14. Mechanisms Available under the Law of the Sea to Speak on Behalf of Future Generations

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Abstract: *The protection and preservation of the marine environment, the conservation of marine living resources, and the sustainable exploration and exploitation of marine resources more generally are of significance for food security and for the survival and health of future generations. Thus, the marine environment and the marine resources, including the Area and its resources, are valuable assets for future generations, which can only be preserved if current generations take action in this respect. It is the purpose of this contribution to examine and draw attention to the typology of these actions and the tools and mechanisms through which future generations' interests can be voiced in the law of the sea context. These include: interpretation; accessible dispute settlement mechanisms for the resolution of disputes concerning the protection of the marine environment and the conservation of marine living resources; procedures for rendering advisory opinions; and the principle of 'Common Heritage of Mankind'.*

1. Introduction

The seas and oceans cover a vast majority of the Earth's surface and form part of the ecosystem balance. They play a critical role is maintaining its life-support systems, in moderating the climate, in sustaining animals and plants, including oxygen-producing phytoplankton.[1] They constitute the natural habitat of fish, which are an important source of protein and whose very survival and conservation are of essential significance for food security and, hence, have intergenerational repercussions. The submarine areas subjacent to the water column are rich in non-living resources of tremendous economic significance which are heavily exploited in areas within national jurisdiction. This exploitation also has intergenerational repercussions, given the risks to the marine environment in terms of its degradation and by implication for the marine ecosystem and biodiversity.

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1 Report of the World Commission on Environment and Development: Our Common Future, Annex to UN Doc A/42/427, 258.

The submarine areas also embody the area of the seabed, the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, which the United Nations Convention on the Law of the Sea (UNCLOS or 'Convention')[2], the constitution for the seas and oceans, denotes as 'the Area', and the resources of that area. Furthermore, objects of an archaeological and historical nature found in the Area are to be preserved or disposed of for the benefit of mankind as a whole.[3] In addition, the Area is a home to genetic organisms whose importance for human health and medicine is yet to be established.[4]

The Area and its resources were the only areas of the planet which at the time of the UNCLOS negotiations had not been appropriated for national use.[5] The manner in which the Convention has dealt with these areas has a direct bearing on the interests of future generations. It declares the Area and its resources to be the common heritage of mankind, thus essentially recognising future generations, an inalienable part of 'mankind' or rather 'humankind',[6] as beneficiaries of the Area. UNCLOS subjects the activities taking place in that area to the principle of 'Common Heritage of Mankind'[7], while imposing an obligation upon the States parties to the Convention ('States Parties') to develop the said common heritage for the benefit of mankind.[8] The Convention addresses the legal status of the Area and its resources and brings deep seabed mining activities under the con-

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

3 Art 149 UNCLOS.

4 These are not covered by the utilisation regime embodied in Part XI UNCLOS. However, the negotiations on an international legally binding instrument under the UNCLOS on the conservation and sustainable use marine biological diversity of areas beyond national jurisdiction (BBNJ) are ongoing. See: <https://www.un.org/bbnj/> accessed 7 July 2023.

5 The oceans, outer space and Antarctica are usually regarded as the 'global commons', although there is some controversy as to whether Antarctica should be treated as part of the international commons, given the fact that some States maintain territorial claims. See Report of the World Commission on Environment and Development (n 1) 275. Whereas outer space and Antarctica are addressed by other treaties, the UNCLOS is concerned solely with the oceans.

6 The Convention utilises the term 'mankind', unlike the UNESCO Declaration of the Responsibilities of the Present Generations Towards Future Generation, adopted by UNESCO's General Conference at its 29th Session, 21 October-12 November, 1997, Paris, France (29 C Resolution/ 44). However, the terms 'mankind' and 'humankind' (being considered a gender neutral term) will be used interchangeably in this paper.

7 Arts 136 and 150 UNCLOS.

8 Art 150 (i) UNCLOS.

trol of an international organisation – the International Seabed Authority ('the Authority'), which acts as a proxy of mankind and is designed to ensure that the utilisation of the Area and its resources benefit mankind. Thus, the Convention not only treats humankind, and by logical implication future generations, as an addressee of rights under treaty law – a novelty in international law – but it establishes an institution and mechanisms to ensure that these rights are protected. As a result, the principle of 'Common Heritage of Mankind' as enshrined in the Convention envisages institutional co-operation among States Parties through the Authority for the management and use of the common heritage of mankind in the interest of mankind which has no analogue in treaty law. It constitutes one of the most important achievements of the UNCLOS in the law of the sea context, enables the protection of the interests of future generations in the Area, and will be given special consideration in this paper.

Against this backdrop, the protection and preservation of the marine environment, the conservation of marine living resources and sustainable fisheries, and the sustainable exploration and exploitation of the marine resources more generally (including the resources of the Area with a view to the conservation of the marine biodiversity), are of significance for food security and for the survival and health of future generations. In other words, the marine environment and the marine resources, including the Area and its resources, are valuable assets for future generations, which can only be preserved if current generations take action in this respect. Thus, positive action taken by present generations with a view to preserving these assets is a means to safeguarding the interests, including vital interests, of future generations.

It is the purpose of this contribution to examine and draw attention to the typology of these actions, the channels through which these interests can be voiced in the law of the sea context, the subjects who can take action, given the importance of the seas and oceans, and the legal regime developed under the UNCLOS for future generations.[9]

9 The term 'future generations' for the purposes of the current paper denotes cohorts of not yet born, i.e. hypothetical individuals, as opposed to past and present generations, including young people. This approach is premised on the view that such an understanding of the notion of 'future generations' encourages long-term thinking and thinking about intergenerational equity and the distant future (as opposed to the near future), which is likely to induce a greater effort and proactive steps (including by way of progressive development of the law through interpretation) on the part of the present generations to address tough challenges of the present so as to secure the ability

The tools and mechanisms through which intergenerational considerations can be taken into account, and the protection of the marine environment and the conservation of the marine resources can be enhanced and secured, are perceived in this paper as an important means through which the interests of future generations can be voiced and protected. These include: interpretation; accessible dispute settlement mechanisms for the resolution of disputes concerning the protection of the marine environment and the conservation of marine living resources; procedures for rendering advisory opinions; and the principle of 'Common Heritage of Mankind'.

The selection of some of the above mechanisms is premised on the view that, *first*, interpretation by courts and tribunals is a means for bringing intergenerational considerations into the decision-making, i.e. into the understanding and the application of the existing law, and an avenue for the development of the law relating to the protection of the environment, the preservation and conservation of its components and the common heritage of mankind. *Second*, since judicial decisions and advisory opinions normally have an impact on States' conduct, judicial interpretations which take into account intergenerational considerations and the latest developments in environmental law are logically likely to influence States' behaviour with a view to improving the performance of their obligations related to the environment and the conservation of living resources. As a result, interpretation, given in authoritative pronouncements on the state of the law (i.e. in judicial decisions and advisory opinions) is a tool to protect the interests of future generation and a subtle tool for voicing the foreseeable needs of future generations. However, the mechanisms through which the conduct of States can be scrutinised, the UNCLOS provisions interpreted and the performance of States ultimately improved in the interest of future genera-

of future generations to meet their own needs. Future generations thus fall within the broader scope of 'the absent'. The latter concept, given the normal meaning of the word 'absent' undoubtedly encompasses cohorts of individuals who do not currently exist such as past and (not yet born) future generations. However, this concept can be given a broader understanding in light of the purposes of the current project (which is concerned, among other things, with intergenerational equity and the possibility for taking representative action with a view to making decisions and achieving meaningful results with implications for those generations who cannot themselves take action and protect their interests in the present due to the fact that they do not currently exist or cannot vote) and can be extended also to young people, i.e. present generations who have not yet reached adulthood, and respectively cannot yet vote and participate in the decision-making. Under this conception, the guiding criterion for inclusion in the group of 'the absent' is the lack of capacity to participate in the decision-making.

tions are dispute settlement procedures and the procedures for rendering advisory opinions.

The Convention which has almost universal participation embodies a significant body of law aimed at the protection of the marine environment and the conservation of its living resources. The interpretation of the said provisions by UNCLOS courts and tribunals is therefore of crucial significance for the protection of the marine environment and the health of the oceans and hence for the interests of future generations and will be assessed in Section II of this paper. The purpose of this exercise will be to demonstrate how the latest developments in environmental law and intergenerational considerations have been (and can be) integrated into the understanding and the application of the law in practice through interpretation, to display the potential of the UNCLOS dispute settlement mechanism and the procedure for rendering advisory opinions for protecting the interests of future generations.

Section III will deal with the principle of Common Heritage of Mankind and will be concerned with the innovative institutional arrangements under the Convention aimed at the protection of the interests of future generations.

Section IV will address the dispute settlement procedure set out in Part XV UNCLOS. It is compulsory, i.e. proceedings can be initiated by way of unilateral application, which ensures both its efficacy and accessibility.[10] In addition, the Convention provides for a mechanism for the resolution of disputes concerning the activities in the Area which secures the application of the principle of common heritage of mankind enshrined in Part XI UNCLOS and the enforcement of the obligations therein. The discussion on the said dispute settlement procedures will focus on three aspects of the contentious jurisdiction of UNCLOS courts and tribunals: first, their jurisdiction *ratione materiae* over disputes with an environmental dimension, including disputes concerning the conservation of the marine living

10 For more details regarding the UNCLOS dispute settlement system, see Andronico Adede, *The System for Settlement of Disputes under the United Convention on the Law of the Sea: A Drafting History and a Commentary* (Martinus Nijhoff 1987); Rüdiger Wolfrum, 'The Settlement of Disputes Before the International Tribunal for the Law of the Sea – A Progressive Development of International Law or Relying on Traditional Mechanisms?' (2008) 51 Japanese Yearbook of International Law 140; Patibandla Chandrasekhara Rao, 'Law of the Sea, Settlement of Disputes' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (*MPEPIL*) (OUP 2011).

resources; second, the special jurisdiction of the Seabed Disputes Chamber (partly exclusive) over disputes concerning the activities in the Area; and, third, their jurisdiction *ratione personae*. In addition, attention will be drawn to the procedure for rendering advisory opinions and the advisory jurisdiction of the Seabed Disputes Chamber and the ITLOS.

2. *Interpretation of the Obligations Concerning the Protection of the Marine Environment under the UNCLOS*

The Convention embodies a significant body of law aimed at the protection of the marine environment and the conservation of marine living-resources, and, given its almost universal participation, constitutes one of the most important international legal regimes in this respect. Authoritative interpretations of the respective provisions given by UNCLOS tribunals are of crucial significance for the protection of the marine environment, the sustainable exploitation of marine living resources, the health of the oceans, and for the interests of future generations because they guide and have an impact on States' conduct in this respect. Since many of the UNCLOS provisions – including Article 192 -[11] are regarded as reflecting customary international law,[12] these interpretations have the potential to influence the understanding of the respective customary international law[13] and consequently the behaviour of the States Parties and of other States bound by that law. They set the tone and, depending on the approach chosen, can loosen the said protection or, conversely, discipline States and induce them into taking more active steps and adopting stricter measures with a view to ensuring better protection of the marine environment and preventing the over-exploitation of marine living resources with obvious implications for future generations.

11 See Detlef Czybulka, 'Article 192' in Alexander Proelss and others (eds), *United Nations Convention on the Law of the Sea: A Commentary* (Beck – Hart – Nomos 2017) 1284–1285.

12 See James Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (OUP 2017) 17. See also 'United States Ocean Policy' (1983) 77 AJIL 619–623, in which the president of the United States confirmed that the United States would not become a signatory to the Convention, owing to its concerns over the Convention's deep-seabed mining provisions, but it would 'accept and act in accordance with the balance of interests relating to the traditional uses of the oceans, such as navigation and overflight'.

13 This is so given the inclination of international courts and tribunals to look into each other's pronouncements and lean on earlier case law.

Since most of these provisions are framed rather broadly, UNCLOS tribunals' interpretations play a crucial role in clarifying and specifying the content of the relevant States' obligations and the level of protection due. Bringing these interpretations in line with the latest developments in international environmental law and integrating intergenerational considerations in them will logically benefit future generations because such interpretations are most likely to provide the highest protection of the marine environment and foster the sustainable use of the marine ecosystems. UNCLOS tribunals have indeed taken bold steps in this regard, while consistently holding that the existing corpus of international law related to the environment is to inform the meaning of the relevant conventional provisions. They have also contributed to the debate on the nature and content of the precautionary approach, while potentially facilitating the formation of customary international law, which has implications beyond the confines of the law of the sea and strengthens the environmental protection more generally and beyond the marine areas. Adherence to the above obligations, as interpreted, ensures a higher level of protection and maintenance of the marine environment in the long run with implications across generations.

Most relevant to the topic of this contribution are Articles 61 (2) requiring coastal States ensure that the maintenance of the living resources in the Exclusive Economic Zone (EEZ) is not endangered by over-exploitation through proper *conservation* and management *measures*; Article 62 (4) demanding the nationals of all States fishing in the EEZ to *comply with the conservation measures* of the coastal State; Article 117 UNCLOS which obliges all States to take *measures* with respect to their nationals for the *conservation* of the marine living resources on the high seas; and Article 192 UNCLOS imposing upon States the *general duty to protect and preserve the marine environment* which is applicable to all maritime areas,[14] whose interpretation will be given careful consideration in the subsequent paragraphs in light of the aforementioned observations.

14 See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC),* Advisory Opinion, 2 April 2015, ITLOS Case No 21, para. 120, referring to *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order, 27 August 1999, ITLOS Reports 1999, 280, at 295, para. 70.

2.1. The Obligation to Protect and Preserve the Marine Environment Under Article 192 UNCLOS

Under Article 192 UNCLOS 'States have the obligation to protect and preserve the marine environment'. According to Yankov, 'it is the first time that a legal rule of this kind has been incorporated in a multilateral treaty of a universal character'[15] and it 'should be considered as an important step in the codification and progressive development of the law of the sea'.[16] Article 192 is phrased in general terms and says nothing about the protection due. By reference to the ITLOS jurisprudence, however, the arbitral tribunal constituted for the purposes of the *South China Arbitration* affirmed that this provision 'does impose a duty on States Parties'[17] and that its content is informed by the other provisions of Part XII and the corpus of international law relating to the environment:

> [t]he corpus of *international law relating to the environment*, which informs the content of the general obligation in Art. 192, requires that States "ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control." Thus, States have a positive "duty to prevent, or at least mitigate" significant harm to the environment when pursuing large-scale construction activities [emphasis added].[18]

15 Alexander Yankov, 'The Significance of the 1982 Convention on the Law of the Sea for the Protection of the Marine Environment and the Promotion of Marine Science and Technology – Third Committee Issues' in Bernard H Oxman and Albert W Koers (eds), *The 1982 Convention on the Law of the Sea* (Law of the Sea Institute 1984) 75.

16 ibid., 76.

17 *The South China Sea Arbitration (Philippines v China),* Award, 12 July 2016, PCA Case No 2013–19, para. 941, referring to *M/V "Louisa" (Saint Vincent and the Grenadines v Kingdom of Spain)*, Provisional Measures, Order, 23 December 2010, ITLOS Reports 2008–2010, 58, at 70, para. 76; *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean (Ghana/Côte D'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, para. 69. Harisson supports the view that Art 192 is better characterised as a statement of principle whose primary function is to determine the scope of Part XII as a whole. See Harrison (n 12) 23.

18 *The South China Sea Arbitration* (n 17) para. 941, referring to *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion*,* 8 July 1996, ICJ Rep 226, para. 29; *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award, 18 February 2013, PCA 31 RIAA 55, para. 451, quoting *Arbitration Regarding the Iron Rhine ('IJzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award, 24 May 2005, PCA 27 RIAA 35, para. 59.

Drawing on the preceding jurisprudence of UNCLOS tribunals and the ICJ, it further clarified that the content of the obligation under Article 192 is given shape in Article 194 (5) UNCLOS and includes the obligation to adopt certain measures necessary to protect and preserve the rare and fragile ecosystems, and constitutes an obligation of conduct which as such requires due diligence.[19]

2.1.1. Due Diligence Obligation

In the *South China Sea Arbitration*, the Arbitral Tribunal stated that due diligence signifies that the obligation to adopt appropriate rules and measures goes beyond their mere adoption and necessitates a certain level of vigilance in the enforcement of these measures and in the exercise of administrative control.[20] As a consequence, it reached the conclusion that the obligation to preserve and protect the environment in Article 192 UNCLOS includes a *due diligence obligation* to *prevent* the harvesting of species that are recognised as being at risk of extinction and requiring international protection[21] as well as the obligation to *prevent* the harmful activities that would affect depleted, threatened, or endangered species indirectly through the *destruction* of their *habitat*.[22] In the process of elucidating the scope and meaning of Article 192 UNCLOS, the Arbitral Tribunal touched and elaborated on concepts and issues of relevance for international environmental law such as the concepts of 'due diligence' and 'obligation of conduct' and the link between them,[23] as well as the core content of the general obligation to protect and preserve the marine environment.

19 *The South China Sea Arbitration* (n 17) para. 956.
20 ibid.
21 ibid.
22 ibid., para. 959.
23 ibid., para. 941, referring to the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (n 14) paras 118–136, and *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Rep 14.

2.1.2. Preservation of the Environment – Maintaining and Improving the Present Condition

It is to be observed that Article 192 not only concerns the protection of the marine environment from future damage but also its preservation.[24] Preservation goes beyond protection and entails 'maintaining and improving its present condition' as explained by the Arbitral Tribunal in the *South China Sea Arbitration*.[25] In this respect, the Arbitral Tribunal also clarified that 'Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation *not to degrade* the marine environment [emphasis added].'[26] This interpretation of Article 192 gives the obligation embodied in it a wide-ranging character requiring from States to prevent the negative changes of the marine environment through its use as well as taking active measures, i.e. positive action, to preserve the oceans as an ecosystem. This aim undoubtedly forms part of the aspirations of the present generations, and, hence, is in their interest, respectively in the interest of future generations. Such interpretations encourage and, indeed, induce States to take positive action of the kind discussed by the arbitral tribunal with a view to preserving the marine environment and engaging in sustainable fisheries so as to be in compliance with their international obligations.

2.1.3. Erga Omnes

Article 192 has often been assigned an *erga omnes* quality.[27] This is why, any State will have standing to sue for breach or non-compliance and this applies to the obligation to protect and preserve the marine environment, including in areas beyond national jurisdiction.[28] Arguably, the award rendered in the *South China Sea Arbitration* provides some tentative

24 See Czybulka (n 11) 1286.
25 *The South China Sea Arbitration* (n 17) para. 941.
26 ibid.
27 Alexander Proelss, *Meeresschutz in Völker- und Europarecht: Das Bespiel des Nordatlantiks* (Duncker & Humblot 2004) 82; Patricia Birnie, Alan Boyle and Catherine Redgwell (eds), *International Law and the Environment* (3rd edn, OUP 2009) 383; Czybulka (n 11) 1283; Elena V Ivanova, *The Competing Jurisdiction of the UNCLOS and the WTO Dispute Settlement Fora in the Context of Multifaceted Disputes* (Nomos 2022) 212.
28 See Birnie, Boyle and Redgewell (n 27) 234.

support for this view, although the Arbitral Tribunal did not deal with the said *erga omnes* quality of Article 192. In the *South China Sea Arbitration*, the Philippines brought claims relating to environmental harm caused by Chinese activities in various locations in the South China Sea. The Arbitral Tribunal held that it had jurisdiction to deal with these claims, although the Philippines did not argue that it had suffered damages in its own maritime zones. Neither did the Arbitral Tribunals require that the Philippines demonstrate that it had been specifically affected by the alleged environmental harm. In this respect, the Arbitral Tribunal highlighted that:

> because the environmental obligations in Part XII [starting with Article 192] apply to States irrespective of where the alleged harmful activities took place, its jurisdiction is not dependent on the question of sovereignty over a particular feature, on a prior determination of the status of any maritime feature, on the existence of an entitlement by China or the Philippines to an exclusive economic zone in the area or on the prior delimitation of any overlapping entitlements.[29]

2.2. Conservation of Living Resources in the light of Articles 61 (2), 62 (4), 117

Concerning the conservation of living resources, both Article 61 (2) and Article 117 impose upon the coastal State and upon all States, respectively, the obligation to take conservation measures, whereas Article 62 (4) prescribes that nationals of other States fishing in the EEZ *shall comply* with the conservation measures of the coastal State (i.e. it imposes a specific obligation on the flag State within the EEZ). Article 61 (2), which requires that coastal States '*ensure* through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation [emphasis added]', and Article 62 (4) apply to the EEZ, whereas Article 117, requiring that all States '*take*, or cooperate with other States in taking, *such measures* for their respective nationals *as may be necessary* for the conservation of the living resources of the high seas [emphasis added]', applies to the high seas.[30] All of these obligations concern the conservation of marine living resources and are incumbent upon different categories of legal subjects.

29 *The South China Sea Arbitration* (n 17) para. 927.
30 Art 117 UNCLOS.

2.3. Due Diligence Obligations

If regarded as due diligence obligations, their performance would necessitate greater effort and diligence on the part of States that goes beyond the mere adoption of measures for conservation of living resources and includes their enforcement and the exercise of administrative control. The Tribunal has had the opportunity to address the content of the broadly framed obligation under Article 62 (4) UNCLOS. In its *Fisheries Advisory Opinion* rendered upon the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC),*[31] the ITLOS characterised this obligations as on obligation of due diligence which entails the adoption by States of laws and regulations, *including enforcement procedures,* so as to ensure that their nationals comply with the coastal States' conservation measures.[32] Such an approach/interpretation ultimately serves the interests of future generation in so far as it effectively demands from States – and potentially secures – better performance, which ought to result in enhanced conservation of living resources. This is precisely the manner in which interpretation can be instrumentalised to protect the interests of future generations.

2.3.1. Conservation of the Living Resources as an Element in the Protection and Preservation of the Environment

While leaning on its earlier pronouncements, the ITLOS affirmed the interconnectedness and interdependence of the conservation of marine living resources and the protection and preservation of the marine environment by treating the former as a constitutive element of the latter: 'the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'.[33] Moreover, it held that Article 192 UNCLOS imposing the obligation to protect and preserve the marine environment applies to all maritime areas.[34] As a result, efforts for the conservation of living resources form a necessary part of the performance

31 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (n 14).
32 ibid., paras 104, 134, 219.
33 ibid., para. 120, referring to *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (n 14) para. 70.
34 ibid.

of the obligation to protect and preserve the environment in the marine space.

Another important aspect of the *Fisheries Advisory Opinion* is the discussion on the interaction between the conservation of the marine living resources and Illegal, Unreported and Unregulated (IUU) fishing.[35] The conservation of living resources is inextricably linked to the phenomenon of IUU fishing which heavily compromises States' conservation efforts. Indeed, IUU fishing is now well recognised as a key threat to the management and sustainability of fisheries and therefore a matter of global concern.[36] The Tribunal acknowledged the negative impact of IUU fishing on the conservation of marine living resources[37] and construed the obligations stemming from the Convention, while taking into account that IUU fishing heavily compromises States' conservation efforts.[38] As a consequence, flag States will have to engage more actively in the fight against IUU fishing, including through a higher degree of vigilance in law enforcement, in order to meet their obligations under the UNCLOS.

2.3.2. Implications

Although context specific and concerned with obligations within the EEZ, the *Fisheries Advisory Opinion* contains various declarations of a more general nature which can have implications in the future beyond the advisory proceedings and the maritime zone in question. These relate to the notion of 'conservation', the link between the obligation to protect and preserve the marine environment and the obligation to take measures for the conservation ofliving resources, the core content of the obligation to protect the marine environment. Concerning the latter, the Tribunal adopted a

35 See Hélène Ruiz Fabri, Makane M Mbengue and Brian McGarry (eds), 'Special Issue: Regime Convergence and Lex Ferenda in IUU Fishing Disputes' (2022) 22 (3–4) International Community Law Review 363.

36 Seokwoo Lee, Anastasia Telesetsky and Clive Schofield, 'Slipping the Net: Why Is It So Difficult to Crack Down on IUU Fishing?' in Myron H. Nordquist and others (eds), *Freedom of Navigation and Globalization* (Brill Nijhoff 2015) 88. According to the Food and Agriculture Organisation (FAO), it represents 20 % of the catches annually, and its value is estimated at up to USD 23 billion annually. See the official website of FAO <http://www.fao.org/iuu-fishing/en/> accessed 7 July 2023.

37 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (n 14) paras 101–102.

38 ibid., paras 119–124.

strict approach with respect to the level of protection due, which would necessitate a higher degree of vigilance and engagement by States in enforcing the laws and regulations aimed at the conservation of marine living resources. It should be noted that advisory opinions are not binding,[39] but as authoritative legal pronouncements on the state of the law,[40] they have significant persuasive value and practical implications in that they are likely to be taken into account and influence the decision-making in subsequent international proceedings and the future conduct of States.[41] Thus, for example, the principled positions embodied in the *Fisheries Advisory Opinion* concerning the links among conservation of living resources, IUU fishing and the protection of the marine environment can be relevant in interpreting Article 117 UNCLOS which is applicable to the high seas. Article 117 imposes on '[a]ll States […] the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of living resources'. This obligation can be interpreted as implying a duty to take measures to ensure that their nationals, i.e. natural or juridical persons, do not support or engage in IUU fishing. The wording of Article 117 UNCLOS ('*take* […] measures' as opposed to *adopt* laws and regulations or measures) suggests that this obligation goes beyond the mere adoption of legal measures and involves a certain degree of vigilance in enforcing these measures,[42] i.e. it is a due diligence obligation.

39 See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, 65, 71; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, at 26, para. 76.

40 See *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgement, 28 January 2021, ITLOS Case No 28, para. 203.

41 Elena V Ivanova, 'The Cross-Fertilization of UNCLOS, Custom and Principles Relating to Procedure in the Jurisprudence of UNCLOS Courts and Tribunals' (2019) 22(1) Max Planck Yearbook of United Nations Law 142, 154. Indeed, the ITLOS decision on preliminary objection in the maritime boundary delimitation dispute between Mauritius and Maldives in the Indian Ocean confirms the former point, given the ample reference in it to a preceding advisory opinion of the ICJ. See *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (n 40) paras 168, 171, 174, 205 *et seq*.

42 In the same vein, Rosemary Rayfuse, 'Article 117' in Alexander Proelss and others (n 11) 809; *Fisheries Jurisdiction Case (Spain v Canada),* Judgement, 4 December 1998, ICJ Rep 432, para. 84.

What is more, the broader interpretation of the term 'conservation' consistently adopted by the ITLOS suggests that ecosystem considerations (from which IUU fishing can hardly be delinked) have and will continue to play a role in the assessment of the performance of the obligations under Articles 61 (2), 62 (4), 117, 192 UNCLOS all of which concern the conservation of marine living resources. It should be noted that the UNCLOS adopts a species specific approach to the conservation of living resources[43] and does not cover all species which might be in need of conservation.[44] Yet, there are provisions within UNCLOS which allude to the ecosystem approach, i.e. to a more inclusive and homogenous approach to the protection and preservation of the marine environment.[45] Also, UNCLOS tribunals have consistently taken into account the intricate relationship of marine species, marine ecosystems and the marine environment that supports them. The ecosystem approach to the protection of the marine environment implies sustainable use of natural resources with implications across generations, i.e. implies taking intergenerational considerations into account. The ecosystem-based approach together with the precautionary approach are the main pillars supporting the international efforts for sustainable development, recognised in the Plan of Implementation of the World Summit on Sustainable Development.[46] It can be observed that the ecosystem approach is enshrined in post-UNCLOS instruments concerning the conservation of marine species.[47]

43 It provides different rules applicable to different marine species: shared fish stocks (Art 63(1)); straddling fish stocks (Art 63(2)); highly migratory species (Art 64); marine mammals (Arts 65 and 120); anadromous stocks (Art 66), catadromous species (Art 67), and sedentary species (Art 68).

44 Deep-sea species are highly vulnerable to fishing activities due to their exceptional longevity, slow growth, delayed maturity and low productivity and would need special conservation measure for which the UNCLOS does not expressly provide. See Julian Anthony Koslow and others, 'Continental Slope and Deep-Sea Fisheries: Implications for a Fragile Ecosystem' (2000) 57(3) ICES Journal of Marine Science 548, 550; Yoshifumi Tanaka, 'The Changing Approaches to Conservation of Marine Living Resources in International Law' (2011) 71 ZaöRV 291, 301; see also Rüdiger Wolfrum and Nele Matz, 'The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity' (2000) 4(1) Max Planck Yearbook of United Nations Law 445.

45 For example, Arts 194(5) (providing for the protection of fragile marine ecosystems), 196(1) (on the introduction of alien species into marine ecosystems) UNCLOS.

46 See Plan of Implementation of the World Summit on Sustainable Development, paras 25, 25, 30, 109 <https://perma.cc/UUR2-FDVP>.

47 See the Preamble to the UNFSA, the Convention on Biological Diversity.

Although the term marine environment is not defined in the UNCLOS, the jurisprudence of UNCLOS tribunals suggests that it includes the concept of marine life, thus going beyond the anthropocentric understanding of the environment.[48] This is implied in the declaration of the ITLOS in *the Southern Bluefin Tuna* Cases that 'the conservation of the *living resources* of the sea is an *element* in the protection and preservation of the marine *environment* [emphasis added]'[49] which has been reiterated and incorporated in subsequent pronouncements of UNCLOS tribunals.[50] Moreover, in its *Fisheries Advisory Opinion*, the ITLOS explicitly stated that 'living resources and marine life are part of the marine environment.'[51] The Arbitral Tribunal in the *South China Sea Arbitration* has similarly determined that the general obligation to protect and preserve the marine environment under Article 192 'may be broadly enough worded to include the obligation to protect and preserve marine biodiversity'.[52] It also held that Article 192 which imposes the obligation to protect and preserve the environment includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction[53] and covers not only the prevention of the direct harvesting of these species but '*extends* to the *prevention* of harms that would affect depleted, threatened, or endangered species *indirectly* through the *destruction of their habitat* [emphasis added]'.[54] Thus, the obligation to 'protect and preserve' refers to the all-encompassing living and non-living marine nature, its ecosystem and components.

48 Gerhard Hafner, 'Meeresumwelt, Meeresforschung und Technologietransfer' in Wolfgang Graf Vitzthum (ed), *Handbuch des Seerechts* (CH Beck 2006) 363.

49 *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (n 14) para. 70.

50 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (n 14) para. 110; *The South China Sea Arbitration (Philippines v China),* Award, 12 July 2016, PCA Case No 2013–19, 956.

51 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (n 14) para. 216.

52 *The South China Sea Arbitration (Philippines v China),* Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case No 2013–19, para. 284.

53 *The South China Sea Arbitration* (n 17) 956.

54 ibid., 959.

2.4. The Precautionary Approach

The UNCLOS does not mention the precautionary approach but UNCLOS tribunals and the Seabed Disputes Chamber have elaborated on it. In its *Advisory Opinion Concerning Responsibilities and Obligations of States with Respect to Activities in the Area*, the Seabed Disputes Chamber held that the precautionary approach is part of the aforementioned obligations. What is more, it explicitly stated that this approach is 'an integral part of the general obligation of due diligence of sponsoring States which is applicable even outside the scope of the Regulations' and which requires States Parties to take 'all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor'.[55] It further clarified that '[t]his obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks', that this obligation would not be met if those risks are disregarded and that '[s]uch disregard would amount to a failure to comply with the precautionary approach'.[56] To support these findings, it referred to the earlier practice of the ITLOS, while noting that the 'link between due diligence obligation and the precautionary approach is implicit the Tribunal's Order of 27 August 1999 in the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)',[57] as well as to para. 164 of the ICJ judgment in *Pulp Mills on the River Uruguay,* stating that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute' (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties).[58] The Seabed Dispute Chamber also acknowledged the existence of a trend towards making the precautionary approach part of customary international law, while indicating its incorpor-

55 *Responsibilities and Obligations of States with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber*), para. 131.

56 ibid., paras 58–59. In the preceding paragraphs the Seabed Disputes Chamber also stated the 'due diligence' concept is a variable one and may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light of new scientific or technological knowledge, but, nonetheless the standard of due diligence has to be more severe for riskier activities. ibid., para. 117.

57 ibid., para. 132.

58 ibid., para. 135, referring to *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 23).

ation into a growing number of international agreements.[59] Tentative steps in that direction were also made much earlier by the ITLOS in the *MOX Plant Case* and in the *Southern Bluefin Tuna Cases* which have contributed to its reputation as an environment-friendly dispute settlement forum.[60]

3. Common Heritage of Mankind

Pursuant to the UNCLOS, the principle of Common Heritage of Mankind is applicable to the Area. This principle is recognised in different treaties. Its nature of customary international law has also been discussed in the literature,[61] but the UNCLOS gives it a specific expression and content. One of its features is that it implies taking intergenerational considerations, i.e. sustainability.

3.1. Evolution of the Notion

3.1.1. UNCLOS III

The term common heritage of mankind (more recent terminology speaks of 'humankind'[62] instead of 'mankind') has been developed in connection with the codification activities concerning the progressive development of international law within the framework of the UNCLOS.[63]

During the Third United Nations Conference on the Law of the Sea, the anticipated scarcity of terrestrial resources triggered an increased interest in the possibility of mining the polymetallic nodules in the deep seabed, which were perceived as having significant economic value, whereas heavy exploitation was expected within a decade or so. This led to the development of a comprehensive legal regime governing the activities in the Area,

59 *Responsibilities and Obligations of States with Respect to Activities in the Area* (n 55) para. 135.

60 See *MOX Plant (Ireland v United Kingdom) (Order)* ITLOS Case No 10 (3 December 2001), at paras 84, 89; *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan),* Provisional Measures, 27 August 1999, ITLOS Cases Nos 3, 4, at para. 77.

61 Rüdiger Wolfrum, 'Common Heritage of Mankind' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2009); Silja Vöneky and Anja Höfelmeier, 'Article 136' in Alexander Proelss and others (n 11) 956.

62 See for example the Preamble to the Paris Agreement.

63 Wolfrum (n 61).

i.e. the only areas of the planet which had not then been appropriated for national use. The term common heritage of mankind was introduced by Malta in a *note verbale* of 18 August 1967 requesting the introduction of an agenda item: 'Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind.'[64] The invention of the concept is particularly attributed to Arvid Padro, representative of Malta at the General assembly of the United Nations.[65] While elaborating on the dangers of allowing the extension of national jurisdiction to the deep seabed,[66] Malta suggested a new approach through the prohibition of national appropriation, dedication to peaceful uses of the Area and shared and sustainable utilisation of its resources with consideration for developing countries.[67] Thus, the concept of common heritage of mankind was meant to counter the idea that the sea was *res communis* and the seabed *res nullius* open for appropriation.[68]

Against this backdrop, the implementation of the principle of common heritage of mankind in the UNCLOS differs historically to other novelties within the Convention such the EEZ legal regime. Whereas the latter is regarded as codification of naturally evolved international law, the principle of common heritage of mankind is rather revolutionary.[69] The common heritage of mankind is an essential principle under the UNCLOS implemented in Part XI which governs the activities and the exploitation of the resources of the Areas. Article 136 (entitled Common heritage of mankind) which is the starting provision of Part XI Section 2 (entitled Principles

64 UN Doc. A/6695.

65 See Tullio Scovazzi, 'The Conservation and Sustainable Use of Marine Biodiversity, Including Genetic Resources, in Areas beyond National Jurisdiction: A Legal Perspective' (Speech at the Twelfth Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, 22 June 2011) <https://perma.cc/7LCJ-ZRTD>; Vöneky and Höfelmeier (n 61) 952.

66 Including increased suspicions and tensions among the dominant marine powers resulting from the competition for the resources of the Area; militarization of the said area and growing danger of permanent damage to the marine environment. ibid., 952.

67 See UN Doc. A/6695 2.

68 Wolfrum (n 61).

69 Arvid Pardo, *The Common Heritage: Selected Papers on Oceans and World Order 1967–1974* (Malta University Press 1975) 16.

governing the Area) and Article 137 (entitled Legal status of the Area and its resources) are the key provisions.

From the UNCLOS it was then introduced into the national legislation pertaining to the activities in the Area. In 1967 it was also brought into the discussion on a legal regime concerning outer space[70] and Antarctica.[71] Attempts have been made to invoke this principle with respect to cultural property,[72] the protection of the environment.[73] The main impact of this principle is the establishment of an international administration for the areas beyond national jurisdiction, the so-called international commons.

70 See UNGA Res 1962 (XVIII) entitled 'Declaration of Legal Principles Governing the Activities of State in the Exploration and Use of Outer Space'; Art 1 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty). See also Art 11 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) which entered into force in July 1984. The Moon Treaty though demands that the activities on the moon be carried out in the interest of promoting international co-operation and focuses on it.

71 Concerning Antarctica, the common heritage principle has been invoked to a lesser extent. At the Eleventh Consultative Meeting to the Antarctic Treaty, it was emphasized in para. 5 (d) Recommendation XI-1 that 'the Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica'. See Recommendation XI-1 (ATCM XI – Buenos Aires, 1981. More recently, the Consultative Parties to the Antarctic Treaty, meeting in Santiago, Chile, in May 2016, reiterated that' the comprehensive protection of the Antarctic environment and dependent and associated ecosystems is in the interests of science and mankind as a whole'. See Santiago Declaration on the Twenty Fifth Anniversary of the signing of the Protocol on Environmental Protection to the Antarctic Treaty, adopted on 30 May 2016. See also the Preamble to the Protocol on Environmental Protection to the Antarctic Treaty.

72 The UNCLOS does not provide for a comprehensive regime on the underwater cultural heritage. Two provisions are devoted to 'archeological and historical objects': Art 149 concerns 'archeological and historical objects' found in the Area; Art 303 deals with 'archeological and historical objects' found at sea. Under Art 149, such objects must be 'preserved or disposed of for the benefit of mankind as a whole' which seems to be close to the objective for which the regime on the common heritage of mankind was established, although the latter does not apply to such objects. The subject matter of Arts 149 and 303 is also covered by the Convention on the Protection of the Underwater Cultural Heritage (CPUCH).

73 Environmental Law makes some allusion to the principle of common heritage of mankind. See for example Protection of Global Climate for Present and Future Generations of Mankind, UNGA Res 43/53 (6 December 1988) GAOR 43rd Session Supp 49 vol 1, 133. However, this resolution uses the term 'common concern of mankind' which seems to call predominantly for co-operation and does not cover the full spectrum of the common heritage principle.

The way this principle was implemented in the UNCLOS did not lack criticism and it is one of the main reasons why the United States did not become a signatory to the Convention.[74] Given this criticism, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ('Implementation Agreement') did indeed modify this principle without, however, sacrificing its core.[75]

It has been discussed whether it is more appropriate to refer to it as a doctrine or a concept[76] but since it is installed in treaty law concerning common spaces and governs the regime on the deep seabed, it would be appropriate to speak of it as a principle.[77] No fully agreed definition of the notion exists, given that it varies across treaty regimes, and there is no unified State practice or express acceptance. However, it is possible to identify some common core elements.

3.2. Content of the Principle of Common Heritage of Mankind under the UNCLOS

The principle is set forth in different provisions within the UNCLOS. The Preamble refers to UNGA Res 2749 (XXV) of 17 December 1970 declaring *inter alia* that 'the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States'. The principle is highlighted in Article 136 and Article 311 (6). The latter provides *inter alia* that 'there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136' and thus attributes a special status to Article 136 elevating it above treaty law without qualifying it as *jus cogens*.[78] It proclaims the employment of the principle and declares the Area and its

74 See 'United States Ocean Policy' (n 12) 619–623, in which the president of the United States confirmed that the United States would not become a signatory to the Convention, owing to its concerns over the Convention's deep-seabed mining provisions.

75 For more details, see Wolfrum (n 61) and Ram Prakash Anand, 'Common Heritage of Mankind: Mutilation of an Ideal' (1997) 37 Indian Journal of International Law 1.

76 Kemal Baslar, *The Concept of Common Heritage of Mankind in International Law* (Brill 1998) 2–3.

77 Wolfrum (n 61).

78 Rüdiger Wolfrum with respect to the Kyoto Protocol. ibid.

resources the common heritage of mankind, whereas subsequent provisions install different aspects of it. They deal with the legal status of the Area and its resources and set out the regime for their utilisation.

3.2.1. Legal Status: Prohibition of Private and Public Appropriation or Sovereignty

Article 137 (1) prohibits the exercise of sovereignty or appropriation over any part of the Area and its resources by not only States but also by natural or juridical persons. The reference to all States instead of the States Parties could be seen as an implicit reference to customary international law. In addition, it imposes upon States Parties the obligation not to recognise any such act which operates as an important safeguard for the prohibition of appropriation and sovereignty.[79] The duty of non-recognition implies that States cannot take any action which implicitly or explicitly recognises the validity of the relevant claim.[80]

Complementarily, Article 137 (2) prescribes that all rights in the resources of the Area are vested in 'mankind as a whole' and specifies that the Authority is to act on behalf of mankind. The UNCLOS does not attach an international legal personality to 'mankind' but it does so with respect to the Authority.[81] However, the Authority rather serves as an advocate securing the needs and long term concerns of mankind. These include the foreseeable needs and interests of future generations implying aspects of the principle of sustainable development in the management of exhaustible resources and safeguards for the protection of the environment.

The resources of the Area are inalienable (Article 137 (2) second sentence), whereas the minerals recovered from the Area may be alienated but only in accordance with Part XI and the rules, regulations and procedures of the Authority. This arrangement is supplemented by Article 1 Annex III UNCLOS which states that title to minerals shall pass upon recovery. Thus,

79 Vöneky and Höfelmeier (n 61) 955.

80 The ICJ held that '[t]he member States of the United Nations were under an obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia': Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 21 June 1971, ICJ Rep 16, 54). See also Jochen A Frowein, 'Non-Recognition' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2011).

81 Art 176 UNCLOS.

the Convention distinguishes between the legal status of the seabed and the recovered resources: unlike the seabed, minerals can be subject to appropriation. Acquisition of rights over minerals must be in accordance with the Convention, i.e. through contractual agreements with the Authority[82] where the activities are not carried out by the Enterprise.[83] Unilateral mining and appropriation of minerals is thus prohibited under the UNCLOS. As far as non-States Parties are concerned, there are good reasons to argue that customary international law hinders their claims to rights over the seabed and obliges them to not recognise any such claims.[84] It has widely been recognised that some general features of the principle of common heritage of mankind embodied in the UNCLOS, such as the prohibition of appropriation and sovereignty, peaceful use and utilisation for the benefit of mankind, have become customary international law. Ambiguity exists with respect to unilateral mining. Views have been expressed that it is to be carried out for the benefit of mankind as whole, although States would have the discretion to decide how the common benefit is to be effectuated.[85]

3.2.2. Regime of Utilisation

The regime of utilisation features several core components: *International Cooperation and International Management; Regulated Utilization; Intertemporal Dimension; Distributive Effect; Peaceful Use*[86]*,* all of which to a varying degree secure the protection of the interests of future generations. However, the most distinctive and innovative achievement of the UNCLOS regime of utilisation is the creation of an international organisation – the International Seabed Authority or the Authority which is designed to ensure that the Area and its resources are being developed for the benefit of mankind and respectively for the benefit of future generations. The Authority exercises control over the activities in the Area and is vested with legal capacity, including the capacity to adopt regulations and institute and be a party to legal proceedings, which enable it take active steps in view of the interests of future generations. This will be given thorough consideration in the subsequent paragraphs. Also, attention will be drawn

82 Art 3(5) Annex III UNCLOS.
83 See Art 153(3) read in conjunction with para. (2) UNCLOS.
84 Vöneky and Höfelmeier (n 61) 956.
85 Wolfrum (n 61); Wolfgang Durner, *Common Goods* (Nomos 2000) 223.
86 Wolfrum (n 61). See also Vöneky and Höfelmeier (n 61) 955, whose description of the major components overlaps with the aforementioned ones to a significant extent.

to the intertemporal dimension of the utilisation regime in light of the objectives of the current project.

(a) The Authority – a Means for Achieving International Cooperation and International Management

Under the said regime of utilisation, States are obliged to co-operate internationally in the exploration and exploitation of the Area's resources.[87] In this respect the obligation to cooperate under the legal regime of the Area surpasses the general obligation to co-operate under international law.[88] International cooperation and management of the Area is achieved through the establishment of the Authority. All States Parties to the Convention are *ipso facto* members of the Authority[89] which acts on behalf of mankind as far as the deep seabed and the ocean floor are concerned,[90] and consequently represents those States which are not parties to the UNCLOS. Thus, 'States Parties are meant to act as a trustee on behalf of mankind'.[91]

The principal organs of the Authority are an Assembly (a plenary organ), a Council (an executive organ) and a Secretariat (an administrative organ),[92] whereas the Enterprise (also an operative organ but with a commercial purpose which in some aspects resembles a private corporation) is the organ through which the Authority is to carry out activities in the Area directly.[93]

Pursuant to Article 176 UNCLOS, the Authority has international legal personality thus becoming a member of the international community different from the States Parties and from other legal persons. It is vested with 'legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'[94], which includes: capacity to contract;[95] capacity

87 This duty is installed through various provisions under Arts 138, 150 UNCLOS.
88 See Rüdiger Wolfrum, 'Cooperation, International Law of' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2010).
89 Art 156(2) UNCLOS.
90 Art 137(2) UNCLOS.
91 Wolfrum (n 61).
92 Art 158(1) UNCLOS.
93 Art 158(2) UNCLOS.
94 Art 176 UNCLOS.
95 Art 153(3) UNCLOS.

to acquire and dispose of immovable property;[96] capacity to institute or to be party to legal proceedings[97] and capacity to adopt regulations.[98] The last two aspects of the said legal capacity are particularly relevant to the topic of this contribution and shall be addressed further.

Similar to the Authority, the Enterprise is endowed with 'legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'[99], which entails capacity to contract, capacity to acquire and dispose of immovable property as well as judicial capacity.[100] Its legal personality differs from that of the Authority as it is confined to the specific functions and purposes of the Enterprise.[101] Moreover, the latter enjoys autonomy in the conduct of its operations.[102] The Authority and the Enterprise act and are obliged independently.[103]

Concerning the Authority's capacity to *adopt regulations*, Article 145 UNCLOS authorises and obliges[104] the Authority to adopt rules, regulations and procedures for the 'effective protection of the marine environment from harmful effects' which may arise from activities in the Area. This obligation of the Authority is further complemented by Annex III and the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea (1994 Implementation Agreement). Paragraphs (a) and (b) of Article 145 UNCLOS both specify harms and activities of particular concern which are to be addressed, '*inter alia*', by these regulations. The term '*inter alia*', however, makes clear that the listed harms and activities are not exhaustive and additional threats to the environment might be addressed by the said regulations.

The Authority is to *exercise control* over the activities in the Area and is responsible for ensuring that they are carried out in accordance with the relevant UNCLOS provisions and the rules, procedures and regulations issued by the Authority.[105] The key provision regarding the utilisation of

96 Art 176 UNCLOS. See Pablo Ferrara, 'Article 176' in Alexander Proelss and others (n 11) 1230–1231.
97 Arts 187 and 188 UNCLOS.
98 Art 145 UNCLOS.
99 See Art 170(2) UNCLOS, Art 1(1)(2) Annex IV UNCLOS.
100 See Art 13(2) Annex IV UNCLOS.
101 See Art 170(2) UNCLOS; Art 1(1)(2) Annex IV UNCLOS.
102 Art 2(2) Annex IV UNCLOS.
103 See Art 2(3) Annex IV UNCLOS.
104 ISA, written statement of the Proceedings in ITLOS Case No17 (2010), para. 4.25.
105 Art 157 UNCLOS.

the Area is Article 153 UNCLOS[106] which prescribes that the activities in the Area are to be carried out by the Enterprise or, in association with the Authority, by the States Parties, or state enterprises or natural or juridical persons which possess the nationality of the States Parties, through contracts with the Authority. As a result, the utilisation of the Area is subject to a specific regulation and is controlled by an international organisation through which States Parties are to take into account not only the interests of other States but mankind as a whole, and, by necessary implication, those of 'future generations' as part of 'mankind'.

Through its capacity to regulate and manage the utilisation of the Area and its resources, and given the wording of the relevant UNCLOS provisions, the Authority can ensure that the latest developments in international environmental law pertaining to the protection of the marine environment are reflected in the legal rules governing the activities in the Area and are observed by all the entities involved in the prospecting, exploration, and future exploitation of the resources of the Area, and ultimately that the common heritage of mankind is being developed in a sustainable manner for the benefit of future generations, among others. Indeed, in accordance with its obligation under Article 145 UNCLOS, the Authority adopted Regulations on the Prospecting and Exploration for Polymetallic Nodules in 2000,[107] Regulations on the Prospecting and Exploration for Polymetallic Sulphides in 2010[108] and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in 2012,[109] which explicitly require the Authority, sponsoring States and contractors to apply the precautionary approach,[110] the best environmental practices,[111] and environmental impact

106 Although the utilization regime has been further elaborated and slightly modified by the 1994 Implementation Agreement, Art 153 was not affected.

107 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, adopted in 2000, ISA Doc. ISBA/6/A/18 (2000).

108 Regulations on prospecting and exploration for polymetallic sulphides in the Area, adopted in 2010, ISBA/16/A/12/Rev.1 (2010).

109 Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, adopted in 2012, ISBA/18/A/11 (2012).

110 Regulation 31(2) Regulations on the Prospecting and Exploration for Polymetallic Nodules; Regulation 5(1) Regulations on the Prospecting and Exploration for Polymetallic Sulphides; Regulation 2(2) Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

111 Regulation 5(1) Regulations on the Prospecting and Exploration for Polymetallic Sulphides; Regulation 5(1) Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts.

assessment[112] to their activities in the Area. Moreover, in its High-Level Action Plan adopted in 2019 by the Assembly, the Authority expressed a commitment to building 'a comprehensive and inclusive approach to the development of the common heritage for the benefit of mankind as a whole that balances the three pillars of sustainable development and adoption of regulations for exploitation reflecting best international standards and practices, as well as agreed principles of sustainable development.'[113]

Humankind-New Subject of International Law? It has been argued that the principle of common heritage of mankind resulted in the establishment of a new subject of international law – humankind.[114] Since international law is State-focused and has so far regulated relationships amongst States, treating humankind as an addressee of rights under treaty law is a novelty.[115] Yet, the UNCLOS does not vest humankind with international legal personality. Humankind as such is not capable of representative legal action such as international organisations. The Authority is an administration through which States Parties control the activities in the Area with a view to ensuring they are in line with the rules and principles established under the Convention and benefit mankind. The Authority has various means to achieve this target, two of them being its regulatory powers and its capacity to initiate proceedings before relevant dispute settlement fora with respect to disputes concerning the activities in the Area. Through its judicial capacity the Authority acts as a proxy of humankind and is in a position to take active steps in the interest of mankind. Indeed, one of the important achievements of the UNCLOS is the establishment of a mechanism through which the interests of humankind as a whole, including the populations of all States, comprised of present and future generations, can be taken into account in the process of utilisation of the seabed and the ocean floor and their resources. This translates into developing production policies and

112 Regulation 18(b) Regulations on the Prospecting and Exploration for Polymetallic Nodules; Regulation 20(1) Regulations on the Prospecting and Exploration for Polymetallic Sulphides; Regulation 20(1) Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts.

113 See Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019–2023 adopted on 27 July 2018 and High Level Action Plan of the International Seabed Authority and Priorities for the 2019–2023 Period, available at: <https://www.isa.org.jm/index.php/our-work/protection-marine-environment> accessed 7 July 2023.

114 See Christian Walter, 'Subjects of International Law' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2007).

115 See Vöneky and Höfelmeier (n 61) 956.

regulations and exploitation with a long-term perspective, while assessing their potential impact upon future generations so as to ensure that seabed mining would benefit, *inter alia*, future generations. In this respect, the mentioning of mankind is not futile. It operates as a reference point for assessing all activities in the Area. As a reference group, mankind is wider than States and provides for the inclusion of those human beings, currently existing or not yet present, which are not represented by States.[116] Compared to other treaties alluding to the common heritage of mankind and concerning areas beyond national jurisdiction, the complex management and exploitation system developed by the UNCLOS is by far the most elaborate. Also, the manner in which the principle of common heritage of mankind was implemented in the UNCLOS differs from the approach adopted in other treaties. While the Convention established a complex international management system such as the Authority, the latter has no analogue in other treaties dealing with or alluding to the principle of common heritage of mankind.[117]

(b) Intertemporal Dimension

Neither Part XI nor the UNCLOS more generally make reference to the concept of sustainable development, whose core feature is its intertemporal dimension. Yet it is acknowledged that this concept is one of the important elements of the principle of common heritage of mankind.[118] The combined use of the terms mankind and heritage suggests that the interests of future generations as part of mankind are to be taken into account and respected in the utilisation of the Area and its resources, i.e. the international commons.[119] Articles 145 and 209 demand the marine environment be protected from harmful effects which *may arise* in the *future* from the activities in the Area. In addition, the aim of the prohibition of appropriation as the term 'appropriation' indicates, is to preserve indefinitely, i.e. over time, the

116 See Wolfrum (n 61).
117 ibid.
118 Baslar (n 76) 103; Wolfrum (n 61); Silja Vöneky and Anja Höfelmeier, 'Article 137' in Alexander Proelss and others (n 11) 963.
119 Wolfrum (n 61).

legal status of the international commons against all States and all private persons with implications for future generations.[120]

4. Dispute Settlement Mechanism under the UNCLOS

The legal regime concerning the activities in the Area and the obligations of States Parties with respect to the protection of the marine environment and the conservation of marine living resources were identified in this paper as the major elements of the Convention which directly concern the interests of future generations. In addition to this, the Convention creates a dispute settlement mechanism featuring a compulsory dispute settlement procedure and a procedure for rendering advisory opinions, a key tool for protecting the said interests. This mechanism is a means for scrutinising States' conduct, improving their performance in the realm of environmental protection and conservation of marine living resources, and ensuring proper implementation of the principle of Common Heritage of Mankind. The compulsory procedure regarding environmental disputes and disputes concerning the activities in the Area facilitates the activation of the said dispute settlement mechanism, which for its part, has the potential to deter non-compliance with the respective UNCLOS provisions. The exercise of the contentious and advisory jurisdiction of UNCLOS adjudicatory bodies, on the other hand, is a channel through which intergenerational considerations can be integrated in the interpretation of the conventional provisions and from there reflected in the application of the relevant law, national law and the conduct of States. The following paragraphs will address the advisory jurisdiction of UNCLOS adjudicatory bodies and three aspects of their contentious jurisdiction: first, their jurisdiction *ratione materiae* over disputes with an environmental dimension, including disputes concerning the conservation of marine living resources, second, the special jurisdiction of the Seabed Disputes Chamber (partly exclusive) over disputes concerning the activities in the Area, and, third, their jurisdiction *ratione personae.*

120 ibid.

4.1. Disputes Concerning Activities in the Area

The UNCLOS has established a special dispute settlement mechanism for the resolution of disputes concerning the activities in the Area detailed in Article 187 UNCLOS. The Seabed Disputes Chamber, composed of 11 members, operates as a court within a court and has compulsory jurisdiction, generally exclusive, over disputes concerning the activities of the Area.[121]

The jurisdiction *ratione materiae* comprises: disputes between States Parties concerning the interpretation and application of Part XI UNCLOS and the related Annexes;[122] disputes between a State Party and the Authority (types of non-contractual disputes arising from acts of omissions of the Authority or a State Party alleged to be in violation of Part XI UNCLOS and its related Annexes or of the rules, regulations and procedures adopted by the Authority or disputes marked by excess of jurisdiction or misuse of power by the Authority);[123] contractual disputes between States Parties, the Authority or the Enterprise, state enterprises, legal and natural persons which possess the nationality of a State Party or are effectively controlled by them or their nationals, when sponsored by such States) or between the Authority and prospective contractors;[124] disputes relating to the responsibility of the Authority[125] and other disputes for which the jurisdiction of the Seabed Disputes Chamber is specifically provided in the Convention.[126] However, disputes concerning the interpretation or application of a contract referred to in Article 187 (c) (i) may be submitted to binding com-

121 See Tullio Treves, 'Seabed Disputes Chamber: International Tribunal for the Law of the Sea (ITLOS)' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law (MPEiPro)* (OUP 2019).

122 This jurisdiction is not exclusive as the parties have the other options to submit such disputes to a special chamber of the ITLOS or an *ad hoc* chamber of the Seabed Disputes Chamber. See Art 188(1) UNCLOS. See Elena V Ivanova, 'Special Chambers: International Tribunal for the Law of the Sea (ITLOS)' in *MPEiPro* (OUP 2019).

123 Art 187(b) UNCLOS.

124 See Art 187(c) and (d) UNCLOS. See also Joseph Akl, 'The Seabed Disputes Chamber' in Patibandla Chandraskhara Rao and Rahmatullah Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International 2001) 84.

125 Art 187(e) UNCLOS.

126 Art 187(d) UNCLOS.

mercial arbitration at the request of any party, unless otherwise agreed.[127] The commercial arbitral tribunal has no jurisdiction over questions of interpretation of the Convention: the Seabed Disputes Chamber retains its compulsory jurisdiction in this regard.[128]

4.2. Environmental Disputes

Disputes concerning the interpretation and application of the UNCLOS, including its provisions relating to the protection of the marine environment and the conservation of marine resources, are subject to the compulsory procedure under Part XV UNCLOS. Moreover, the ITLOS has established two standing special chambers, the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes, available to deal respectively with disputes concerning the conservation and management of marine living resources[129] and with disputes relating to the protection and preservation of the marine environment.[130] In addition, the Seabed Disputes Chamber has exclusive jurisdiction over a major part of the disputes concerning the activities in the Area, including those with an environmental dimension.

127 See Art 188(2)(a) UNCLOS.

128 ibid.

129 These include disputes concerning the interpretation and application of any provision of the UNCLOS which relates to the conservation and management of marine living resources as well as disputes concerning any provision of any other agreement relating to the conservation and management of marine living resources which confers jurisdiction upon the Tribunal. See Resolution on the Chamber for Fisheries Disputes (adopted on 28 April 1997). ITLOS, *Yearbook International Tribunal for the Law of the Sea 1996–1997* (Brill 1999) 154.

130 These include disputes concerning the interpretation and application of any provision of the UNCLOS which relates to the protection and preservation of the marine environment; disputes concerning the interpretation and application of any provision of special convention and agreements relating to the protection and preservation of the marine environment referred to Art 237 UNCLOS, as well as disputes concerning any provisions of any other agreement relating to the protection and preservation of the marine environment which confers jurisdiction upon the Tribunal. See Resolution on the Chamber for Marine Environment Disputes (adopted on 28 April 1997). ibid. 156; Ivanova (n 122).

4.3. Advisory Jurisdiction

Under the UNCLOS, the Seabed Disputes Chamber is vested with jurisdiction to issue advisory opinions[131] which it has already exercised upon a request of the Council of the Authority.[132] Through this mechanism, the Seabed Disputes Chamber has the opportunity to pronounce itself on whether certain rules, procedures or regulations of the Authority are in conformity with the Convention, including the principle of common heritage of mankind and the rules concerning the protection and preservation of the environment, before they are adopted by the Assembly.[133]

Similar to the Seabed Disputes Chamber, the ITLOS can issue advisory opinions. Pursuant to Article 138 ITLOS Rules, the Tribunals may give an advisory opinion if an international agreement related to the purposes of the UNCLOS specifically provides for the submission to the Tribunals of a request for such an opinion.[134] Although the advisory function of the Tribunal and the adoption of Article 138 ITLOS Rules have been debated as neither the ITLOS Statute nor the UNCLOS expressly provide for the Tribunal to give advisory opinions,[135] the ITLOS rendered its first advisory opinion as a full court upon a request of the Sub-Regional Fisheries Commission (SRFC), thus confirming the compatibility of Article 138 ITLOS Rules with the UNCLOS.

The aforementioned advisory opinions addressed various legal questions pertaining to international environmental law, the precautionary approach, the content of the obligation to protect and preserve the marine environment, the fight against IUU fishing, the activities in the Area (in the case of the Seabed Disputes Chamber's advisory opinion) all of which concern and contribute to maintaining the 'health' of the seas and oceans, food security, respectively the sustainable use of marine resources with implications

131 Art 191 UNCLOS.

132 *Responsibilities and obligations of States with respect to activities in the Area,* Advisory Opinion, 1 February 2011 ITLOS Case No 17.

133 Akl (n 124) 86.

134 See Art 21 ITLOS Statute in conjunction with Art 138 ITLOS Rules. See Alexander Proelss, 'Advisory Opinion: International Tribunal for the Law of the Sea (ITLOS)' in *MPEiPro* (OUP 2019).

135 It has been questioned whether the adoption of Art 138 was a lawful exercise of the regulatory powers conferred on the Tribunal by Art 16 Annex VI. See Sotirios-Ioannis Lekkas and Christopher Staker, 'Annex VI Article 21' in Alexander Proelss and others (n 11) 2381.

across generations and across legal sectors. The advisory opinions were heavily relied on in the jurisprudence of UNCLOS Tribunals.[136] Indeed, both the ITLOS and the Seabed Disputes Chamber, have admitted and have taken into account that their advisory opinions would have practical significance as they 'would assist [the SRFC or the Council of the Authority as the case may be] in the performance of [their] activities and contribute to the implementation of the Convention'.[137] Notably, the advisory opinion of the ITLOS has already influenced the operation of the SRFMO which has taken steps for its effective implementation.[138] These observations confirm the point made in the initial paragraphs of this paper, namely that advisory opinions, albeit non-binding, can have an impact and indirectly induce States into compliance with their obligations under the UNCLOS, including under the common heritage principle, in a manner that would benefit future generations as part of humankind.

4.4. Locus Standi

Unlike the ICJ whose access, according to Article 34 (1) ICJ Statute, is limited to States, the ITLOS is also open to non-State entities, including natural and juridical persons and even entities which are not parties to the Convention in any case expressly provided for in Part XI UNCLOS or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.[139]

136 See *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (n 39) paras 125, 128, referring to the *Advisory Opinion of the Seabed Disputes Chamber on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*; *The South China Sea Arbitration (Philippines v China*), Award, 12 July 2016, PCA Case No2013–19, paras 743, 744, referring to *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (n 39).

137 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission,* Advisory Opinion*,* 2 April 2015, ITLOS Case No 21, para. 77; *Responsibilities and obligations of States with respect to activities in the Area* (n 132) para. 30.

138 Following the rendering of the requested opinion, the SRFMO organised various events, including national workshops to validate national and sub-regional action plans with a view to its effective implementation. More information is available on the official website of the SRFMO <https://spcsrp.org/en/harmonization-policies-and-legislation> accessed 7 July 2023.

139 Art 20(2) UNCLOS Annex VI. See also Elena V Ivanova, 'Intervention: International Tribunal for the Law of the Sea (ITLOS)' in *MPEiPro* (OUP 2019).

As a result, under certain conditions, **non-State entities** and even non-parties to the UNCLOS can submit a dispute concerning the *conservation of the marine living resources* and the *protection and preservation of the marine environment* (these are two categories of disputes which concern and are of essential interest for future generations). The accessibility of the dispute settlement mechanism for non-State entities results in a greater variety of actors capable of taking action with a view to scrutinising States' conduct and thus inducing States into compliance with their international obligations.

Disputes concerning the *activities in the Area* can be submitted to the Seabed Disputes Chamber, to a special chamber of the ITLOS or an ad hoc chamber of the Seabed Disputes Chamber not only by States, but also by non-State entities, including the Enterprise, the Authority, natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States or any group of the foregoing which meets the requirements under the Convention.[140]

The UNCLOS has created new legal subjects vested with international legal personality. Given their legal capacity to contract and be a party to legal proceedings, both the Enterprise and the Authority have separate *locus standi* before the Seabed Disputes Chamber of the ITLOS as well as before commercial arbitral tribunals.[141] Notably, although the Seabed Disputes Chamber does not have jurisdiction with regard to the exercise by the Authority of its discretionary powers and cannot declare invalid or pronounce on the compatibility of the rules, regulations and procedures of the Authority, it can decide on claims concerning excess of jurisdiction or misuse of power by the Authority as well as claims that application of such rules, regulations and procedures would be in conflict with the contractual obligations of the parties in dispute or with the obligations

140 See Arts 187(c), (d), 188(2) UNCLOS.

141 Art 187(c) in conjunction with Art 188(2) UNCLOS enable the Enterprise and Authority to institute or be a party in legal proceedings before the Seabed Disputes Chamber or in commercial arbitration with respect to disputes concerning joint arrangements between contractors and the Enterprise, in the case of the Enterprise, as well as with respect to disputes concerning the activities in the Area between the Authority and: States Parties, contractors (States Parties; state enterprises, legal and natural persons which possess the nationality of a State Party or are effectively controlled by them or their nationals, when sponsored by such States) or prospective contractors, in the case of the Authority.

under the UNCLOS.[142] This litigation possibility provides a mechanism for monitoring and scrutinising the exercise of powers by the Authority in individual cases and give remedy for its eventual failures to comply with its contractual obligations or obligations under the UNCLOS.[143] Whereas the Authority enjoys immunity from legal process in the territory of its States, unless expressly waived by it,[144] actions can be brought against the Enterprise in a court of competent jurisdiction in the territory of a State Party in which it operates.[145] Further to the question of standing, it should be mentioned that, pursuant to Article 187 (c) UNCLOS, state enterprises, natural or legal persons referred to in Article 153 (2) (b) have standing before the Seabed Disputes Chamber of the ITLOS.

In sum, various types of non-State entities can institute proceedings with respect to disputes concerning the interpretation and application of relevant contracts or acts or omissions relating to the activities in the Area and affecting the interests of the other contracting party. Thus, not only States and States Parties but non-State entities, including the Authority acting on behalf of mankind as a whole, can control the execution of the said contracts and ensure through litigation that the activities in the Area conform to the rules and principles established by the UNCLOS, and by implication that the principle of common heritage of mankind (with all the implications for future generations discussed above) is respected. The UNCLOS effectively broadens the scope of entities capable of taking legal action with a view to ensuring that the obligations under the UNCLOS concerning the activities in the Area and the application of the principle of common heritage of mankind are met.

The same applies *mutatis mutandis* to advisory proceedings. Whereas the exercise of the advisory jurisdiction of the Seabed Disputes Chamber

142 Art 189 in conjunction with Art 187 UNCLOS.

143 This solution was a compromise at the UNCLOS III Conference between those who insisted on the necessity to allow a full judicial appreciation of the rules, regulations and procedures of the Authority and those who were in favour of its overriding power. See Akl (n 124) 85.

144 Art 178 UNCLOS. For more details, see Pablo Ferrara, 'Article 178' in Alexander Proelss and others (n 11) 1237.

145 Pursuant to Art 13(3) Annex IV UNCLOS, actions may be brought against the Enterprise in a court of competent jurisdiction in the territory of a State Party in which the Enterprise has an office, has appointed an agent for the purpose of accepting service or notice of process, has entered into a contract for goods and services, has issued securities, is engaged in commercial activity.

can be triggered by the Assembly or the Council,[146] a request for an advisory opinion of the Tribunal may be submitted 'by *whatever body* is authorised by or in accordance with [emphasis added]' an international agreement related to the purposes of the Convention specifically providing for such a submission.[147]

5. Conclusion

Although not yet present or not yet capable of taking legal action to protect their interests themselves, future generations are not devoid of voice. Their voice is echoed in the various provisions of the UNCLOS which oblige present generations to take active steps to protect and preserve the marine environment and develop the Area for the benefit of mankind. The UNCLOS offers a variety of mechanisms which could be utilised to this end. While imposing upon the States Parties the obligation to protect and preserve the marine environment and take measures for the conservation of marine living resources, it also creates a compulsory dispute settlement procedure through which the adherence to the said obligations can be secured. The latter constitutes a mechanism through which the conduct of the States Parties can be scrutinised and their performance improved. The exercise of the compulsory and advisory jurisdiction of UNCLOS adjudicatory bodies is a channel through which intergenerational considerations can be integrated into the interpretation and from there reflected in the application of the relevant law, national law and the conduct of States. Their broad jurisdiction *ratione personae* allows a greater variety of actors to take action and question by judicial means the legality under the Convention of States' acts and thus demand correction in their behaviour in line with the principles and rules of the Convention. However, its most innovative achievement is the development of the principle of common heritage of mankind and the creation of mechanisms, a compulsory dispute settlement procedure and a procedure for rendering advisory opinions, through which the efficient implementation of this principle is ensured. Through this principle, the UNCLOS recognises future generations, an inalienable part 'Mankind' or rather 'Humankind', as beneficiaries of the Area and its resources and imposes an obligation upon the States Parties

146 Art 191 UNCLOS.

147 See Art 21 ITLOS Statute in conjunction with Art 138 ITLOS Rules.

to the Convention to develop the said common heritage for their benefit. Under this principle, a complex international management system, the Authority, has been established which has no analogue in other treaties dealing with or alluding to the principle of common heritage of mankind. The Authority serves as an advocate securing the needs and long term concerns of mankind which include the foreseeable needs and interests of future generations. Thus, States Parties are meant to act as a trustee on behalf of mankind and hence on behalf of future generations.