activities", provides for a duty of EIA for "planned activities" under the jurisdiction or control of States Parties which "may cause substantial pollution of or significant and harmful changes to the marine environment". No indication may be found as to what is meant by "substantial pollution" and "significant and harmful changes". And while other binding instruments—such as the Espoo Convention—list activities requiring EIA,[19] or—like the PEPAT—use screening criteria based on different stages,[20] UNCLOS does not.

To give more precise scope and content to EIA for activities in the Area, the Chamber refers to three instruments of the Mining Code, i.e. the Recommendations, the RPN, and the RPS.[21] In particular, the RPN and the RPS require the applicant to submit "a preliminary assessment of the possible impact of the proposed *exploration activities* on the marine environment"[22] as a condition to receiving the approval of the plan of work for exploration by the Authority. More specific provisions regulate *prospecting*, which "(…) shall not be undertaken if substantial evidence indicates the risk of serious harm to the marine environment" (Regulation 2.2). As a result, taking into account the definition of "serious harm to the marine environment" under Regulation 1 (f), which has the same content in both the RPN and the RPS, prospecting could be started only if it was proven that the activity would not involve:

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[18] On the notion of "sponsorship", see Activities in the Area, supra n. 14, para 74 ff.

[19] Espoo Convention, Appendix I.

[20] PEPAT, Article 8 and Annex I.

[21] Activities in the Area, supra n. 14, para 149.

[22] RPN, Regulation 18.*c*; RPS, Regulation 20.1.*c*.

> (…) 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.[23]

More detailed provisions on EIA for *exploration* activities have been developed in the Recommendations, which were approved two years after the adoption of the RPN to give contractors some guidance for the assessment of the possible environmental impacts arising from *exploration* for polymetallic nodules in the Area. The Recommendations exclude certain activities from the obligation of EIA, as they have "no potential for causing serious harm to the marine environment",[24] and explicitly list activities requiring EIA. The latter include:

> (a) Dredging to collect nodules for on-land studies for mining and/or processing;
> (b) Use of special equipment to study the reaction of the sediment to disturbances made by collecting devices or running gears;
> (c) Testing of collection systems and equipment.[25]

No definition of "serious harm" may be found in the Recommendations; nevertheless, the specific enumeration of exploration activities requiring EIA excludes unilateral interpretations, as the "threshold" of seriousness requiring EIA has already been determined at the international level.

As correctly stressed in one of the first comments to the Chamber's opinion, the bold reference to the relevant Regulations and Recommendations issued by the Authority marks a major departure from the judgment in the *Pulp Mills* case, where the ICJ held that the specific content of the EIA required in each case is to be determined by national legislations.[26] Indeed, it has been observed that: "[t]his approach possibly leads the way to a wider understanding of the content of the EIA; an understanding that looks towards international bodies for the definition of the content of the EIA, thus working towards a global and not a narrow localised approach".[27] As a result, it could be added, a limited margin of appreciation is left to contractors and sponsoring States to determine activities requiring EIA. Discretion is left to the latter only in the adoption of laws, regulations, and administrative measures to ensure that the contractor fulfills its obligation to conduct an EIA.[28] Furthermore, when deciding what measures are reasonably appropriate, sponsoring States "(…) must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole."[29]

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[23] Further limitations may be found under RPS, Regulation 2.3.

[24] Recommendations, para IV.A.9.

[25] Ibidem, para IV.A.10.

[26] Pulp Mills, supra n. 11, para 205.

[27] Plakopkefalos 2011, p. 7.

[28] Activities in the Area, supra n. 14, para 227 ff.

[29] Ibidem, para 230.

This assertion is worth stressing: if sponsoring States are instrumental for the fulfillment of the benefit of the humankind, the interest of the international community (not the national one) is the fundamental yardstick to be taken into account at all levels of the decision-making process. In addition, if the adequacy of national measures is to be assessed on a case-by-case basis (for no measure is reasonable simply because of its adoption), the Chamber implicitly paves the way to international scrutiny on the consistency of national measures with the interests of humankind.

The Chamber has particular consideration for the general obligation to protect and preserve the marine environment (UNCLOS, Article 192). This is another element in the Chamber's reasoning which contributes to better understanding the scope and content of the EIA obligation. The Chamber does not explicitly acknowledge the supremacy of this obligation with respect to competing rights of sponsoring States. However, it refers to this obligation as the main parameter to be taken into account in assessing the duties of sponsoring States in respect of activities which are "among the most hazardous to the environment."[30] This characterization is made by the same Chamber having regard to both their specific nature and the extreme environmental vulnerability of the area where they are carried out. This approach is evident when the Chamber pronounces on the meaning of "activities in the Area" and excludes any restrictive interpretation which could exempt sponsoring States from responsibility for activities particularly hazardous for the environment.[31] But the most far-reaching consequence of the special consideration given to the obligation to protect and preserve the marine environment is the characterization of the precautionary approach as a binding and direct obligation for sponsoring States.[32]

Indeed, here, the Chamber goes a step further than the ICJ did in the *Pulp Mills* case.[33] In the Chamber's opinion EIA is not expressly acknowledged as an instrument of precaution. Nevertheless, it is truly incongruous and unreasonable to conclude that EIA and precaution are to be considered as separate and unrelated undertakings, when both are characterized by the Chamber as a direct and binding obligation for sponsoring States and an integral part of their due diligence obligation.[34]

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[30] Ibidem, para 97.

[31] Ibidem, paras 94–97.

[32] Ibidem, para 127.

[33] Perplexity has been expressed as the ICJ considers the EIA obligation exclusively with regard to the principle of prevention and not as a requirement of precaution; see e.g. Kerbrat and Maljean-Dubois 2011, p. 67.

[34] Activities in the Area, supra n. 14, p. 72 and para 125 ff.

3 The Scope of the Obligation of EIA *Ratione Personae*

In the Chamber's opinion, *all* sponsoring States (i.e. developed and developing States) are under a direct obligation to conduct an EIA and a due diligence obligation to ensure compliance by the contractor with his obligation to conduct an EIA.[35] Exceptions are allowed, provided that derogations are specifically set forth by the applicable provisions. As an example, the Chamber mentions Principle 15 of the Rio Declaration, which requires States to apply the precautionary approach "according to their capabilities".[36]

This criterion of feasibility entails that States are expected to assess environmental risks by resorting to economic and technological means consistent with their stage of development.[37] It can also be observed, however, that Article 202.*c* of the UNCLOS provides for a duty of solidarity, which requires States Parties to "provide appropriate assistance", in particular to developing States, in the preparation of EIAs. The prevention of environmental harm caused by ultra-hazardous activities in areas beyond any national jurisdiction is an interest shared by all States; as a result, international assistance aimed at remedying the weaknesses of EIA regulations in sponsoring States should be developed and encouraged.[38] Furthermore, the Chamber characterizes the adoption of appropriate laws and regulations on EIA as a mandatory requirement both for developed and developing countries. In recent years, steps have been taken toward the strengthening of EIA regulations and capacity in developing countries and countries in transition[39]; nevertheless, EIA is not mandatory in many developing countries.[40] The ruling of the Chamber could accelerate the evolution of State practice and prompt sponsoring States to enact and implement effectively appropriate legislative and administrative measures on EIA.

Finally, if the Chamber admits that "the obligation to apply the precautionary approach may be stricter for the developed than for developing sponsoring States" it also strongly emphasizes that "[t]he reference to different capabilities in the Rio Declaration does not (…) apply to the obligation to follow 'best environmental practices'."[41] Again, the special consideration for the general obligation to protect and preserve the marine environment is in the forefront of the Chamber's reasoning:

> The spread of sponsoring States 'of convenience' would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.[42]

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[35] Ibidem, p. 72.

[36] Ibidem.

[37] See e.g. Boisson de Chazournes 2002, p. 82.

[38] See e.g. Activities in the Area, supra n. 14, para 163.

[39] See Bastmeijer and Koivurova 2008, p. 380 ss.

[40] See e.g. Wood 2003.

[41] Activities in the Area, supra n. 14, para 161.

[42] Ibidem, para 159.

As far as the due diligence obligation is concerned, *all* sponsoring States (developed and developing countries) are under the duty to adopt appropriate laws, regulations, and administrative measures. However, the purpose is different from the direct obligation to conduct an EIA, i.e. to ensure the contractor's compliance with its EIA obligations. One wonders whether a developing State may exercise effective control over a foreign contractor, which is sometimes a multinational corporation using advanced technologies. Obviously, each situation is to be assessed on a case-by-case basis; nevertheless, the Chamber observes, the sponsoring State may choose among various means, such as "enforcement mechanisms for active supervision" and "penalties for non-compliance by such contractors."[43] What really matters is that the sponsoring State makes all necessary efforts to adopt and enforce measures of control, under its national legislation, which are proportional to the risks associated with the mining activities planned by the contractor.

Furthermore, in the Chamber's opinion, the reasonableness of the commitment required from the sponsoring State is strengthened by the characterization of the due diligence obligation as an obligation of means, rather than an obligation of result.[44] Important consequences flow from this assumption with regard to the State's responsibility. The sponsoring State is not responsible for environmental harm if it has fulfilled its due diligence obligations: "Where the sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability."[45]

If no damage has occurred, but the sponsoring State has failed to meet its due diligence obligations, this omission can be characterized as an internationally wrongful act under the general regime of State responsibility.[46]

Any further discussion on the relationship between the contractor and the sponsoring State's liabilities would go beyond the scope of this short comment.[47] Suffice here to stress, on the one hand, that these considerations are useful to underscore the significant role played by EIA in determining whether the sponsoring State failed to behave in a manner consistent with the required degree of due diligence. On the other hand, both the RPN and the RPS contain provisions to ensure that the applicant is financially and technically capable of responding to any incident or activity which causes serious harm to the marine environment.[48] In addition, according to Annex 4 (Standard clauses for exploration contract) to the RPN and the RPS, "The Contractor shall maintain appropriate insurance policies with internationally recognized carriers, in accordance with generally accepted

[43] Ibidem, pp. 74–75.

[44] Ibidem, para 110.

[45] Ibidem, p. 73.

[46] Ibidem.

[47] For further considerations see Handl 2011, p. 211 ff. For a general survey on international instruments regulating compensation for damage resulting from activities of exploration and exploitation of mineral resources located in the seabed falling under national jurisdiction, see Scovazzi 2012.

[48] RPN, Regulation 12.5.c and 12.7.c and RPS, Regulation 13.4.c and 13.6.c.

international maritime practice" (Sect. 16.5). Nevertheless, neither the RPN nor the RPS provide for an explicit connection between the obligation of EIA and the requirement of a specific guarantee for adequate compensation for environmental damage caused by planned activities like, for instance, Article 20 of the Resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the *Institut de Droit International* in 1997.[49]

4 The Obligation of EIA and Duties of Co-operation

All *ad hoc* binding instruments on EIA require States Parties (Espoo Convention, Articles 3–6) or member States[50] to comply with duties of co-operation with other potentially affected parties or member States if planned activities risk causing an adverse impact on their environment.[51]

Information is the first step of the duties of co-operation. These include, as well, consultation and negotiations in good faith with the aim to arrive at an agreement, not to acquire the consent of the potentially affected State before the undertaking or the carrying on of a certain activity. In other words, the latter State is not vested with a right of veto.[52] Nevertheless, to reconcile competing interests, the views of the potentially affected State should be taken in due account by the State of origin when adopting its final decision (EIA Directive, Article 8; Espoo Convention, Article 6.1). In addition to the information given to other States, public participation is envisaged by certain instruments. As a result, States under the duty to conduct prior EIA must ensure that individuals of potentially affected member States (EIA directive, Article 7.3) or States Parties (Espoo Convention, Articles 2.6 and 3.8) are informed of the proposed activity and given the opportunity to submit their comments.

Also under the PEPAT duties of co-operation are associated with the obligation to conduct an EIA.[53] Nevertheless, unlike the EIA directive and the Espoo

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[49] "The submission of a proposed activity to EIA does not in itself exempt from responsibility for harm alone or civil liability if the assessed impact exceeds the limit judged acceptable. EIA may require that a specific guarantee be given for adequate compensation should the case arise". www.idi-iil.org/idiE/resolutionsE/1997_str_03_en.PDF. Accessed 3 February 2012.

[50] Directive 2011/92/EU of the European Parliament and of the Council (13 December 2011), on the Assessment of the Effects of Certain Public and Private Projects on the Environment (Codification), Article 7, hereinafter EIA directive.

[51] In principle, binding instruments are silent about the rights of potentially affected third States. However, both the UNEP Goals and Principles and the Draft articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the International Law Commission in 2001 (UN Doc. 56/10), broadly refer to any State which is likely to be significantly affected by a proposed activity (UNEP Goals and Principles, Principle 12; ILC Draft Articles, Article 2.e).

[52] See Lake Lanoux arbitration (France v. Spain), Award (16 November 1957). International Law Reports 24: 139.

[53] PEPAT, Annex I, Article 3.4.

Convention, the PEPAT does not characterize notification, information, and consultation as reciprocal duties, but instead as obligations *erga omnes partes*. This is a correct approach, consistent with the special responsibility undertaken by the ATCPs for the comprehensive protection of Antarctica, as a Special Conservation Area.[54] It could be contended that the common interests of the international community in Antarctica are protected by a narrow group of States. However, it is also true that the PEPAT is open to accession by all Members of the United Nations[55] and that transparency is sufficiently provided by States Parties to the PEPAT (information on the draft EIAs has been always made available on the Antarctic Secretariat's website).[56]

With regard to deep sea mining, the UNCLOS contains no specific regulation of the duties of notification, information, and consultation associated with EIA. An obligation of transparency is provided for under Article 206, which is to be read in conjunction with Article 205: States Parties are required to communicate the results of EIAs "to the competent international organizations, which should make them available to States". Starting from the assumption that "harm to the marine environment is a matter of global interest", some scholars infer from this broad obligation of transparency that "all States have equal access to information respecting potential harms."[57] More specific obligations are provided for under the RPN and the RPS, where information concerning "a preliminary assessment of the possible impact of the proposed exploration activities on the marine environment" and a description of "proposed measures for the prevention, reduction and control of pollution and other hazards, as well as possible impacts, to the marine environment" are to be submitted for approval of the plan of work for exploration (Regulation 18).

In its ruling, the Chamber deals with EIA obligation only incidentally as a necessary part of environmental cooperation duties. In particular, it recalls that in accordance with the customary duty to conduct an EIA:

> (…) it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to 'resource deposits in the Area which lie across limits of national jurisdiction'.[58]

Article 142 of the UNCLOS deals with a specific issue: it aims to protect the interests of coastal States with regard to resources that straddle between the Area and their continental shelf. Environmental concerns are specifically taken into account. Consultations will be triggered with the States concerned "with a view to

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[54] Ibidem, Preamble, para 5.

[55] Ibidem, Article 22.2 and Antarctic Treaty, Article XIII.1.

[56] www.ats.aq. Accessed 15 February 2012. Comments of other Parties can be drawn from the official documents of the Antarctic Treaty consultative meetings and the Committee on Environmental Protection.

[57] Craik 2008, p. 145.

[58] Activities in the Area, supra n. 14, para 148.

avoiding infringement of such rights and interests" (Article 142.2) and coastal States are entitled

> (…) to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area (Article 142.3).

The significance of the *dictum* of the Chamber is not to be underestimated. First, the express inclusion of EIA under the duties of notification and consultation provided for under Article 142.2 of the UNCLOS fills a gap of the Convention and gives a more specific content to these obligations. Second, increased transparency in the planning of mining activities in the Area is ensured and potentially affected coastal States are enabled to play a more active and meaningful role during consultations: they can put forward their concerns, make comments on planned activities, and propose alternatives on the basis of the EIA prepared by the sponsoring State. Third, going beyond the limited scope of Article 142 of the UNCLOS, it should be recalled that in various parts of its opinion the Chamber emphasizes the obligation of sponsoring States "(…) to assist the Authority in its task of controlling activities in the Area"[59] and "to cooperate with the Authority in the establishment and implementation of impact assessments".[60] In particular, the Chamber mentions the obligation of contractors and sponsoring States to "cooperate with the Authority in the establishment of monitoring programs to evaluate the impact of deep seabed mining on the marine environment".[61]

On a more general level, the content of certain duties of co-operation associated with the obligation to conduct an EIA (e.g., consultation with the public concerned, outcome of the decision-making process) remains unclear. Very broad conclusions may be inferred from the Chamber's particular consideration for the general obligation to protect and preserve the marine environment coupled with the recognition of the special role played by the Authority in the protection of the environmental interests of humankind.[62] Against this background, a sponsoring State's omission to notify the Authority of the risks of adverse impact on the marine environment of certain planned activities, or its refusal to enter into consultation with the Authority if requested would be manifestly inconsistent with the general obligation to co-operate with the Authority in good faith. But beyond these broad speculations, it is unreasonable to expect the Chamber to fill gaps which require a specific regulation.

[59] Ibidem, para 124.

[60] Ibidem, para 142.

[61] Ibidem, para 143.

[62] Ibidem, para 180.

5 Conclusions

If one starts from the assumption that the international regulation of EIA is "still in its infancy",[63] the light shed by the Chamber's opinion on certain controversial aspects of the obligation of EIA in a common area is unprecedented.

In particular, the opinion has the merit of offering an authoritative assessment of the content of this obligation, and above all of considering the purpose of this obligation in its right perspective. The Chamber takes account of the different capabilities of individual States in controlling environmental risks, but the effective protection of the marine environment remains its primary concern. Basic clarifications on the scope of the obligation to conduct an EIA highlight a number of positive duties for sponsoring States. Indeed, the very obligation to adopt specific laws, regulations, and administrative measures and to establish enforcement mechanisms for active supervision means that any formalistic approach is excluded. The characterization of the EIA obligation as a customary rule that covers activities undertaken in areas beyond national jurisdiction extends its application to States that are not Parties to the UNCLOS.

On a more general level, the prominent role that the general obligation to protect and preserve the marine environment plays in the Chamber's ruling deserves special emphasis. On the one hand, this obligation is considered by the Chamber as an integral feature of the general principle of the "common heritage of mankind". Normally, the emphasis on the *rights* of all States to have access to the resources of the deep seabed overshadows the fact that the concern for environmental protection has always been inherent to this notion.[64] The protection of the marine environment is characterized by the Chamber as a common value, to be taken into account for the proper application of the principle of the common heritage of mankind. As a result, the traditional approach based on the general principle of prevention of transboundary pollution is replaced by the consideration of the protection of the marine environment as a community interest, which has in the principle of the common heritage of mankind a specific source of *rights* and *duties* of all States. On the other hand, the Chamber does not explicitly acknowledge the supremacy of the obligation to protect and preserve the marine environment with respect to competing mining rights of sponsoring States. Nevertheless, the practical result of its reasoning is that potential conflicts between mining rights and the general obligation to protect and preserve the marine environment are to be solved by giving priority, at the interpretative level, to the

[63] Woodliffe 2002, p. 145. Positive evolutions are expected by three pending cases before the International Court of Justice: Construction of a Road in Costa Rica along the San Juan River (Nicaragua *v.* Costa Rica); Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); and Aerial Herbicide Spraying (Ecuador *v.* Colombia).

[64] See e.g. Declaration of Principles Governing the Seabed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, General Assembly Resolution 2749 (XXV) (17 December 1970), para 11. See also: Kiss 1982, Dupuy 1983, Mahmoudi 2000, Brunnée 2007, Warner 2009, Tanaka 2011.

values underlying this obligation. From this perspective, the Chamber's opinion could be considered as an authoritative precedent for the characterization of the obligation to protect and preserve the marine environment from large-scale interferences as a peremptory rule of international law.[65]

A number of questions on certain controversial issues remain unanswered; this enhances the role that the Authority is called upon to play in the aftermath of the Chamber's opinion. On the one hand, the Authority has primary responsibility in the adoption of appropriate rules, regulations. and procedures for the protection of the marine environment and the prevention of pollution from activities in the Area (UNCLOS, Articles 145 and 209). While the Mining Code is still under development,[66] the Authority should seriously take into account the urgent need for a comprehensive regime, based on a coordinated strategy "among sectoral bodies for improved integrated management and ecosystem approaches", as the Secretary-General of the United Nations[67] and academic writers[68] have invoked. On the other hand, a genuine adherence to the Chamber's ruling requires the Authority to effectively exercise its role of custodian of the common heritage of mankind, actively watching over the conduct of States Parties to the UNCLOS which are planning mining activities in the Area and their effective compliance with their international environmental obligations.

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[65] The peremptory character of certain norms of international environmental law is controversial; nevertheless, a positive development in this direction cannot be ruled out. See Orakhelashvili 2006, p. 65.

[66] See Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, Doc. ISBA/18/C/WP.1 (24 October 2011). On the efforts of the Authority to ensure a comprehensive regulatory framework for the protection of the marine environment see Scovazzi 2009, p. 349 ff.

[67] Oceans and the Law of the Sea. Report of the Secretary-General, Doc. A/66/70/Add.2 (29 August 2011), para 177.

[68] See e.g., Knox 2003, p. 660 ff.

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