International environmental obligations and liabilities in deep seabed mining

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7 International Environmental Liabilities of the Sponsoring State and the International Seabed Authority

1 Introduction

In Chapter 5, I have examined the issue of international environmental liability of the contractor, including the establishment, forms and content, and implementation of that liability. As will be shown below, the international environmental liability of the sponsoring State and of the ISA share many similarities with that of the contractor. For the sake of being concise, I will avoid lengthy parallel discussions; instead, analogies will be drawn with previous discussions whenever appropriate. The emphasis in this Chapter is on the special issues attached to the sponsoring State and to the ISA.

Section 2 discusses the international environmental liability of the sponsoring State. Considering that the SDC's clarification of this issue in the 2011 Advisory Opinion is deemed as an authoritative interpretation, the main task in this section is to comment on the SDC's 2011 Advisory Opinion, in particular, the SDC's response to the second question.[1] Section 3 examines the international environmental liability of the ISA. The emphasis there is on the liability of (member) States for acts of international organizations in the existing instruments.

2 International environmental liability of the sponsoring State – commentary notes on the Seabed Disputes Chamber's 2011 Advisory Opinion

2.1 Establishment of international environmental liability of the sponsoring State

2.1.1 Related provisions

Article 139 (2) prescribes the liability of the sponsoring State in both positive and negative ways. In a positive way, the first sentence of the article lays down the conditions for the establishment of liability as follows:

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1 The second question posed before the SDC is as follows: 'What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?'.

> Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability

In a negative way, the ensuing, second sentence describes those circumstances where a State is exempted from liability:

> A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

A more specific construction on the key phrase 'necessary and appropriate measures' can be found in Annex III, article 4(4), which reads:

> A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

A few preliminary remarks on these provisions: first, a sponsoring State cannot be exempt from liability by simply contending that it is not the operator. Second, on the other side, a sponsoring State will not be held liable simply because of the sponsorship or based on the mere fact that damage has occurred. Instead, three conditions for establishing liability can be identified from Article 139(2): (i) internationally wrongful act of the sponsoring State, (ii) environmental damage, and (iii) the causal link between the two.[2]

2.1.2 The condition of an internationally wrongful act of the sponsoring State

Article 2 of the 2001 ILC ASR prescribes two constituent elements of 'an internationally wrongful act' as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.[3]

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2 The SDC stated that: 'The wording of article 139, paragraph 2, of the Convention clearly establishes two conditions for liability to arise: the failure of the sponsoring State to carry out its responsibilities; and the occurrence of damage.' (ITLOS, Advisory Opinion of 1 February 2011 (case No. 17), para. 176). This statement failed to capture the third condition: the causal link between environmental damage and the internationally wrongful acts of the sponsoring State.

3 Article 2, the 2001 ASR.

This general rule can also apply to the sponsoring State in the context of DSM. Thus, for ascertaining the internationally wrongful act of the sponsoring State, the first constituent element is that there is 'a breach of an international obligation of the sponsoring State' and the second constituent element is that 'the act is attributed to the sponsoring State'. Here, the SDC emphasized that the sponsoring State is liable for the failure to carry out its own obligations rather than 'the failure of the sponsored contractor to meet its obligations'[4]. In a word, the sponsoring State is responsible for its own internationally wrongful act.

As Brownlie observed:

> In some cases, however, the conduct of private persons or groups, although not directly attributable, may indicate a failure by the State to perform adequately its own obligations of regulation, protection, or control. Here responsibility arises because of the State's own actions or omissions.[5]

For instance, the responsibility of host States in the context of the protection of aliens and their properties is just such an example. When aliens or their properties are injured or damaged by private persons, the conduct of private persons cannot be attributed to the host State, and the host State is not responsible in substitution for the private person who caused the injury or damage. On the contrary, the host State is responsible only if it fails to: provide adequate police protection, provide indiscriminate access to the judicial system, and fulfil other international obligations to protect aliens and their properties. In short, the host State is responsible for its own internationally wrongful act. Similarly, in the case of DSM, the conduct of the sponsored contractor cannot be attributed to the sponsoring State, and the sponsoring State is not liable in substitution for the sponsored contractor. On the contrary, the sponsoring State is liable only if it fails to fulfil its own international obligations.

To determine whether there is a breach of its obligations, clarification of the content of the primary obligations of the sponsoring State becomes the key question. As the SDC commented: 'whether a sponsoring State has carried out its responsibilities depends primarily on the requirements of the obligation which the sponsoring State is said to have breached.'[6] Thus, although in principle the responsibility or liability (as the second rule) can be examined independently from the obligations (as the primary rule), in practice, it is not possible to apply the responsibility or liability without

4 ITLOS, Advisory Opinion of 1 February 2011 (case No. 17), para. 172. The reason why the SDC made such an emphasis is because the failure to fulfil the international obligations of the sponsoring State is closely connected with the failure to fulfil the international obligations of the sponsored contractor. Thus, the liabilities of the sponsoring State and the sponsored contractor are easily mixed.

5 Ian Brownie, *System of Law of Nations (part I): State Responsibility* (OUP 1983), Chapter 8.

6 ITLOS, Advisory Opinion of 1 February 2011 (case No. 17), para. 177.

investigating the obligations. In this respect, reference is made to Chapter 3 of this research where I examined the general international environmental rules in IEL and analysed whether and how such general rules fit within the specific context of DSM. The SDC also clarified in particular the obligations of the sponsoring State. The SDC categorized the primary obligations of the sponsoring State into two groups: the obligations to ensure compliance of its sponsored contractor and direct obligations. As to the former category, they are obligations of conduct; the criterion for the determination of their fulfilment is 'all necessary and appropriate measures to secure effective compliance'. If the sponsoring State meets this criterion, it would be exempt from liability. The latter category, however, are obligations of result. For obligations of result, once established, there is no exemption from liability. Although taking different approaches, Chapter 3 of this research and the 2011 Advisory Opinion of the SDC are consistent in the interpretation of the international environmental obligations of the sponsoring State.

In sum, liability of the sponsoring State does not arise if a wrongful act of the sponsoring State cannot be identified under international law. Determination of an internationally wrongful act requires two elements: one is attribution of acts to the sponsoring State and the other is breach of primary obligations. And the answer to the question of whether there is a breach of obligations depends on the requirement of the primary obligations. This shows the connection between the primary rule of obligation and the secondary rule of responsibility or liability. It should be noted that, when ascertaining if an internationally wrongful act of the sponsoring State exists, the occurrence of damage is not related. Damage is a separate condition for establishing liability of the sponsoring State.

2.1.3 The conditions of environmental damage and the causal link

Environmental damage is the prerequisite condition and triggering element for the establishment of international environmental liabilities of any participants in DSM, including the sponsoring State. Just as the SDC observed: 'the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage.'[7] In addition, the condition of the causal link between the environmental damage and the internationally wrongful act of the sponsoring State can also be inferred from the phrase 'caused by' in Article 139(2) UNCLOS. Moreover, this causal link cannot be presumed but must be proven.[8]

As has been shown in Chapters 4 and 5, both the identification and the measure of the environmental damage and the proof of the causal link between the environmental damage and the wrongful act are difficult tasks.

7 ITLOS, Advisory Opinion of 1 February 2011 (case No. 17), para. 178.
8 Ibid., para. 182.

The analysis of these two conditions concerning the contractor in Chapters 5 and 8 applies equally to the sponsoring State. Yet, one more point should be made. In section 4.3 of Chapter 5, the causal link to be proven is between the environmental damage and the wrongful act of the contractor, while in this Chapter, it is the causal link between the environmental damage and the wrongful act of the sponsoring State. However, unlike the contractor who is in direct control of the operation of DSM activities, the relationship between the sponsoring State as the regulator and the environmental damage arising out of DSM activities is indirect. From both theoretical and practical perspectives, it is difficult to ascertain how much the failure to regulate on the part of the sponsoring State contributes to the occurrence of environmental damage caused by the DSM activity operated by the contractor. This difficulty together with the problem surrounding the measure of environmental damage makes the establishment of international environmental liability of the sponsoring State a very difficult, if not impossible, task.

In effect, the requirement of environmental damage not only makes the establishment of international environmental liability of the sponsoring State difficult, but also makes it different from the notion of State responsibility under the 2001 ILC ASR. The fundamental principle of State responsibility is that 'every internationally wrongful act of the State entails its international responsibility of that State'.[9] Since liability of the sponsoring State in DSM requires the occurrence of environmental damage, it departs here from the fundamental principle of State responsibility.

2.2 Differentiation of State liability *ex delicto* from State responsibility

2.2.1 Departure from the fundamental principle of State responsibility

When examining the element of damage, the SDC noted the difference between the liability of the sponsoring State in the context of DSM and the general rule of State responsibility as codified in the 2001 ASR. It observed that:

> […]the provision covers neither the situation in which the sponsoring State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the sponsoring State has met its obligations. This constitutes an exception to the customary law on liability since, as stated in the Rainbow Warrior Arbitration, and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.[10]

9 Article 1 of the 2001ILC ASR stipulates this principle which is regarded as reflecting customary international law.

10 ITLOS, Advisory Opinion of 1 February 2011 (case No. 17), para. 178.

It is noted that in his fourth report, the last Special Rapporteur appointed by the ILC on the topic of State responsibility Mr Crawford made it clear that:

> There seems to be general acceptance of the proposition that damage is not a necessary constituent of every breach of international law, and that articles 1 and 2 should not therefore include any specific reference to "damage". It will be a matter for the primary rule in question to determine what is the threshold for a violation.[11]

As has been demonstrated in Chapter 3 of this research, environmental damage is not a necessary constituent of breach of international environmental obligations of the sponsoring State. Thus, in comparison with State responsibility, the occurrence of environmental damage is an additional condition for establishing liability of the sponsoring State

However, the question is why an additional condition – the occurrence of environmental damage – is required for establishing international environmental liability of the sponsoring State. In effect, a similar question was raised during the period when the ILC was working on the topic of international liability, before it turned to civil liability in 1990. This question is connected to the debates over the distinction between the two terms of 'state liability *ex delicto*' and 'state responsibility'. Some contended that such a distinction between the two is unnecessary[12] because State liability *ex delicto* has been completely assimilated by State responsibility. Taking Boyle as the representative of the position, he expressed that 'to state in general terms that damage is a necessary element to liability while not to responsibility, although it may be true, misses the point'.[13] In his view, 'what is in issue is the particular obligation', and 'general propositions regarding the absence of harm or injury in the concept of State responsibility may therefore be unhelpful or misleading.'[14] He further used the 'no harm principle' introduced in the seminal case of *Trail Smelter* as the example which, in his opinion, was exactly 'a specific obligation whose content is defined in terms requiring harm and injury'.[15]

It is true that there are various types of international obligation with distinctive characteristics that have an effect on the conditions for determining their breach. In some cases, failure to adopt a certain course of conduct will be tantamount to a breach of the international obligation; while in other cases, it is the failure to achieve a particular result; still others require that the occurrence of a certain event is a necessary condition for constituting a

11 ILC, the fourth report of Mr Crawford, A/CN.4/517, 2001, paragraph 28.

12 A representative of this view can be found in Alan Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 ICLQ 1-26. Boyle rejected the distinction between State liability and State responsibility and argued against the conceptual viability of the topic of international liability.

13 Ibid., 16-17.

14 Ibid.

15 Ibid.

breach of the international obligation.[16] It is also true that whether 'damage' is a condition for meeting the threshold of a breach depends on the specific primary obligation. In effect, the reasoning of Boyle was in line with the ILC's on State responsibility and the SDC's in the 2011 Advisory Opinion. However, Boyle's interpretation of the 'no harm principle' in the area of IEL was contestable. Pursuant to his interpretation, 'damage' is a condition for meeting the threshold of the breach of obligation under the 'no harm rule'. In other words, the occurrence of damage is a condition to establishing a wrongful act: no damage, no wrongful act. Akehurst was of a similar opinion with respect to the interpretation of the no harm rule. According to Akehurst, 'attaching liability *sine delicto* to the environment is a misunderstanding on the part of the Commission, since rules of international law concerning the environment are phrased in terms of duty not damage to the environment, from which it follows that any resulting liability for damage to the environment is liability *ex delicto* not *sine delicto*.'[17]

By implanting damage into the element of internationally wrongful act, both Boyle and Akehurst had the underlying understanding that obligations under the no harm principle are, by their nature, 'obligations of result'. The problem is, however, that that understanding is contrary to the established opinion of international judicial institutions, State practice subsequent to the *Trail Smelter* arbitral case, and the prevailing position in the scholarly literature. To date, the established understanding of the no harm principle can be exemplified by the statement below:

> […] a State can only breach the no harm principle if it fails to act with due diligence. This is the reason why some scholars refer to this principle as the principle of due diligence. […] Due diligence obligations can well be categorized as obligations of conduct, i.e. those primary obligations that require States to endeavor to reach the result set out in the obligation.[18]

The SDC took the same position in the 2011 Advisory Opinion.[19] Also, as can be seen from the analysis in Chapter 3 of this research, the obligations of States emanating from the no harm principle and the prevention principle are obligations of conduct. In short, the no harm principle only indicates the obligation to prevent the occurrence of damage, a breach of that obligation

16 The ILC once made an effort to categorize international primary obligations. For more information see the reports of the second Special Rapporteur on the topic of State responsibility Mr Ago: Article 20 (breach of an international obligation calling for the State to adopt a specific course of conduct) and Article 21 (breach of an international obligation requiring the State to achieve a particular result) in the sixth report, 1977. UN Doc. A/CN.4/302 and Add. 1, 2 & 3. Article 23 (breach of an international obligation to prevent a given event) in the seventh report, 1978. UN Document A/CN.4/307 and Add. 1 & 2 and Corr. 1 & 2.

17 M. Akehurst, 'International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law' (1985) 16 NYIL 3-16, 3.

18 Timo Koivurova, 'Due Diligence', MPEPIL (last updated in February 2010), para. 15.

19 ITLOS, Advisory Opinion of 1 February 2011 (case No. 17), para. 111.

is not necessarily connected with the occurrence of damage. Occasions do exist where breach of the obligation can be identified but environmental liability of the State does not arise for the reason that the trigger element – occurrence of environmental damage – is absent. In other words, environmental damage is always the required, more precisely the prerequisite, element of liability but not of responsibility. To sum up, the importance of 'environmental damage' in the international environmental liability regime must not be underestimated. State liability *ex delicto* constitutes a departure from the fundamental principle of State responsibility: while every internationally wrongful act entails State responsibility, not every internationally wrongful act entails State liability *ex delicto*. In this sense, State liability *ex delicto* cannot be completely assimilated by the general rule of State responsibility.

2.2.2 State liability *ex delicto* as a hybrid between State responsibility and liability and as a *lex specialis*

The ILC provided a new view on the nature of State liability *ex delicto* and its relationship with State responsibility in the study of the topic of international liability.[20] In the analysis of Article 8(3) of the Convention on the Regulation of Antarctic Mineral Resource Activities (the '1988 CRAMRA'),[21] the ILC wrote:

> This is a unique form of accountability of the sponsoring State, even though, theoretically, it arises from the failure to perform obligations. The difference between this form of accountability and 'responsibility' derives from the triggering element of accountability, and the consequences of accountability, both of which resemble 'liability' and not classical 'responsibility' doctrine. As for the triggering element, contrary to State responsibility, the failure to perform an obligation is insufficient, by itself, to entail responsibility. There should always be damage or injury, the *sine qua non* of a liability doctrine. As regards remedies, the normal ones of State responsibility, namely, cessation, restitution, satisfaction, do not arise in this case.[22]

It further indicated explicitly in the same document that 'this type of State accountability is a hybrid between State responsibility and liability.'[23] This observation captured the nature of State liability *ex delicto*.

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20 Secretariat of the ILC, Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, 1995, UN Doc. A/CN.4/471.

21 The text of Article 8 (3): Damage of the kind referred to in paragraph 2 above which would not have occurred or continued if the Sponsoring State had carried out its obligations under this Convention with respect to its Operator shall, in accordance with international law, entail liability of that Sponsoring State. Such liability shall be limited to that portion of liability not satisfied by the Operator or otherwise.

22 The 1995 Survey of the ILC, UN Doc. A/CN.4/471., para. 81.

23 Ibid. para. 161.

The ILC opined that the application of the general rules of State responsibility as codified in the 2001 ILC ASR can be excluded partially or entirely by special legal regimes; the 2001 ILC ASR operates in a residual way.[24] This is the endorsement of the principle of *lex specialis*, an approach to deal with 'conflict of rules'. Insofar as the international environmental liability of the sponsoring State in the context of DSM is concerned, being identified above as the State liability *ex delicto*, it departs from the fundamental principle of State responsibility. There exist 'conflict of rules'. According to Article 55 of the 2001 ILC ASR and the principle of *lex specialis*, the State liability *ex delicto* as prescribed in UNCLOS is a *lex specialis* to State responsibility, the application of State liability *ex delicto* excludes that of State responsibility where and to the extent the former departs from the latter. Yet, on issues about which UNCLOS is silent, such as invocation of State liability *ex delicto*, the 2001 ILC ASR could still be applicable. Thus, it is the author's opinion that State liability *ex delicto*, in nature, is a hybrid between State responsibility and liability, while from a structural perspective, should be seen as *lex specialis* to State responsibility.

In brief, although both in the sphere of secondary rules, State liability *ex delicto* still needs to be differentiated from State responsibility. First, State responsibility and State liability differ in the governing element. While 'internationally wrongful act' is the governing element for State responsibility, the governing element for State liability is 'the objective fact of harm having occurred'.[25] Second, State responsibility and liability have distinct concerns. Indeed, 'wrongful acts are the focus of State responsibility, whereas compensation for damage became the focus of international liability.'[26] For these reasons, this Chapter employs the term 'State liability' rather than 'State responsibility' when referring to the legal consequences for breach of the international environmental obligations of the sponsoring State.

Moreover, as the reflection on the ILC's work on international liability has shown, it was precisely because of the poor adaptability of State responsibility to the subject matter of environmental protection that the new topic of international liability was initiated. The liability regimes involve not only States but also operators, and there are close connections between State liability and the liability of the operator when it comes to prevention and remediation of environmental damage.

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24 Commentary to Article 55 of the 2001 ILC ASR, para. (2).

25 Francisco Orrego Vicuna, 'Responsibility and liability for environmental damage under international law: issues and trends', final report prepared for the Eighth Committee of the Institut De Droit International, 285.

26 ILC, Third report on subtopic prevention of transboundary damage from hazardous activities, 2000. UN Doc. A/CN.4/510, para. 27.

2.3 Connection between international environmental liabilities of the sponsoring State and of the contractor

The international DSM regime does not touch upon the relationship between liabilities of the sponsoring State and of its sponsored operator. Yet, the SDC explored this issue. The SDC's basic position was that 'both forms of liability exist in parallel'.[27] As to the question of whether the liability of the sponsoring State is residual or complementary to that of the sponsored operator, the SDC's answers can be found in several paragraphs. In paragraph 200, in a reference to Article 22, Annex III to the UNCLOS, the SDC observed:

> No reference is made in this provision to the liability of sponsoring States. It may therefore be deducted that the main liability for a wrongful act committed in the conduct of the contractor's operations or in the exercise of the Authority's powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State.

After assigning the primary places to the sponsored contractor and the ISA in the DSM liability regime, the SDC went deeper into two different scenarios. In paragraph 202, it opined: 'if the contractor has paid the actual amount of damage, there is no room for reparation by the sponsoring State.' In paragraphs 203 and 204, it expressed that:

> The situation becomes more complex if the contractor has not covered the damage fully. In the view of the Chamber, the liability regime established by article 139 of the Convention and in related instruments leaves no room for residual liability.

In short, the SDC pointed out correctly that, as far as the issue of establishment of liabilities is concerned, liability of the sponsoring State and liability of the sponsored contractor are independent from each other, they run in parallel. However, the SDC failed to elaborate fully on their connection. As has been examined carefully in the introductory Chapter and Chapter 5, civil liability (that is, liability imposed on the operator) and State liability are a two-track system deliberately designed for better compensation for the damaged environment. In some cases, a third track, such as the compensation fund, might be designed to fill in the gap left by the two tracks. Be it a two-track system or three-layer or multilayer system, all forms of liability are triggered by the same environmental damage, and have the common goal to provide remedies to the same damaged environment which include primarily restoration and secondarily complementary or compensatory

27 ITLOS, Advisory Opinion of 1 February 2011, paras. 201 and 204.

remediation.[28] Therefore, in my view, if both are established, liability of the sponsoring State and of the sponsored operator will be closely linked to each other. Putting it concretely, when it comes to distribution of the amount of payment, if the sponsoring State is obliged to pay, it will only pay the portion of damage which the contractor is unable to make whole. This idea was perfectly reflected in the second sentence of Article 8(3) of the CRAMRA: 'Such liability [i.e., liability of the sponsoring State] shall be limited to that portion of liability not satisfied by the Operator or otherwise'. The SDC touched upon that idea partially in paragraph 202; yet it stopped short of embracing it explicitly.

Another aspect of the connection between the international environmental liability of the sponsoring State and that of the sponsored contractor is whether the sponsoring State has residual liability *vis-à-vis* the primary liability of the sponsored contractor. In this respect, I agree with the SDC that under the current DSM legal regime there is no room for such residual liability. Here, a legal loophole on reparation of the damaged environment was discovered. As already pointed out by the SDC, 'situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139, paragraph 2, of the Convention'.[29] It continued, 'the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered'.[30] This subject has already been discussed in section 3 of Chapter 6.

2.4 Forms and content of liability: the full reparation principle for environmental damage

As to the forms and content of international environmental liability of the sponsoring State, again, the discussions of the same issues concerning the contractor in section 5 of Chapter 5 apply by analogy. The main ideas in section 5 of Chapter 5 were: (a) restoration should be the primary form of reparation; (b) the criterion for reparation is 'the actual amount of damage'; and (c) reparation is substantially dependent on the definition and measure of environmental damage discussed in Chapter 4. These same ideas are also valid for international environmental liability of the sponsoring State. Addi-

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28 While acknowledging that damage is a point of connection between both forms of liability, the SDC did not see it as a critical factor which had effect on the relationship between liability of the sponsoring State and liability of the sponsored contractor. See the two sentences in para. 201, which states: "there is only one point of connection, namely, that the liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor. But, in the view of the Chamber, this is merely a trigger mechanism." Apparently, the Chamber does not consider damage as the most fundamental basis for the liability regime. Nor does it consider the liability regime (including liability of the sponsoring State and liability of the sponsored contractor) as a whole.

29 ITLOS, Advisory Opinion of 1 February 2011, para. 205.

30 Ibid.

tionally, this section further considers: whether, and if so to what extent, the full reparation principle is applicable to the sponsoring State in the context of DSM?

The full reparation principle is a general principle of international law. The PCIJ elaborated on the meaning of the full reparation principle (*restituto in integrum*) in the *Factory at Chorzow* case as follows:

> The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[31]

The full reparation principle is one of the fundamental tenets in the general rule of State responsibility. It is described in Article 31 of the 2001 ASR:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

The full reparation principle was also endorsed by the IDI[32] and the UNCC[33] as well as the SDC in the 2011 Advisory Opinion. When commenting on the amount of compensation of the sponsoring State, the SDC enunciated that:

> The obligation for a State to provide for a full compensation or *restituto in integrum* is currently part of customary international law[34] and that the provisions concerning liability of the contractor for the actual amount of damage […] equally valid with regard to the liability of the sponsoring State.[35]

Apparently, the full reparation principle is widely accepted as the criterion for environmental compensation. The SDC considered the full reparation principle also applicable to international environmental liability of the sponsoring State.

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31 PCIJ, *Factory at Chorzow case (merits)(Germany/Poland)*, Judgment of 26 July 1927, Series A, No. 13, 1928, 47.

32 International Law Institute, Responsibility and Liability under International Law for Environmental Damage, Session of Strasbourg, 1997, Article 25: 'full reparation of environmental damage should not result in the assessment of excessive, exemplary or punitive damages'.

33 The fifth 'F4' report, 2005, para. 80. 'The overall criterion is always that of effective reparation for the wrongful act'. '[…]particular the principle that reparation must, as far as possible, wipe out all the consequences of the illegal act'.

34 ITLOS, Advisory Opinion of 1 February 2011, para. 193.

35 ITLOS, Advisory Opinion of 1 February 2011, para. 195.

However, the practical difficulties in applying the full reparation principle with regard to environmental damage[36] mark the limitations of the principle in the field of IEL and that the full reparation principle is not well adaptable to environmental liability regimes, in particular, the international environmental liabilities of the sponsoring State and of the ISA under discussion in this Chapter. This same argument was made and systematically explained by Hardman Reis in a monograph.[37] After an overview of compensation standards in international law, Hardman Reis closed the chapter by stating that:

> All the reports analysed seems to have difficulties in applying the existing criteria [full compensation and adequate compensation] with regard to environmental damages. It seems that none of these standards are capable of remediating environmental damages.[38]

Gray and Greafrath emphasized that the full reparation principle is an abstract norm of a high level of generality the specific contents of which are left to be determined by more concrete rules. As Gray stated:

> The basic principle of full reparation cannot be a practical guide to the assessment of damages, as can be seen from the fact that although all legal systems share this aim, their methods of assessment and the results arrived at vary considerably and also that full compensation must be given content by particular detailed rules: it has no single, logically determined, fixed meaning.[39]

Similarly, Greafrath stated that:

> In general it is recognized that the purpose of reparation is 'to wipe out all consequences of the wrongful act'. Scholars, however, agree that only a broad orientation is given by this formula. On the one hand, it would very rarely be possible to wipe out all consequences of a wrongful act – if simply for the reason that dead persons cannot be revived. On the other hand, however, it is not so easy to determine all the consequences that have to be covered by the duty to reparation.[40]

It is not problematic that the content of the full reparation principle is not yet determined. Yet, it would be problematic if the concrete rules with respect to the measure of damage were lacking. Unfortunately, that is the case for environmental liability regimes. The largest problem in environmental cases is that methods for assessing environmental damage are controversial and environmental damage cannot be measured with accuracy. Here, one might

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36 Again, attention should be drawn to the fact that I discuss in this research only the reparation of 'damage to the environment *per se*', while reparation of 'damage relating to death, personal injury or loss of property or economic value' is excluded.

37 Tarcisio Hardman Reis, *Compensation for Environmental Damages under International Law – The Role of the International Judge* (Wolters Kluwer 2011).

38 Ibid., 114.

39 Christine Gray, *Judicial Remedies in International Law* (Clarendon 1987) 7.

40 Bernard Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', (1984-II) 185 RdC 94.

ask: how can the full reparation principle be implemented if one does not even know what precisely the environmental damage is? Indeed, a failure to give a satisfactory answer to this question will reasonably lead to doubt about the adaptability of the full reparation principle to the environmental liability regime.

Considering that the SDC did not go into detailed discussion on the questions of how to define and assess environmental damage, it is not surprising that it failed to point out the mutual influences between the measure of environmental damage and the reparation. Suppose that the impracticality of the full reparation principle is agreed, what would be the alternative? An answer is by no means easy to give. For Hardman Reis who conducted in-depth research into this specific topic, he turned to analyse the relevance of equity elements in the establishment of fair compensation which in his opinion was more adaptable to environmental liability than the standard of full compensation. From there, he moved further to work out a framework of four elements for compensation for environmental damages.[41] In the end, he advocated for a case-by-case approach[42] and correspondingly appealed to subjectivity as a result of accepting the role played by international judges.[43] Taking into account the inherent difficulty in measuring environmental damage, Hardman Reis's proposal might be a better way out.

As to the forms of the reparation, Article 34 of the 2001 ILC ASR lists restitution, compensation and satisfaction. In the area of environment law, restoration of the damaged environment is the primary purpose of the reparation. Therefore, restitution is the preferred form of reparation, while compensation as a form might also be resorted to because restoration is not always feasible, as has been commented, 'it is the view of the Chamber that the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the status quo ante.'[44]

2.5 Invocation of liability of the sponsoring State: *locus standi*

2.5.1 The issue of invocation under the ILC's 2001 Articles on State Responsibility

Concerning the issue of invocation, there is no distinction made between the two concepts of State liability *sine delicto* and State responsibility. Thus, this section first draws on the ILC's 2001 ASR. The core question concerning

41 In the last part of the book, Hardman Reis makes once again clear: 'in the present study, it was defended that the criteria of full restitution commonly adopted in international law, is not properly adapted to environmental damages.' Tarcisio Hardman Reis, *Compensation for Environmental Damages under International Law – The Role of the International Judge* (Wolters Kluwer 2011) 157.

42 Tarcisio Hardman Reis, *Compensation for Environmental Damages under International Law – The Role of the International Judge* (Wolters Kluwer 2011) 158.

43 Please note the subtitle of the book: 'the role of the international judge'.

44 ITLOS, Advisory Opinion of 1 February 2011, para. 197.

the invocation of State responsibility is, from a substantive perspective, who has the right or legal interest and therefore is entitled to invoke State responsibility; this is, from a procedural perspective, the issue of *locus standi*.[45] The ILC's ASR presents two categories of subject who are entitled and have the *locus standi* to invoke State responsibility: the injured State and the State other than the injured State (also referred to as 'the non-injured state' or 'the third party'). Then how to define the scope of 'the injured State' and 'the State other than the injured State' on whom is conferred the right to invoke State responsibility?

The ILC prescribes three different situations under which a State can be regarded as the injured State in Article 42 as follows:

> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
> (a) that State individually; or
> (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
> (i) specifically affects that State; or
> (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

The first situation is stipulated in Article 42(a). It should be indicated here, however, that by the phrase 'the obligation breached is owed to a State individually' is meant the primary obligation is of a bilateral character; while the legal sources from which the obligation derives are not necessary in bilateral forms. For that reason, a State party to a multilateral treaty can claim against another party as long as a bilateral legal relation exists between the party who makes the claim and the party who is alleged to breach the obligation. To illustrate this point: for instance, the Vienna Convention on Diplomatic Relations is a multilateral treaty. Yet, the obligation under Article 22 to protect the premises of a mission is owed to the sending State individually, this obligation is thus of a bilateral character.[46] This kind of multilateral treaties is considered as 'giving rise to bundles of bilateral relations'[47] or 'containing dyads of bilateral relationships'.[48] In the same vein, bilateral obligations can also be created in other legal forms, such as, unilateral commitment, judicial decisions and general or customary international law. Simply put, the key requirement to make use of Article 42(a) is that the primary obligation, whatever its sources, can be differentiated or individualized.[49]

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45 Under the 2001 ASR, invocation of State responsibility means 'taking measures of a relatively formal character'. Commentary to Article 42 of the ILC's 2001 ASR, para. (2).

46 Commentary to Article 42 of the 2001 ILC ASR, para. (8).

47 Ibid.

48 Jan Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conceptions', in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011).

49 Ibid.

By contrast, the two other situations as stipulated in Article 42(b)(i) and (ii) are totally different. Because under these two situations the legal relation under primary rules is between the State which has allegedly breached the obligation and a group of States or the international community as a whole. The primary obligation is not bilateral in its nature since it cannot be differentiated or individualized. In this sense, they are closer to the situations depicted in Article 48(1) as follows:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>   (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>   (b) the obligation breached is owed to the international community as a whole.

If the primary obligations described in Article 42(b) and Article 48(1) are not different – both are bilateral in their nature, then the question is why a State is regarded as the injured State in Article 42(b) but a third party in Article 48(1). In comparison with Article 48(1), Article 42(b) contains additional conditions, namely the State is 'specifically affected' by the breach of the obligation. This condition promotes a State as a third party to an injured State. However, Article 42 (b)(i) 'does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case.'[50] One condition in Article 42(b)(ii) is that 'the breach of the obligation is of such a character as it radically changes the position of all other States to which the obligation is owed with respect to the further performance of the obligation.' The subparagraph deals with a special category of obligations, the 'integral' or 'interdependent' obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed.[51] According to the ILC, interdependent obligations covered by Article 42(b)(ii) will usually arise under treaties establishing particular regimes.[52] In this case, every party to this type of the treaty is qualified as the injured State if the breach places the very existence of the regime under peril. Therefore, although the nature of the primary obligation does not differ between Articles 42(b) and 48(1), the effects of the breach of the primary obligations differ. It is this difference in the effect of the breach, namely the different new legal relation under the secondary rule, that distinguishes these two articles.

50 Commentary to Article 42 of the ILC's 2001 ASR, para. (12).
51 Commentary to Article 42 of the ILC's 2001 ASR, para. (13).
52 Commentary to Article 42 of the ILC's 2001 ASR, para. (15).

It is revealed from the analysis above that there are actually two criteria underlying the categorization of the situations stipulated in Articles 42 and 48. One criterion is the nature of the primary obligation, based on which the bilateral obligation involving individual interests (Article 42(a)) is distinguished from the multilateral obligation seeking to safeguard the collective interests (Article 42(b) and 48(1)). The other criterion is the nature of the legal relation under the secondary rule, based on which the situations where a State can be singled out as the injured State (Article 42) are separated from the situations where singling out a State with a special interest of its own is not possible (Article 48(1)). The first criterion plays a fundamental role in shaping the conceptualization process through which the invocation system is designed. Yet, with respect to the provisions, it seems the ILC employs only the second criterion which results in the usage of such a pair of binary notions as 'the injured State' (Article 42) and 'the State other than the injured State' (Article 48). As to the relationship between the two articles, the ILC states clearly that Article 48 complements the rule contained in Article 42.[53] Implicitly, the invocation by the injured State under Article 42 would prevail over that by the State other than the injured State under Article 48 if invocations under both articles were to occur simultaneously.

Indeed, it is generally acknowledged that the well-known obiter dictum of the 1970 *Barcelona Traction* case[54] ushered in a new era with respect to understanding the nature of obligations as well as invocation of State responsibility. Following this line, there is enormous amount of scholarly discussion about the concepts of '*obligations erga omnes*', 'multilateral obligations', 'international community', '*Jus Cogens*' and others which reflect community interests, as has been shown in Chapter 1. There are also cases before the ICJ where the 1970 *Barcelona Traction* case's obiter dictum was reaffirmed.[55] Within the ILC, there had been decades of fierce debates over the inclusion of invocation by a third party.[56] Ultimately, Articles 42 and 48 were included in the 2001 ASR. To some extent, these articles can be seen as the cumulative result of practice and scholarly efforts. 'The recognition that States may have a range of legal interests in the performance of obliga-

53 Commentary to Article 48 of the ILC's 2001 ASR, para. (1).

54 ICJ, *Case concerning The Barcelona Traction, Light and Power Co., Ltd (second phase) (Belgium v. Spain)*, Judgment of 5 February 1970, para. 33.

55 For instance: the *case concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, para. 29. ('In the Court's view, Portugal's assertion that the right of people to self-determination, as it evolved from the Charter and from UN practice, has an *erga omnes* character, is irreproachable.'); *the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (preliminary objection)*, Judgment of 11 July 1996, para. 31. ('It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.'); and *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the advisory opinion of 9 July 2004, para. 88.

56 Article 40 of the Draft Articles on State Responsibility (first reading), 1998.

tions where they are not the primary beneficiaries of those obligations is an important step forward.' [57]

Being aware that traditionally the entitlement to invoke State responsibility was vested only in the injured State,[58] it is not surprising that Article 48 appeared innovative. Admittedly, even though the key notions within Article 48 have already been discussed for decades, their conceptual meaning are still not entirely settled.[59] Moreover, when Article 48 is implemented, it will encounter many theoretical as well as practical problems.[60] In the following section, however, I will not join those discussions in a general sense, but will try to raise the problems and the attempted answers with regard to application of Article 42 and particularly Article 48 in the context of DSM.

57 James Crawford, 'Responsibility to the International Community as a Whole' (2001) 8(2) Ind. J. Global Legal Stud 319.

58 Jonathan Charney, 'Third State Remedies in International Law' (1989) 10 Mich. J. Int'l L. 57-101.

59 For instance, who will and how to identify obligations *erga omnes*? To whom exactly are obligations *erga omnes* owed to? In Crawford's words, that is, what is lurking behind the Latin phrase 'erga omnes'?

60 First, are there accompanied procedures through which claims for the protection of common interest can be made? If not, should procedures be designed, and if so, how? (The backwardness of the procedural aspect with respect to obligations *erga omnes* is highlighted by Rosenne in his article of 'Some Reflections *Erga Omnes*', in Antony Anghie, and Garry Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer 1998). In that article, Rosenne analysed the practice of the ICJ and found that 'the fact is that the traditional bilateralism of the Court's contentious procedure, which is linked to the equally traditional consensual basis of its jurisdiction to determine contentious cases, has led the Court to fall behind – far behind – the fast developing substantive rules of modern international law faced with a multitude of planetary problems.' (p. 512.) He also observed that 'in current international treaty practice as well as in the drafting of declarations of obvious *erga omnes* impact, there is a sharp dichotomy between the enunciation of rules of law in *erga omnes* form, and the employment of procedural, and especially judicial, remedies for disputes arising out of the treaty.' (p. 518.) In the end, he contended that 'the question therefore arises whether international litigation procedures and especially those of the International Court itself, are keeping pace with these developments. Does the present form of the bilateralism of the Court's procedure stand up to the present-day requirements?' He summarized that 'the thrust of Judge Weeramantry's opinions is to highlight that tension between the abstract statement of the law in black letter text and the procedural backwardness.' (p. 520.) Secondly, what to do if there are concurrent invocations? Thirdly, what are the limitations of Article 48? Is obligation *erga omnes* owed to the international community as a whole, including not only all States but also all individuals and entities? Are those non-State actors also entitled to invoke State responsibility for breach of obligations *erga omnes*? If so, how to accommodate this into the existing inter-State international law system? Or to think reversely, should international law be developed in order to catch up with the new international reality/ideal? There are still continuing discussions over these questions.

2.5.2 Invocation of liability of the sponsoring State in the context of deep seabed mining

The core question in this subsection is that of *locus standi*, namely who is entitled to invoke liability of the sponsoring State. This question constitutes a procedural barrier which needs to be overcome before a case can go into the merits phase if invocation of liability is made before a judicial body. In the absence of an answer in the UNCLOS, it is suggested that States Parties to the UNCLOS and the ISA have standing, with the ISA being the better choice.

A Invocation by States

Following the approach adopted by the ILC's 2001 ASR, the liability of the sponsoring State could be invoked by an injured State or a State other than an injured State. The application of Article 42 of the 2001 ASR in the context of DSM is relatively easy: any State the rights and legitimate interests of which are specifically affected by the internationally wrongful acts of the sponsoring State is certainly entitled to invoke liability of the sponsoring State. Since the Area and its resources are declared as the common heritage of mankind,[61] and States are considered as having common interests in the use of resources in the Area and the protection of the marine environment, a non-injured State could also invoke liability of the sponsoring State via application of Article 48 of the 2001 ILC ASR. Under this article, a State Party to a treaty can invoke liability of another State Party for protecting the common interest under the convention and, any States (including non-States Parties) can invoke liability of a State Party if it is for the protection of the common interests of the international community as a whole. Both means of invocation are possible in the context of the DSM regime.

However, invocation by a State Party to the UNCLOS is more practical because the dispute settlement mechanism under the UNCLOS is available for States Parties only. Article 187(a) of the UNCLOS prescribes that the SDC has jurisdiction over 'disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto'. Moreover, Article 188(1) states that:

> Disputes between States Parties referred to in Article 187, subparagraph (a), may be submitted:
> (a) at the request of the parties to the dispute, to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17; or
> (b) at the request of any party to the dispute, to an ad hoc chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, article 36.

61 Article 136, UNCLOS.

Invocation by a non-State Party will encounter a practical problem, namely the lack of a compulsory judicial mechanism. The International Court of Justice could have jurisdiction under Art. 36(2) of the Statute of the International Court of Justice. However, such a mechanism is still preconditioned on the consent of the States. Therefore, it is suggested that liability of the sponsoring State be invoked by States Parties to the UNCLOS.

Despite the availability of judicial dispute settlement mechanisms, there are problems with the invocation of liability of the sponsoring State by States Parties. Following Article 48(a) of the 2001 ASR, each individual State Party is entitled to invoke liability of the sponsoring State. This might have the following potential difficulties. The first potential difficulty is concurrent invocation. Since each State is entitled to invoke liability, theoretically, there might be a situation where two or more States invoke liability of the sponsoring State simultaneously. The coordination or synthesis of these claims may become problematic. The UNCLOS, however, has a solution. Article 32 of the ITLOS Statute prescribes the right to intervene in cases of interpretation or application as follows:

> 1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith. [...]
> 3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.

Through the procedural mechanism of intervention, the problem of concurrent invocation is solved. Second, however, some might worry that, although concurrent invocation is not problematic, recognition of the entitlement of each individual State to invoke liability of the sponsoring State might open the floodgates of international litigation against the sponsoring State, thereby significantly increasing the legal risk of sponsoring DSM activities. Third, and conversely, others might argue that empowerment of everyone is tantamount to empowerment of no-one because of the classic free rider problem. To illustrate, a key example can be found in the area of international human rights protection. Although established as an enforcement mechanism in almost all human rights treaties, the interstate complaint mechanisms are rarely used in reality. One might argue that what makes States reluctant to accuse other States of breaching their human right obligations will also make States reluctant to invoke liability of the sponsoring State for breaching its international obligations in the context of DSM. Lastly, one may also contend that invocation of liability of the sponsoring State by a State Party carries the risk of being politicized. For instance, a non-sponsoring State Party might use the entitlement to invoke liability of the sponsoring State as a weapon to check the right of the latter for the sake of its own economic interests rather than the common interests of mankind.

Although only hypothetical, the potential problems outlined above cannot be ruled out. It thus seems that invocation of liability by States Parties

is far from ideal. Accordingly, the ISA's role as a guardian of the common heritage of mankind is examined next.

B Invocation by the International Seabed Authority

The ISA is also entitled to invoke liability of the sponsoring State. There are two channels through which it may do so. The ISA can invoke liability of the sponsoring State through political channels. Article 162(2)(a) of the UNCLOS states that the Council is empowered to 'supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance'.

On the other hand, the ISA can invoke liability of the sponsoring State through the judicial channel. Article 162(2)(u) of the UNCLOS states that the Council shall 'institute proceedings on behalf of the Authority before the SDC in cases of non-compliance'. Moreover, a judicial dispute settlement mechanism is available. Pursuant to Article 187(b)(i) of the UNCLOS, the SDC has jurisdiction over:

> [D]isputes between a State Party and the Authority concerning acts or omissions of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith.

It is therefore undoubtable that, under the DSM legal regime, the ISA is entitled to invoke liability of the sponsoring State either through the political or judicial channel – there is a judicial dispute settlement mechanism available.

In comparison to invocation of liability by States Parties to the UNCLOS, the advantages of the invocation by the ISA are obvious. Namely, all of the potential problems analysed above concerning invocation by individual States can be avoided. Firstly, there will be no concurrent invocations. Secondly, the invocation cannot be omitted or deliberately avoided, that is, the ISA has to invoke the liability of the sponsoring State when non-compliance occurs, otherwise the liability of the ISA itself would arise. Thirdly, the invocation of liability would be less likely to be used as a weapon against the sponsoring States to further the economic interests of non-sponsoring States since the decision is made by the ISA as an organisation.

However, there is one drawback to the invocation of liability by the ISA. This drawback is related to the composition and decision-making procedure of the Council. According to section 3 of the annex to the 1994 Implementation Agreement, decisions of the Council are normally made on the consent of its members. Considering that most sponsoring States are members of the Council, this means that if the Council intends to invoke liability of a sponsoring State which is a member of the Council, the Council must obtain the consent of the sponsoring State itself. This procedural arrangement paralyses the functioning of the Council. The problem could be resolved

by amending or interpreting the decision-making procedure, for instance, by requiring the State whose liability is at issue not to participate in the decision-making procedure. Upon comparison, it seems that the advantages of invocation by the ISA prevail.

2.6 Conclusions

In this section, I examined the establishment, forms and content, and invocation of international environmental liability of the sponsoring State. I also identified international environmental liability of the sponsoring State as State liability *ex delict* which was argued to be distinct from the notion of State responsibility. Also, it is found that the connection between the international environmental liabilities of the sponsoring State and of the contractor lies in the fact that they face the same environmental damage and share the same aim of reparation for that damage.[62] The overall position of this section is that the ILC's 2001 ASR is not well adapted to the field of environmental protection; the notion of liability is preferable because it has environmental damage and compensation rather than internationally wrongful acts at its core. Liability suits the subject matter of environmental protection better. Thus, it is necessary to devote attention to the subtle differences between these two notions and to consider which parts of the ILC's 2001 ASR apply to the liability regime and which do not.

However, in giving its 2011 Advisory Opinion, the SDC completely followed the line of State responsibility as described in the ILC's 2001 ASR; it failed to give attention to the particularity of the liability regime in the field of environmental protection. This constitutes the main defect of the 2011 Advisory Opinion of the SDC. Such defect includes three aspects. As regards establishment of liability of the sponsoring State, the SDC did not explain the departure of the liability regimes in the context of DSM from the fundamental principle of State responsibility, namely 'every internationally wrongful act of State entails State responsibility'. As regards reparation, the SDC did not give due attention to the practical difficulties in applying the full reparation principle with respect to environmental damage. This is related to the greatest flaw, which is the SDC did not take up the difficult task of defining and measuring damage to the marine environment which,

62 A similar statement can be made with regard to the connection between environmental liabilities of the contractor and the ISA. Plakokefalos regards these liabilities as 'shared responsibility' which 'refers to the instances where a multiplicity of actors contributes to a single harmful outcome'. See Ilias Plakokokefalos, 'The Practice of Shared Responsibility in relation to Environmental Protection of the Deep Seabed' SHARES Research Paper 94 (2016). The conceptual clarification of the term 'shared responsibility' can be found in Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International law: A Conceptual Framework' (2013) 34(2) MIJIL 359-438. This research follows the conceptual frameworks concerning 'state responsibility' and 'international liability' of the ILC in general.

however, constitutes the core of both establishing international environmental liability and reparation.[63]

With respect to the invocation of liability of the sponsoring State, it is argued that owing to the silence of the UNCLOS, the related part of the ILC's 2001 ASR is applicable. Following the ILC's approach in the 2001 ASR, international environmental liability of the sponsoring State could be invoked by injured States or third parties. However, in the specific context of DSM, apart from States, the ISA serves as the guardian of the marine environment and is thus entitled to invoke international environmental liability of the sponsoring State. Moreover, in comparison with the invocation of States and the ISA, the invocation of the ISA is a preferable choice because, as a centralized international organization, the ISA is not motivated by individual interests and thus can safeguard the community interest through the implementation of liability of the sponsoring State better.

3 International environmental liability of the International Seabed Authority

3.1 Establishment and content of international environmental liability of the ISA

Article 22, Annex III to the UNCLOS prescribes that:

> The Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage.

Thus, three constituent elements need to be met to establish international environmental liability of the ISA: internationally wrongful acts of the ISA, environmental damage and the causal link between the two. This is the same as establishing international environmental liability of the contractor and sponsoring State. As to the forms and content of liability, again it is the same as for the contractor and sponsoring State. The primary form is restoration, namely to restore the overall functioning of marine ecosystems.

63 As it is expressed in the context of the CBD: 'establishing the damage to biodiversity as a result of an incident is a fundamental step in applying liability and redress rules. The determination would provide the basis to establish the extent of actual restoration needed, any additional complementary and compensatory measures, then, their cost and, ultimately, who will be liable for them.' (para. 5) 'A clear definition of damage to biodiversity would be central to the application of any liability and redress rules.' (para. 7) See 'liability and redress in the context of paragraph 2 of article 14 of the convention on biological diversity: synthesis report on technical information relating to damage to biological diversity and approaches to valuation and restoration of damage to biological diversity, as well as information on national/domestic measures and experiences', 20 March 2008, UNEP/CBD/COP/9/20/Add.1

If restoration is not possible or if there is interim loss, then compensation is required. The content for liability is 'the actual amount of damage'. Thus, any discussions concerning the conditions for the establishment, forms, and content of international environmental liabilities of the contractor and the sponsoring State would apply *mutatis mutandis* to the ISA. However, the issue of liability of the ISA as an international organization raises a special question: whether and, if so, in what situations member states will be held liable for the ISA.

3.2 Liability of member States for the acts of international organizations

3.2.1 Account of the general rule

Since the DSM legal regime is silent on the issue of liability of member states for the acts of the ISA,[64] to answer the question raised above, reference must be made to other relevant instruments. Ann examination is made below of the following three instruments: the 1995 resolution on 'the legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties' by the Institute of International Law (the '1995 IDI Resolution'), the 2004 resolution on the 'accountability of international organizations' by the International Law Association (the '2004 ILA Resolution'), and the 2011 Articles on the Responsibility of International Organizations of the ILC (the '2011 ARIO').[65]

64 However, it is written in Article 3, Annex IV to the UNCLOS that: 'without prejudice to article 11, paragraph 3, of this Annex, no member of the Authority shall be liable by reason only of its membership for the acts or obligations of the Enterprise.' From this article, it might infer that the drafter of the UNCLOS would take the same position that members of the ISA shall not be liable by reason only of its membership for the acts or obligations of the ISA as an administrative international organization.

65 The ILC's work on the codification and progressive development of the general rule of the responsibility of international organizations had lasted for about one decade (2002-2011). Subsequent to the close of the project on State responsibility in 2001, the ILC launched the project on responsibility of international organizations. Mr Gaja was appointed as the Special Rapporteur in 2002. From 2003 to 2009, for a consecutive seven years, Mr Gaja submitted seven reports, one each year. In 2009, the first reading of the draft articles was completed. Following the consideration of the comments and observations received from governments and international organizations, the second reading of the draft articles was finished in 2011. In the same year, the final draft article was adopted by the General Assembly of the UN by Resolution 100. See: ILC, Draft Articles on the Responsibility of International Organizations, with Commentaries, Yearbook of the International Law Commission, 2011, Vol. II, Part Two; And UN General Assembly Resolution, UN Doc. A/RES/66/100. Despite challenges to the desirability or feasibility and the approach adopted by the ILC, discussions on the topic of responsibility or liability of international organizations among researchers have been very much revolving around the work of the ILC.

A The 'no liability of member States rule'

There is a consensus that an international organization possessing international legal personality is responsible for breach of its obligations.[66] However, the answer to the question of whether member States of an international organization are liable for the acts of the organization is not consistent.[67] In Amerasinghe's opinion, different answers to the question can derive from the different interpretations of the implication of the international legal personality of the organization. As he observed when commenting on the *International Tin Council* cases before English courts:

> From a conceptual standpoint, it becomes important to establish what the nature of the juridical personality of an international organization basically involves in regard to liability; that is, whether, in the absence of any positive indications in the constituent instrument, there is a presumption flowing from the concept of international judicial personality that members of an organization assume concurrent or secondary liability for its obligations, or whether their liability in this respect is limited.[68]

Nonetheless, there emerged a prevailing opinion: member States shall not be liable by reason only of their membership for acts of the international organization. Such an opinion is reflected in Article 6 of the 1995 IDI Resolution:

> Save as specified in Article 5, there is no general rule of international law whereby states members are, due solely to their membership, liable concurrently or subsidiarily for the obligations of an international organization of which they are members.

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66 See the advisory opinion of the ICJ that 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'. (ICJ, *interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (advisory opinion), 1980*, para. 37); See Article 3 of the 1995 IDI Resolution: 'an international organization within the meaning of Article 1 [an international organization possessing an international legal personality distinct from that of its members] is liable for its own obligations towards third parties'; See the statements that 'inasmuch as responsibility is, in any legal system, the corollary of legal personality, a breach of an obligation entails a number of consequences which form the very content of responsibility'. (Alain Pellet, 'International Organizations Are Definitely Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 42); and see also the statements that 'as an independent subject, the international organization has to bear the responsibility and liability for its own actions'. (Matthias Hartwig, 'Responsibility and Liability of International Organizations or Institutions', MPEPIL (last updated in May 2011), para. 11.)

67 Amerasinghe examined the opinions of Adam, Seidl-Hohenveldern, Schermers, Mann and Shihata on the topic of responsibility of member states for the acts of the organization and concluded that there was 'evidently serious disagreement' among them. See C. F. Amerasinghe, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent' (1991) 85(2) AJIL 259-280.

68 Ibid, 276.

The same opinion is expressed by the ILC in the 2011 ARIO: 'membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.'[69] It is also the mainstream opinion demonstrated in the literature. For instance, Hartwig contended:

> Responsibility of the member States for the acts of the international organization based on their membership cannot be established under international law. The introduction of such a responsibility for membership, be it joint and several, concurrent, subsidiary, or whatever, would run counter to the idea of inter-State co-operation through independent international organizations, because to the extent to which the member States will be held liable for the actions of the international organization they will try to keep them under control.[70]

For Hartwig, the purpose of preserving the autonomy of the organization serves as the reason to argue against the responsibility of member States for the acts of the organization. That very same reason also underpinned the statement of Blokker who took a clear position that: 'denying or restricting *responsabilité distincte* can in the end sacrifice the *volonté distincte* which is sought.'[71]

Apparently, a high value is placed on the autonomy of the international organization: international legal personality of the organization serves as a firewall which excludes member States from assuming responsibility of the organization. Under this understanding, a prevailing opinion arises that

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69 Commentary to Article 62, the 2011 ARIO. Gaja explains briefly that 'Article 62 is based on the idea that, given the separate legal personality of the organization, responsibility does not as a rule fall on its members. There are two exceptions which do not contradict this principle.' (Giorgio Gaja, 'Articles on Responsibility of International Organizations' UN Audiovisual Library of International Law, New York, 9 December 2011, para. 12. Available at: <http://legal.un.org/avl/ha/ario/ario.html>). The text of article 62 is dedicated to the two cases where member States are responsible for the acts of international organizations; the commentary to the article, however, mainly elaborates the rule that member States are in principle not responsible for the acts of international organizations. Disapproving the approach of the ILC ('Consistently with the approach generally taken by the present draft articles as well as by the ARS, article 62 positively identities those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. While it would be thus inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which responsibility is not considered to arise for a State in connection with the act of an IO, such a rule is clearly implied.'), the author agrees with Amerasinghe that 'article 62 should be framed differently. It should be made clear initially that in general the rule is that member States are not *per se* responsible for the unlawful acts of an organization which has international personality. Exceptionally, responsibility may arise, as stated in Article 62 (1) (a) and (b).' (C. F. Amerasinghe, 'Comments on the ILC's Draft Articles on the Responsibility of International Organizations' (2012) 9 IOLR 29-31, 30).

70 Matthias Hartwig, 'Responsibility and Liability of International Organizations or Institutions', MPEPIL (last updated in May 2011), para. 32.

71 Niels Blokker, 'International Organizations and Their Members: "International Organizations Belongs To All Members and To None" – Variations on a Theme' (2004) 1 IOLR 139-161, 161.

member States are not in principle liable for acts of international organizations.[72] This prevailing opinion is entitled the 'no liability of member states rule' in this section.

B Situations where member States are responsible for the acts of international organizations

However, the 'no liability of member states rule' is not absolute; there are situations in which responsibility or liability is attributed, jointly or subsidiarily, to member States, albeit the conduct in itself is attributed to the organization.[73] In this respect, reference can, in the first place, be made to Part V (Articles 58 to 63) of the 2011 ARIO. Articles 58, 59 and 60 are modelled on the ILC's 2001 ARS, describing those respective situations where a State aids or assists, directs or controls and coerces an international organization in the latter's commission of an internationally wrongful act.[74] In these situations, responsibility is attributed to the State provided that certain conditions are met. Here, the State involved is not restricted only to the member State of the organization. In contrast, Articles 61 and 62 deal only with member States.[75] Article 62 stipulates two general exceptions to the 'no liability of member states rule'. In accordance with paragraph 1(a), a State may be held directly responsible for the conduct of the organization if 'it has accepted the responsibility towards the injured party'. This situation of the responsibility of member States is, as the ILC puts it, the least controversial.

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72 The opposite view of course exists. For instance, Yee strongly argued for a concurrent or joint and several responsibility regime, his opinion remained unchanged before and after the adoption of the 2011 ARIO. Please see: Sienho Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership', in Maurizio Ragazzi (ed.), *International Responsibility Today – Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005); Sienho Yee, 'Member Responsibility and the ILC Articles on the Responsibility of International Organizations: Some Observations', in Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013).

73 Please note of the distinction between two terms in this section: 'attribution of act' and 'attribution of responsibility'. 'Attribution of act' is used in the similar manner as Part II of the 2001 ILC ARS; it means 'the process by which international law establishes whether the conduct of a natural person or other intermediary can be considered as an "act of the organization"' (James Crawford, *State Responsibility* (CUP 2013) 113). While 'attribution of responsibility' is used for the purpose of accommodating the situations where ancillary and secondary responsibility are involved. See Yifeng Chen, 'Attribution, Causation and Responsibility of International Organization', in Dan Sarooshi (ed.), *Remedies and Responsibility for the Actions of International Organizations* (Martinus Nijhoff 2014); See also Jean D'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 IOLR 91-119.

74 Articles 58, 59 and 60 of the 2011 ARIO correspond respectively to Articles 16, 17 and 18 of the 2001 ARS.

75 Commentary to Part V of the 2011 ILC ARIO, para. 4.

In a similar vein, to protect the reasonable interests of reliance on the third party, paragraph 1(b) prescribes that a member State shall be responsible if 'it has led the injured party to rely on its responsibility'. Article 61, however, prescribes a situation strikingly different from those in Articles 58, 59, 60 and 62. It stipulates:

> 1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.
> 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

This is a novel provision which cannot find a parallel in the ILC's 2001 ASR. It is analogous to the 'piercing the corporate veil' rule in company laws of most domestic legal systems; for this reason, Article 61 is regarded as the 'piercing the organizational veil' provision. How, then, does the 'piercing the organizational veil' situation differ from the situations described in the other four articles? In the first place, under Articles 58, 59, 60 and 62, States are held responsible for the organization only if the act of the organization is internationally wrongful. That is, internationally wrongful act on the part of the organization is the precondition for the attribution of responsibility to States. In those situations, State responsibility is always concurrent with the responsibility of the organization. However, under Article 61, the act is not necessarily an internationally wrongful act for the organization. The responsibility of the State can occur without the responsibility or liability on the part of the organization. In fact, it is more likely that the act is not internationally wrongful for the organization but would be internationally wrongful if it is committed by the State. In other words, the State deliberately seeks acts of the organization with an intention to avoid potential State responsibility; 'the existence of an intention to avoid compliance is implied in the use of the term "circumvention"'.[76] This reveals the second difference between Article 61 and the other articles. A subjective element is required in the establishment of responsibility of the member State under Article 61; this is not only in contrast to Articles 58, 59, 60 and 62, but also departs from the overall attempt to build an objective system of secondary rules in the 2011 ARIO. Thirdly, under Articles 58, 59, 60 and 62, international legal personality of the organization is respected. However, under Article 61, the independent legal personality of the organization is denied.

In sum, Part V of the 2011 ARIO constitutes an important attempt to codify or progressively develop comprehensive rules with regard to responsibility of a State in connection with the acts of an international organization. The situations described in Articles 58, 59 and 60 are those

76 Commentary to Article 61 of the 2011 ARIO, para. 2.

where injuries caused concomitantly by the international organization and the State; the nature of the responsibility of the State can be either concurrent or subsidiary. The situations in Article 62 are prescribed in light of the general principle of international law; the nature of the responsibility of member States is subsidiary.[77] And the situation in Article 61 concerns the responsibility of the member State, irrespective of the responsibility on the part of the organization. Yet, it creates new issues of the extent to which the international legal personality of the organization should be denied.[78]

In the second place, Article 5 of the 1995 IDI Resolution is also relevant. Firstly, it prescribes that the rules adopted by the organization provide the legal basis for the liability of the member States and, in particular circumstances, a relevant general principle of international law can also be the legal basis.[79] Secondly, it also endorses the situation of the acceptance of liability by member States as depicted in Article 62, paragraph 1(a), of the 2011 ARIO as an exception to the 'no liability of member states rule'.[80] Lastly, it includes the situation that 'the international organization has acted as the agent of the State, in law or in act' as another exception for a member State's liability to third parties.[81] The inclusion of the last situation mentioned above raises a question of how the different power-conferring relationship between member States and the organization and its exercise in practice affect the distribution of responsibility between member States and the organization. In this respect, Sarooshi pointed out that

> States confer powers on international organizations to allow them to achieve specified objectives. However when considering issues of responsibility, there needs to be careful consideration given to the nature of the specific relationship between a state and an international organization since they vary greatly in practice.[82]

77 Article 62(2), the 2011ARIO.

78 Criticism of an earlier draft of Article 61 can be found, for instance, in D'Aspremont's comment. He contends that 'draft article 28 is unsatisfactory' because it 'only embodies situations of the *provision of competence* to the organization with the aim of circumventing international obligations binding the member states' but 'fails to embody cases where member states abuse the legal personality of the international organization *at the decision-making level* when exerting overwhelming control over the decision-making process of the organization'. Jean D'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 IOLR 91-119.

79 Article 5, paragraphs (a) and (b) of the 1995 IDI Resolution.

80 Article 5, paragraph (c) (i) of the 1995 IDI Resolution.

81 Article 5, paragraph (c) (ii) of the 1995 IDI Resolution.

82 Dan Sarooshi, 'International Organizations: Personality, Immunities and Responsibility', in Dan Sarooshi (ed), *Remedies and Responsibility for the Actions of International Organizations* (Martinus Nijhoff 2014) 20. He subdivided the power-conferring relationship into 'agency relationship, 'delegation of powers' and 'transfer of powers' and analysed the distribution of responsibility in each scenario.

It is therefore appropriate to indicate that it might not be sufficient to argue for an exclusive responsibility of the organization based solely on the concept of international legal personality of the organization; specific circumstances like the power-conferring relationship and its exercise in practice in each case should be taken into account in the analysis of the responsibility of the organization and its member States.

In the third place, apart from Part V of the 2011 ARIO and Article 5 of the 1995 IDI Resolution which depict exceptions to the 'no liability of member states rule', there is still another situation in which a member State is held liable for the acts of the organization. This opinion is based on the practical reason of, in particular, the limited capacities of organizations to make reparation. For instance, Pellet observed that 'for practical reasons, it seems indispensable to pierce through the "organizational veil", if the principle of full reparation is to be respected.'[83] Looking through the same lens, Martín argues that 'the eventual subsidiary responsibility of member States would exclusively arise under its membership condition'.[84] This opinion, however, is inconsistent with the position of the ILC. Being fully aware of the limited capacities of international organizations to make reparation,[85] Article 40 of the 2011 ARIO imposes a duty on member States to ensure the fulfilment of the obligation to make reparation by the organization, which states:

> 1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.
> 2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

As to the nature of the obligation of member States under Article 40, the ILC explains in the Commentary that '[Article 40] does not envisage any further instance in which states […] would be held internationally responsible for the act of the organization of which they are members.'[86] It further clarifies that 'member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.'[87] Therefore, although taking notice of the same problem (the inadequacy in the

83 Alain Pellet, 'International Organizations Are Definitely Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 50.

84 José Manuel Cortés Martin, 'The Responsibility of Members Due to Wrongful Acts of International Organizations' (2013) 12 CJIL 679-721.

85 Commentary to Article 31 of the 2011 ARIO, para. (4). 'It may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense.'

86 Commentary to Article 40 of the 2011 ARIO, para. (1).

87 Commentary to Article 62 of the 2011 ARIO, para. (7).

financial capacity of the organization to make reparation), the ILC resorts to a different solution. While Pellet and Martín proposed to hold member States responsible towards the third parties directly, the ILC imposes an obligation on members to finance the organization which as an internal matter is opposable only to the organization, but not the third parties. This obligation of member States, in the view of the ILC, finds its legal basis in the rules adopted by the organization. And if the organization does not adopt such rules as found in Article 40 of the 2011 ARIO, the obligation of member States to finance the organization can derive from the general principle of cooperation.[88]

There might be criticism of the approach adopted by the ILC in Article 40. Prominently, the ILC's approach fails to take adequate consideration of the effective remedies of third parties. Following the approach of the ILC, the remedies of third parties depend solely on the fulfilment of the obligation of reparation by the organization,[89] while the latter in return must rely on the fulfilment of the financial obligation by its member States. Here, the problem consists in the fact that 'the organizations lack effective means for ensuring the enforcement of the obligation of members to contribute to the expenses, including the expenses arising from its responsibility vis-à-vis an injured state.'[90] It therefore puts the remedies of third parties in an uncertain situation. In addition, if one takes into account the lack of remedy mechanisms towards international organization at both international and national levels, that uncertainty would increase. Taken together, it seems that the third parties would be left with little chance of effective remedies if claims cannot be made directly against member States. Certainly, it is the concern about the remedies of the third parties that gives rise to questioning not only the nature of the financial obligations of members, but more fundamentally, the overall approach of the ILC in dealing with the issue of distribution of liability between the organization and its member States.

Consideration of the remedies of the third parties is now confronted with that of the autonomy of the organization. While the latter points to an exclusive responsibility of the organization, the former is drawn in the direction of the responsibility of member States. Indeed, these two opposite considerations generate the tensions which are at the core of the issue of responsibility of international organizations, in particular, the distribution of responsibility between the organization and its member States. A balance between the two considerations needs to be struck. The IDI pointed out such tensions in its 1995 Resolution.[91] Likewise, the ILA reported that, 'the Committee considers it crucial that its proposals should maintain the

88 Commentary to Article 40 of the 2011 ARIO, para. (5).

89 Commentary to Article 40 of the 2011 ARIO, para. (3).

90 Paolo Palchetti, 'Exploring Alternative Routes: The Obligation of Members to Enable the Organization to Make Reparation', in Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 310.

91 Preamble, the 1995 IDI Resolution.

delicate balance between preserving the necessary autonomy in decision-making for the international organizations and treaty-organs and responding to the need, both in the sphere of international law and international relations, to have these actors accountable for their acts and omissions.'[92] Upon such an understanding, it is suggested in this Chapter that on the one hand, the 'no liability of member states rule' should be accepted as a general assumption which constitutes only the first step of a complex process of the enquiry into the responsibility or liability of the international organization. On the other hand, rebuttal of the assumption can be made based on various reasons and the interpretation of the exceptions to the rule should not be too strict.

3.2.2 Liability of members of the ISA for the acts of the ISA

Turning to the issue of the liability of members for the acts of the ISA in the context of DSM, nothing more can be added to the general rule identified above, nor is there any reason that calls for a departure from the general rule. This is because, first, the DSM legal regime is silent on this issue and second, no practice can be referred to. Indeed, the lack of practice poses an inherent limit to the interpretation of liability of the ISA in the context of DSM. In a broader context, the lack of practice is regarded by the ILC as a significant obstacle for codification and progressive development of a general rule with regard to the responsibility of international organizations, as it is said:

> One of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice.[93]

Nonetheless, since 1985 when the dissolution of the International Tin Council triggered several claims before English courts, the topic of the liability of international organizations has been increasingly familiarized. Until now, it can be said that 'the international organization shall be held liable for its wrongful acts' has become a widely accepted general rule. As a corollary, clarification or further development of the liability regime in a general or specific context is still needed. The question, however, is how that task can be carried out against the background of a scarcity of pertinent practice. Eagleton chose to compose hypothetical cases.[94] The ILC on the other hand

92 2004 ILA Resolution, 6.

93 Commentary to 2011 ARIO, general commentary, para. (5).

94 Back to 1950 when he gave lectures on the topic of 'International Organizations and the Law of Responsibility' at The Hague Academy, he stated that: 'as a matter of fact, no claims against it [e.g., the UN] under international public law have yet appeared. Discussion of the responsibility of the UN, then, must be entirely speculative; we must imagine possible situations in which the UN might do damage to other legal entities, and consider the consequences of such damage.' (Clyde Eagleton, 'International Organizations and the Law of Responsibility' (1950) 76 RdC 323-423, 386.)

resorted to an analogy strategy.[95] Certainly, both approaches can easily be subjected to criticism.[96] However, if the lack of practice is the undeniable fact and if the liability regime is deemed as desirable, how can the liability regime be developed in other ways except by using one's imagination or drawing an analogy to the well-established general rules on the responsibility of States?[97] In spite of the criticism of the work of the ILC, the analysis of liability of the ISA in this Chapter resorts to both its work approach and the product in dealing with the establishment of liability of the ISA. It is also proposed that the analysis of liability of the sponsoring State be applied to the ISA by analogy. In dealing with liability of member states for the acts of the ISA, it relies heavily on the content of the ILC's 2011 ARIO (Part V).

Lastly, it should be emphasized that when discussing liability of the ISA, the issue of liability of its member States for the acts of the ISA is inescapable. This is because, theoretically, the ISA is by nature a creature of Sates, albeit it operates independently, and realistically, the ISA is, after all, only a small, specialist international organization with about 37 professional staff members, and a two-year budget of about USD 14 million, but which,

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95 The reason for adopting an analogy approach was explained by the Special Rapporteur in his first report in 2002: 'it would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text.' (First report of Mr Gaja, UN Doc. A/CN.4/532, para. 11.) He explained further in the second report in 2003: 'the need for coherency in the Commission's work requires that a change, in respect of international organizations, in the approach and even the wording of what has been said with regard to States needs to find justification in difference concerning the relevant practice or objective distinctions in nature.' (Second report of Mr Gaja, UN Doc. A/CN.4/541, para. 5).

96 For Eagleton's approach, criticism might be that, in the first place, he was drawing the picture out of the blue. Besides, the defect of this approach also lies in the fact that one cannot anticipate all the possible scenarios for the incurrence of liability, therefore, the value of the exploration, if any, would be limited. For the ILC's approach, criticism is prevalent. For instance, Wouters and Odermatt argued that 'the flaw lies in the way the ILC used the ASR as its logical starting point'. (Jan Wouters and Jed Odermatt, 'Are all International Organizations Created Equal?' (2012) 9 IOLR 7-14.) In Aspremont's observation, the conceptual impairment inherited from the ASR has swollen in ARIO. (Jean D'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 IOLR 15-28.)

97 It should be noted, however, there is a fundamental challenge to the desirability or feasibility of the work of the ILC on the topic of international responsibility of the international organizations. See Gerhard Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks', in Ulrich Fastenrath el et (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011). See also Jan Wouters and Jed Odermatt, 'Are all International Organizations Created Equal?' (2012) 9 IOLR 7-14.

on the other hand, is entrusted with broad powers with regard to environmental protection. For these reasons, the relationship between the ISA and its member States should be checked in every specific case whenever the issue of liability arises.

3.3 Invocation of liability of the ISA

Article 187(e) of the UNCLOS expressly states that the SDC has jurisdiction over disputes concerning liability of the ISA. Moreover, contractors and any State Party to the UNCLOS are entitled to invoke liability of the ISA before the SDC. Yet, claims by States Parties and contractors have different legal bases. For the contractor, the legal basis is the contract; while for States Parties, it is the UNCLOS, the 1994 Implementation Agreement or the regulations issued by the ISA. Moreover, owing to the different legal relationships between the parties to a dispute, the content of the claims by a contractor or a State Party could also be different. A contractor is likely to invoke liability of the ISA for the reason that the ISA infringes its contractual rights under the contract. A State Party, on the other hand, might invoke liability of the ISA because it believes the ISA has failed to fulfil its regulatory powers or obligations.

However, since the SDC must refrain from reviewing the regulatory acts and the exercise of the discretionary powers of the ISA,[98] the judicial mechanism as depicted in Article 187 of the UNCLOS is of limited practical value. Alternatively, States Parties might also invoke liability of the ISA through its internal procedures. They might, for example, question the ISA during the annual sessions of the Assembly or Council of the ISA. This is a political way of addressing and perhaps settling disputes.

3.4 Conclusions

The author argues that the discussions concerning the conditions for the establishment, forms and content of the international environmental liabilities of the contractor and the sponsoring State can apply *mutatis mutandis* to the ISA. The main efforts in this section were put on a special issue of the liability of the international organization – liability of member States for the acts of international organizations. Through the analysis of the work of international law forums such as the IDI, the ILC and the ILA, it is shown that there exists a 'no liability of member states rule' which allows for exceptions in certain circumstances. It contends that the findings of the analysis can be applicable to the ISA in the context of DSM. One problem concerning the topic of responsibility or liability of the international organization in both general international law and the specific context of DSM is the inadequacy of practice. As to the procedural aspect of the issue of liabil-

98 Article 189, UNCLOS.

ity, it is found that the contractor and the States Parties to UNCLOS have the *locus standi* to invoke liability of the ISA before the SDC. Yet, it should be noted that the compulsory jurisdiction of the SDC is compromised by the consideration of the independent functioning of the ISA. Additionally, the liability of the ISA could also be addressed through a political way within the organization.