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Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention

Ilias Plakokefalos[*]

1. Introduction

The United Nations Convention on the Law of the Sea[1] (LOSC) contains one of the most comprehensive dispute settlement (DSP) regimes that can be found in a multilateral treaty. A study of the DSP provisions of the LOSC from the point of view of shared responsibility will test the regime's structural advantages and disadvantages in that regard. One of the bases of shared responsibility (that is: an obligation shared by multiple actors and a breach of that obligation attributed to these actors that leads to a single harmful outcome)[2] have not yet been tested in practice under the LOSC in a contentious case. Nevertheless, the Deep Seabed Disputes Chamber in its Advisory Opinion[3] has alluded to a number of issues that arise under the general theme of shared responsibility.

The basic feature of the LOSC DSP is that it is, as to the majority of the disputes that may arise, compulsory. This is particularly important in view of the procedural issues that might arise among multiple actors. It essentially means that, for the most part, the

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[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1834 UNTS 397.

[2] CROSS REFERENCE NOLLKAEMPER, for a comprehensive analysis of shared responsibility see André Nollkaemper, Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2011) *SHARES Research Paper 03 (2001) ACIL 2001-07* (revised May 2012) <www.sharesproject.nl>.

[3] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, (ITLOS Advisory Opinion) (available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>.

problems that are associated with consensual adjudication, as these arise in particular in the International Court of Justice (ICJ),[4] are not to be found in the LOSC DSP.

Nevertheless, it must be admitted that the exceptions to the compulsory nature of the dispute settlement that are envisaged in the LOSC are also relevant to scenarios where more than one actor may be found responsible. This is true especially for fisheries, which is one of the areas where shared responsibility among multiple actors is most likely to arise in practice.

The DSP of the LOSC provides for a special regime pertaining to the management and protection of the Area,[5] which –like the general regime- is also compulsory. The deep seabed dispute settlement regime is of much interest for present purposes, considering that most of the activities that take or will take place in the Area have a shared aspect. Obligations are divided among sponsoring states, sponsored entities and the International Seabed Authority (ISA). Therefore, the activities undertaken by the sponsored entities and overseen by the sponsoring states and the ISA may easily have implications for shared responsibility. What is more, the deep seabed DSP regime departs to a great extent from most procedures for international adjudication since it envisages adjudication including non-state actors and international organizations.

The present paper will proceed in two parts, corresponding to the above-mentioned distinction between the general DSP regime under the LOSC and the deep seabed mining regime. The second chapter will discuss the general DSP regime under the LOSC. It will introduce the basic framework of the dispute settlement procedures of the LOSC and will explain its relationship to issues of shared responsibility. Then, the advantages and shortcomings of the general regime will be discussed in relation to the subject areas where shared responsibility scenarios are particularly likely to materialize such as the protection of the marine environment or fisheries. In this respect it will be shown that, on the one hand, the LOSC DSP, being compulsory in nature, can resolve a number of problems that would arise when recourse to adjudication would have been consensual. On the other hand, the compulsory nature of the LOSC DSP is not

[4] CROSS REFERENCE PAPARINSKIS
[5] LOSC Part XI.

comprehensive giving rise to problems in the process of adjudication in certain areas. The exceptions to the compulsory procedures entailing binding decisions, in particular relating to fisheries, will be studied with regard to the impact they may have on issues of shared responsibility.

The third chapter of the paper will be devoted to the study of the deep seabed dispute settlement regime. This third chapter will first briefly set out the primary rules that may lead to shared responsibility. Then it will seek to expose the importance of the secondary rules applicable to the seabed that bear also on the procedural aspects of the regime. Finally, it will appraise the procedural issues *per se* that render the deep seabed DSP a rather unique case study both within the LOSC and in international law in general.

2. The *General Regime*

2.1 Situations where shared responsibility might arise

The areas where the questions of shared responsibility are most likely to arise under the LOSC are the protection of the marine environment and the regulation of fisheries. The LOSC provides for a comprehensive regime for the protection of the marine environment. Part XII of the LOSC sets the broad obligation that all states parties must protect and preserve the marine environment,[6] followed up by more specific obligations.[7] A number of scenarios spring to mind according to which shared responsibility might be present. First, land-based marine pollution might emanate from more than one states parties jurisdiction or control.[8] This scenario would likely involve the responsibility of a number of states that would contribute to the polluting effect. Another scenario would

[6] LOSC art 192. On issue of environmental protection under the law of the sea see among others, Brian D Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Clarendon Press, 1985); Alan E Boyle, 'Marine Pollution under the Law of the Sea Convention' (1985) 79 (2) AJIL 347; Jonathan I. Charney, 'The Marine Environment and the 1982 United Nations Convention on the Law of the Sea' (1994) 28 (4) Intl Lawyer 879; Thomas Mensah, 'Protection and Preservation of the Marine Environment and the Dispute Settlement Regime in the United Nations Convention on the Law of the Sea' in Andree Kirchner (ed), *International Marine Environmental Law: Institutions, Implementation and Innovations* (Kluwer, 2003) 9; Catherine Redgwell, 'From Permission to Prohibition: the 1982 Convention on the Law of the Sea and Protection of the Marine Environment' in David Freestone, Richard Barnes and David M Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP, 2006) 180.

[7] LOSC Part XII deals with the issue of vessel source pollution, the problem of land based pollution and dumping among others.

[8] LOSC arts 207, 213.

involve the laying of pipelines in the continental shelf which is managed by more than one states – either with or without the coastal state's participation – when damage to the marine environment occurs then the shared responsibility of these states would be in question.[9]

Turning to fisheries, a shared responsibility scenario can appear in a number of ways. Most probably, it would involve the depletion of a stock either in the high seas or in the Exclusive Economic Zone (EEZ) of one or more coastal states. Responsibility for such depletion may be attached, depending on the circumstances, either to the coastal state(s) or to potential distant water fishing states which have overfished in the area. Either way, the LOSC posits that, on the one hand, coastal states shall ensure that there is no over-exploitation of the living resources in the EEZ.[10] On the other hand, it also places an obligation of co-operation (either directly or through a Regional Fisheries Management Organization)[11] towards the conservation of highly migratory species or of stocks that occur between two EEZ and/or between an EEZ and an area adjacent to it.[12]

2.2 General Procedural Provisions

The DSP of the LOSC as it appears in Part XV leaves little doubt as to its comprehensiveness or completeness.[13] Section I of Part XV sets up the basic obligations of the states parties to the LOSC concerning the efforts to settle any dispute that arises by peaceful means[14], it promotes the exchange of views[15] and conciliation[16] and leaves the

[9] LOSC arts 79, 208. See also Robin Churchill, Vaughan Lowe, *The Law of the Sea* (3d edn, Manchester University Press, 1999) 156.
[10] LOSC art 61. Generally on the law of fisheries see, Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: the United Nations Law of the Sea Convention Cooperation Between States* (Martinus Nijhoff, 1989); Peter GG Davies and Catherine Redgwell, 'The International Legal Regulation of Straddling Fish Stocks' (1996) 67 British YB Intl L 199; Francisco O Vicuña, *The Changing International Law of High Seas Fisheries* (CUP, 1999).
[11] On RFMOs see Bob Applebaum, Amos Donohue, 'The Role of Regional Fisheries Management Organizations' in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer, 1999) 216.
[12] LOSC arts 63, 64.
[13] On the dispute settlement system of the LOSC see, among others, Louis B Sohn, 'Settlement of Law in the Sea Disputes' (1995) 10 IJMCL 205; Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ICLQ 863; Jonathan Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1997) 90 AJIL 69; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP, 2005); Igor V Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff, 2012).
[14] LOSC art 279.
[15] LOSC art 283.

method of dispute settlement to be chosen by the parties.[17] The second section of the same part provides for compulsory procedures. It is applicable to any dispute concerning the interpretation or application of the Convention that has not been resolved according to Section 1. Every state party may bring such a dispute before a competent court or tribunal.[18]

States parties are given a number of choices as to the forum before which they will bring the dispute. They may choose among arbitration-either under Annex VII or Annex VIII, the ICJ and the International Tribunal for the Law of the Sea (ITLOS).[19] Arbitration is the default procedure in case there is a discrepancy between the parties' forum of choice[20] or in case a party has not stated a preference. Moreover the states parties may, for specific cases, exclude certain judicial fora.[21]

2.3 Bringing Cases Concerning Shared Responsibility

It is immediately evident that the absence of the requirement of consent is favorable to any situation involving multiple responsible states. In an international legal setting where consensual judicial proceedings reign supreme,[22] the lack of consent to the submission of a dispute before binding court proceedings may be an insurmountable obstacle.[23] The compulsory nature of the DSP of the LOSC means that states parties will be able to bring a claim against any other party to the Convention or a combination thereof. This potential, offered by the LOSC DSP, is of paramount importance in the context of shared responsibility.

International organizations that are parties to the Convention may also bring a claim before a court or a tribunal.[24] At present this, of course, only applies to the EU.[25]

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[16] LOSC art 284.
[17] LOSC art 280.
[18] LOSC art 286.
[19] LOSC art 287 (1).
[20] LOSC art 287 (5).
[21] LOSC art 287.
[22] CROSS REFERENCE PAPARINSKIS
[23] CROSS REFERENCE PAPARINSKIS
[24] LOSC Annex IX art 7 (2).
[25] It is worth noting that Annex IX was drafted specifically with only the EU (then EC) in mind, see LOSC arts 305-307 and Annex IX and Myron Nordquist, Shabtai Rosenne, Louis B Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V* (Martinus Nijhoff, 1989) 185-190. See also

The fact that the EU was a party to a dispute that was brought before the ITLOS by Chile[26] illustrates that the nature of the EU as an international organization was not an impediment in the proceedings.

However, it is not accurate to describe the entire dispute settlement part of the LOSC as compulsory.[27] A number of exceptions and limitations to the compulsory nature of the regime apply. The exception of disputes that emerge in the Exclusive Economic Zone of a coastal state and pertain to scientific research or fisheries is of particular relevance here. The coastal state is not obliged to settle these disputes under the compulsory DSP of Section 2 of Annex XV.[28] This is of major relevance in terms of shared responsibility, since fisheries is one of the areas where states assume shared obligations, both under the LOSC and under arrangements concluded within Regional Fisheries Management Organizations (RFMOs).[29]

It must be pointed out, that the manner in which the dispute is framed is of great importance. Most instances where issues of shared responsibility will arise will concern transboundary fish stocks, that is fish stocks that transcend the man-made maritime zones and move either between multiple EEZs or between EEZs and the high seas. These disputes can be framed as pertaining to the freedom of fishing in the high seas and not to the rights of the coastal state in the EEZ.[30] Nevertheless, this will effectively mean that the dispute will cover only the part of the stock that can be found in the high seas leading to an undesirable piecemeal approach.[31] Moreover, it has been correctly noted that this situation creates an inequitable result: on the one hand, the coastal state will be able to take advantage of the compulsory DSP when it comes to a dispute against a state fishing

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Robin Churchill, Vaughan Lowe (n 9) 18; Donald R Rothwell, Tim Stephens, *The International Law of the Sea* (Hart 2010) 483.

[26] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South –East Pacific Ocean (Chile/European Union)*, Order 2009/1 available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/Ord.2009.1-16.12.09.E.pdf>.

[27] Shigeru Oda, (n 13) 863; Alan Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling fish Stocks' (1999) 14 IJMCL 1, 6-7.

[28] LOSC art 297 (3).

[29] LOSC art 63.

[30] Boyle (n 27) 12; Robin Churchill, 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is there Much in the Net?' (2007) 22 IJMCL 383, 389-390.

[31] Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 ICLQ 37, 45; Boyle, 'Problems of Compulsory Jurisdiction' (n 27) 13.

in the high seas that are adjacent to its EEZ. The state party that fishes in the high seas, on the other hand, will not be able to do the same.[32] Another point that pertains to the issue of shared responsibility is that it will often be the coastal state that will have an interest in resolving such a dispute. It is not uncommon that straddling fish stocks that can be found in both an EEZ and in the high seas will be overfished in the high seas by distant water fishing states.[33] In such a case the coastal state will indeed wish to avail itself of the exception of art 297(3).

The first limitation to compulsory DSP is LOSC article 281, which states that the DSP is applicable only if the parties have not reached settlement by a means of their choice and the agreement between the parties does not exclude any further procedure. An Annex VII Tribunal dismissed the *Southern Bluefin Tuna* case precisely on grounds of application of article 281(1).[34] There the Tribunal held that the Convention for the Conservation of the Southern Bluefin Tuna[35] which was applicable between the parties, did exclude further procedures and therefore it had no jurisdiction.[36] This scenario can be seen as being problematic in a shared responsibility context only in case some, but not all, parties to the dispute have sought an alternative DSP mechanism, under another treaty regime and the rest rely on the LOSC provisions. A problem arises if the said agreement excludes any further procedures. In this case there seems to be an apparent imbalance: some states will be subject to the jurisdiction of a court or a tribunal under LOSC whereas others will not since they will have to follow whatever DSP is provided in the agreement that excludes the LOSC DSP. It is a problem that may lead to a fragmented

[32] Churchill (n 30) 390.
[33] Chile for example brought a case before ITLOS exactly because of the overfishing of swordfish off its coasts, see (n.26). Of course the reverse scenario might be true as well. The *Estai* incident, which prompted the dispute between Spain and Canada to be brought before the ICJ, involved the seizure of a Spanish vessel in the high seas by Canada (see *Fisheries Jurisdiction Case* (Spain v. Canada) [1998] ICJ Rep 342). The dispute, however, had its origins in the overfishing of turbot off the western coast of Canada. If Canada had intended to bring a case earlier under the LOSC DSP, it would indeed have needed to avail itself of the exception of the LOSC.
[34] *Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sea, Southern Bluefin Tuna Case* (New Zealand v. Japan, Australia v. Japan), Award on Jurisdiction and Admissibility, (2000) XXIII UNRIAA, 1-57. For a different view on the applicability of the same article see the order of ITLOS at the provisional measures stage, *Southern Bluefin Tuna Cases* (New Zealand v. Japan, Australia v. Japan), Provisional Measures, Order, 1999 available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf>.
[35] Convention for the Conservation of the Southern Bluefin Tuna (adopted 10 May 1993, entered into force 20 May 1994) 1819 UNTS 360.
[36] Annex VII Arbitral Tribunal Award on Jurisdiction, para 72.

treatment of the case leading to dubious results. If two different courts or tribunals under two different DSPs hear the same substantive dispute they may reach decisions that pertain the danger of not being streamlined or of being contradictory.

However, it is submitted that art 281(1) can be interpreted so as to avoid the fragmentation of the dispute. The first sentence of the article stipulates that the parties to the dispute must have agreed to seek settlement otherwise. This must be taken to mean that *all* parties to the dispute must be parties to the agreement that excludes the application of the LOSC DSP. Any other interpretation would make little sense in the context of Annex XV and the article, no less because it seems it would be against the object and purpose of the LOSC DSP.[37] Annex XV sets the limitations and exceptions to compulsory DSP in a rather cautious manner and it cannot be claimed that the fragmentation of the procedure in such a way would be compatible with the object and purpose of the LOSC. Annex XV aims for a comprehensive approach towards the settlement of disputes under the LOSC.[38] The fact that it provides for limitation to the application of the DSP means that it gives precedence over the parties' choice of forum[39] or procedure.[40] This in no way means that the Convention would aim for the fragmentation of the procedure. To the contrary, the leeway accorded to the parties means that it aims for a unitary effect even if this is achieved outside its own DSP.

A second limitation to the comprehensive application of the LOSC DSP can be found in article 282. Article 282 stipulates that if another agreement provides for a compulsory DSP then that DSP shall apply in lieu of that of the LOSC. The difference from article 281 is that article 282 requires expressly that the parties to the dispute have preferred another DSP entailing a binding decision through a general, regional or bilateral agreement. In contrast, article 281 has two requirements: first, that the parties have exhausted the DSP they have agreed on and second, that the DSP does not exclude any further proceedings. Article 282 has been discussed in the decision of the ITLOS in the

[37] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1).
[38] Nordquist, Rosenne, Sohn (n 25) 6, 8.
[39] LOSC art 287(1).
[40] LOSC art 281(1). For an affirmation of this point see Nordquist, Rosenne, Sohn (n 24) 24.

MOX Plant dispute between Ireland and the UK.[41] The issue at hand was whether the ITLOS and the Annex VII Tribunal would have jurisdiction over the case if the questions fell both under EC regulation and the LOSC. The ITLOS held that art 282 would not prevent the Annex VII Tribunal from having jurisdiction over the case since in its view the dispute involved the interpretation and application of the LOSC and therefore the DSP of the LOSC was applicable.[42] However, the Arbitral Tribunal stayed its proceedings for reasons of comity.[43] It is interesting to note that the European Court of Justice was not seized of the matter at the time the Tribunal issued its order. When the case was indeed brought before the ECJ it held that it had jurisdiction since the matter fell within the competence of the EU.[44] A question that might arise is what would happen if, in the context of fisheries for example, an EU member state brings a claim against two other parties to the treaty of which on is a member of the EU and the other is not. This scenario may cause a problem of fragmentation of the judicial procedure if the Court of the EU decides that it has exclusive jurisdiction over the two parties that are also EU members.

Besides this possible fragmenting effect it seems that art 282 does not present any further complications regarding shared responsibility than the ones presented by art 281(1). Nevertheless, it must be submitted that, like art 281(1), there is a serious chance that it will limit the field of application of the DSP of the LOSC concerning both issues where shared responsibility is more likely to arise, namely, fisheries and the protection of the marine environment.

2.4 Handling Cases Regarding Shared Responsibility

In the scenario where multiple respondents are brought before a competent court or tribunal, the rules of evidence will differ depending on which court or tribunal has

[41] *The MOX Plant case* (Ireland v. United Kingdom), Request for Provisional Measures, ITLOS Order of 3 December, available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf>, paras 48-52.
[42] Ibid. para 52.
[43] *Arbitral Tribunal Established under Annex VII of the Convention, In the dispute concerning the MOX Plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea*, (Ireland v. United Kingdom), Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, Order No.3 of 24 June 2003, available at <www.pca-cpa.org>.
[44] Case C-459/03 *Commission v. Ireland* [2006] ECR I-04635.

jurisdiction over the case.[45] For the purposes of the present paper, the focus will be on the tribunals established under the LOSC. The ITLOS Rules do provide for the calling of expert witnesses[46] while the Tribunal may select two experts to sit with it during the procedure.[47] The provisions of the LOSC on the Annex VII Tribunal do not provide any specific guidance as to how the tribunal may conduct fact-finding, handle evidence or call witnesses. Therefore, the way an Annex VII Tribunal will go about collecting the necessary evidence or hearing expert views will be decided on an *ad hoc* basis.[48]

Much more promising is the potential of the Annex VIII Tribunal. The Annex VIII Tribunal is probably the better-equipped forum under the LOSC so as to accommodate fact-finding or to handle complex factual situations. One of the problems emerging from the presence of multiple actors is that the fact-finding powers of the courts or the accurate appraisal of technical evidence becomes more complex.[49] Special arbitration under Annex VIII is designed so as to meet the demands of technically difficult litigation.[50] The Annex VIII tribunal is to be constituted by experts, either chosen directly by the parties or chosen from a list that is to be established by the requisite international organizations.[51] It is worth noting that Annex VIII also expressly provides for fact-finding that, once undertaken, is to be considered conclusive among the parties.[52] The jurisdiction *rationae materiae* of the Annex VIII tribunal is limited to fisheries, the protection of the marine environment, marine scientific research and navigation, including pollution by vessels.[53] Most shared responsibility issues will indeed

[45] CROSS REFERENCE BAETENS AND PAPARINSKIS
[46] ITLOS Rules, arts 77 and 78(2).
[47] ITLOS Rules, art 15.
[48] LOSC Annex VII, art 5 posits that the Tribunal shall determine its own procedure unless the parties agree otherwise.
[49] Especially when it comes to disputes concerning highly technical matters the courts have not been particularly successful in convincing that they have made an accurate appraisal. That was the case in *Pulp Mills* where the ICJ proceeded to examine the technical reports presented by the parties without recourse to expert advice, see *Case Concerning Pulp Mills on the River Uruguay*, (Argentina v. Uruguay), available at <http://www.icj-cij.org/docket/files/135/15877.pdf> Judgment of 20 April 2010 para 168. Judges Simma and Al Khasawneh criticized this approach in their Joint Dissenting Opinion, see *Joint Dissenting Opinion of Judges Al-Khasawneh and Simma*, available at <http://www.icj-cij.org/docket/files/135/15879.pdf>, at paras 20-23.
[50] Annex VIII was also designed to meet the demands of the socialist states that insisted on procedures where states could have significant influence over the procedure, see Klein (n 13) 56.
[51] LOSC Annex VIII art 2.
[52] LOSC Annex VIII art 5.
[53] LOSC Annex VIII art 1.

arise under one or more of these subject areas. Nevertheless, the fact that only eight states parties to the LOSC have indicated a preference towards the Annex VIII tribunal means that chances are rather slim on verifying its potential on better accommodating issues that involve multiple responsible states.

Also relevant in handling multiple respondents before a court is the issue of joinder. According to the Rules of the ITLOS, the Tribunal may at any time either join two cases formally or direct, informally, common action in respect of the written or oral proceedings including the calling of witnesses.[54] The Rules provide no guidance as to the occasions where the Tribunal may join cases. The same is true for similar provisions in the rules of other international courts and tribunals. If one looks at the equivalent provision of the Rules of the International Court of Justice,[55] as well as its practice,[56] it seems that there is wide discretion conferred upon the Court. The ICJ has in fact joined a number of cases that had arisen out of the same legal or factual bases.[57] Its discretion, however, is not unfettered and it seems that it has also, at times, given prominence to the wishes of the parties.[58] Equally wide is the discretion conferred upon the Trial Chamber of the International Criminal Court (ICC). Article 64(5) of the ICC Statute provides for an obligation to notify the parties and also for a criterion of '*appropriateness*' which is

[54] Article 47 of the Rules of the Tribunal stipulates that '[t]he Tribunal may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Tribunal may, without effecting any formal joinder, direct common action in any of these respects'.

[55] It is not only the number of the articles that is common to the Rules of the ITLOS and the Rules of the ICJ, the text is also identical, see article 47 of the Rules of the Court available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

[56] The practice of the ICJ is not uniform and the Court does not always issue a formal order when it effectively joins cases, see Santiago Torres Bernárdez, Article 48, in Andreas Zimmerman, Karin Oellers Frahm, Christian Tomuschat (eds) *The Statute of the International Court of Justice: A Commentary* (OUP, 2006) 1089. The issue of joinder has been mainly problematic in the context of the ICJ in terms of appointing judges *ad hoc*. Thirlway also discusses the issue of joinder of cases and its repercussions on the appointment of judges *ad* hoc, Hugh Thirlway, The Law and Procedure of the International Court of Justice 1960-1989, Part Eleven, (2000) 71 British YB Intl L 71, 163-169. Another source of concern regarding the joinder of cases has been the issue of counterclaims and how they are to be accommodated, even though this is slightly different since these procedural arrangements fall under article 80 of the Statute of the Court and not under article 47 of the Rules, see Olivia Lopes Pegna, 'Counter Claims and Obligations Erga Omnes before the International Court of Justice' (1998) 9 EJIL 724, 730.

[57] Rosenne states that it is especially the factual base that plays a prominent role in the decision to join cases. This is the scenario envisaged in the deep seabed proceedings discussed in this part. See Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. III (4th edn, Martinus Nijhoff, 2006) 1209.

[58] Ibid. 1219. Also, cross – reference PAPARINSKIS

admittedly not precise and leaves a wide discretion to the Trial Chamber. The recent decision of an ICSID Tribunal in *Abaclat*[59] included a discussion on the issue of joinder albeit in the context of mass claims. The Tribunal pointed out that the purpose of joinder is to allow the claimant to '*ensure an effective remedy in protection of a substantive right provided by contract or law*.'[60] It also made sure to stress that it could not discern a general pattern of how a joinder takes effect in various jurisdictions.[61] It is therefore obvious that the Rules of ITLOS do confer wide discretion on the Tribunal as to the circumstances under which it may join cases.

2.5 Absent Parties

This section will address the problems that arise from the absence of one of the responsible parties form the judicial proceedings. In the context of the law of the sea, the issue of third parties being affected by the bilateral nature of international dispute settlement has arisen in cases of maritime delimitation. States whose interests had been at stake before an international court have been quick to seek intervention in the proceedings. Nevertheless, such requests for intervention have been usually dismissed.[62] The ICJ in particular has been very cautious in allowing third states to intervene.[63] Even though these cases do not pertain to issues of responsibility, some of them do involve law of the sea issues (especially delimitation) and they show the reluctance of the courts to allow the presence of multiple parties. Instead a clear preference has been shown for a bilateral DSP setting.

[59] *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, 2011.
[60] Ibid. para 484.
[61] Ibid. para 480.
[62] See for instance *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) [1981] (Application to Intervene) ICJ Rep 3; *Continental Shelf* (Libyan Arab Jamahiriya/Malta) [1984] (Application to Intervene) ICJ Rep 3.
[63] The first time ever that the ICJ allowed an intervention was in 1990 and also involved maritime delimitation, see *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras) (Application to Intervene)[1990] ICJ Rep 92. The ICJ has allowed intervening states to present their cases in two other occasions, see *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea Intervening) (Application to Intervene: Order) [1999] ICJ Rep1029 and *Jurisdictional Immunities of the State* (Germany v. Italy) (Application by the Hellenic Republic for Permission to Intervene: Order) [2011], available at < http://www.icj-cij.org/docket/files/143/16556.pdf>.

The indispensable third party rule comes into play when an absent party has not consented to be brought to international adjudication.[64] Such an instance would arise if one of the above mentioned limitations or exceptions applied. In the case law of the ICJ, the lack of consent is considered to prevent the court or tribunal from reaching a decision that will affect the legal interest of the absent party.[65] In *Monetary Gold*, [66] it was the lack of consent of Albania that led the ICJ to dismiss the claim,[67] while the same issue has featured prominently in *East Timor*[68] and in *Nauru*.[69] The application of the Monetary Gold rule has not been tested in the LOSC context and the outcome of the application of the rule is essentially a matter of speculation. It will essentially depend on the manner in which the ITLOS would interpret the rule as developed by the ICJ. In principle, if one of the exceptions or limitations to the compulsory DSP of the LOSC applies, then the ITLOS will have to actually deal with the problem of a party being absent from the proceedings, probably much in the same way the ICJ has done.

2.6 Conclusion

In conclusion, it seems that the LOSC DSP does not present any peculiar obstacles to the adjudication of issues pertaining to shared responsibility. On the one hand, the fact that it provides for a compulsory DSP for most disputes removes most problems that are to be found in consensual forms of adjudication. On the other hand, it has been shown that the compulsory nature of the regime can become more limited than it would *prima facie* seem. What is more, the limitation of application of compulsory DSP crucially affects aspects of the LOSC, such as fisheries, where most issues of shared responsibility may arise.

3. Procedural Issues of Shared Responsibility in Deep Seabed Mining Regime

[64] *Case of Monetary Gold Removed from Rome* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and the United States of America) [1954] (Preliminary Question) ICJ Rep 19, 32.
[65] CROSS REFERENCE PAPARINSKIS, Alexander Orakhelashvilli, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: From Monetary Gold to East Timor and Beyond' (2011) 2 JIDS 373, 380.
[66] See above (n 64).
[67] Ibid.
[68] *Case Concerning East Timor* (Portugal v. Australia) [1995] ICJ Rep 90.
[69] *Phosphate Lands in Nauru* (Nauru v. Australia) [1992] (Preliminary Objections) ICJ Rep 240.

The DSP applicable to the resolution of disputes that pertain to the Area is of great importance in relation to shared responsibility for three reasons. First, because issues of shared responsibility may arise from a situation of multiple state sponsor activities in the Area. This scenario has materialized since there is already a consortium formed by Bulgaria, Cuba, the Czech Republic, Poland, Russian Federation and Slovakia that has secured a contract for exploration.[70] Second, because the primary obligations pertaining to the deep seabed apply to states, international organizations and private entities. All these actors share a number of obligations that concern the protection of the environment in the Area. Third, because the DSP regarding the activities in the Area is better geared towards the resolution of shared responsibility disputes than the general DSP of the LOSC.

3.1 Shared primary obligations in relation to the Area

Before embarking upon the examination of the procedural rules, a brief appraisal of the shared obligations arising out of the LOSC and concerning the Area is in order. The LOSC provides for a set of obligations that seeks to regulate the protection of the environment in the Area.[71] These obligations operate on three levels. First, the states that sponsor an entity to undertake activities in the Area (exploration or exploitation) are under an obligation to protect and preserve the environment.[72] The Advisory Opinion of the Deep Seabed Disputes Chamber on the responsibilities of sponsoring states in the Area confirmed the existence of this obligation.[73] The Chamber added that this obligation consists of a number of direct obligations and of a more general due diligence obligation.[74] Second, the International Seabed Authority is also under an obligation to

[70] Interoceanmetal Joint Organization (IOM) registered on 21 August 1991. The contract was signed on 29 March 2001.
[71] See among others, André Nollkaemper, 'Deep Sea-bed Mining and the Protection of the Marine Environment, (1991) Marine Policy 55; Lars Suhr, Environmental Protection in Deep Seabed Mining: International Law and New Zealand's Approach'(2008) NZJ Envtl L 97.
[72] LOSC arts 194(3)(c), 209(2).
[73] ITLOS Advisory Opinion, paras 110-111.
[74] Ibid. para 125-140. On the distinction between the direct and due diligence obligations of the sponsoring state see Duncan French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor-The Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 IJMCL 525, 538-542

take measures to protect and preserve the environment in the Area.[75] This obligation is enhanced by the supervisory role of the ISA in relation to the Area.[76]

The third level of application of these obligations concerns the sponsored entities that engage in activities in the Area. Any sponsored entity that seeks to engage in activities in the deep seabed must conclude a contract with the ISA.[77] All contracts concluded between the ISA and the sponsored entities contain a number of standard clauses. These clauses transpose into the contract the regulations issued by the ISA[78] and the relevant provisions of the LOSC.[79] Both the regulations of the ISA and the standard clauses contain obligations that pertain to the protection of the environment on the part of the sponsored contractors.[80] If these are read in conjunction with the LOSC that clearly stipulates the responsibility of the contractor if damage occurs in the seep seabed,[81] it can be safely concluded that the contractors are indeed bound by international law to protect and preserve the environment in the deep seabed.[82] The governing law of the contract also points to the same conclusion: Standard Clause 27.1 which posits that the governing law of the contract are the terms of the contract, the rules and regulations of the ISA, Part XI of the LOSC as well as other rules of international law.

In conclusion, most of these obligations are couched in similar terms for all actors involved but at the same time they rest on distinct legal bases. The sponsored entity will obviously be liable for the actual damage caused by the exploration activities in the deep seabed, while the sponsoring state will be liable for the breach of its own supervisory

[75] LOSC art 145.
[76] LOSC art 153(4).
[77] LOSC Annex III art 3(4).
[78] Standard Clause 1.2. The Standard Clauses are available at <http://www.isa.org.jm/files/documents/EN/Regs/Code-Annex4.pdf>.
[79] Standard Clause 3.
[80] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18, 4 October 2000 (hereinafter Nodules Regulations), Regulation 31(3), Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA/16/A/12/Rev.1, 7 May 2010 (hereinafter Sulphides Regulations), Regulation 33(5), Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISBA/17/C/CRP.1 (hereinafter Crusts Regulations), Regulation 33(5), Standard Clause 5.1.
[81] LOSC Annex III art 22.
[82] For a detailed analysis on how the contractor is bound by international law see Markos Karavias, '*Corporate Obligations Under International Law*', (forthcoming OUP, 2013, manuscript on file with the author).

obligations. The ISA, on the other hand, may be liable for breach of either its supervisory and regulatory obligations or for breach of its emergency response obligations.

3.2 The impact of secondary rules in the procedural aspects of shared responsibility

A preliminary look into the basic issues of state responsibility, as they appear in the deep seabed regime, will help clarify the relationship among the various actors in terms of their shared secondary obligations and will also provide for a useful background to the analysis of the procedural rules. First, in order for any actor to incur responsibility for violation of a primary obligation of the deep seabed regime, damage must have occurred.[83] The Disputes Chamber proclaimed on this matter in its Advisory Opinion that the addition of the damage requirement as an element of the breach is a departure from the rules of state responsibility.[84] This might be an exaggerated view: the rules on state responsibility do not exclude damage from the elements of the breach altogether.[85] All they do is to refer the issue back to the primary rules. By requiring damage so as to engage the responsibility of states, article 139 simply adds an extra requirement that is warranted, yet not demanded, by the International Law Commission's (ILC) Articles.

Second, it must be remembered that whenever there are multiple wrongdoing actors contributing towards a single damage, the apportionment of each actor's responsibility is a significant challenge. In the case of the deep seabed regime, this is where the major problem concerning shared responsibility lies. The DSP had to accommodate not just the procedure of bringing to the court and apportioning responsibility among multiple states but also among sates, private entities and an international organization. When there are two entities (states and the ISA) charged with supervisory functions and one entity (contractor) that actually carries out the activity in question, it is hard to determine precisely the proportion of contribution of each of them in case they breach their obligations and damage occurs.

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[83] LOSC art 139.
[84] ITLOS Advisory Opinion para 178, referring to the ILC Commentary and the *Rainbow Warrior* Arbitration.
[85] Articles on the Responsibility of States for Wrongful Acts, with Commentaries (hereinafter ILC Commentary) Report of the International Law Commission on the work of its 53d Session, Official Records of the General Assembly, 56th Session, Supplement No10, A/56/10, Commentary to Article 2 para 10.

A third issue that is peculiar to the deep seabed regime is that of joint and several liability. Article 139 of the LOSC provides for joint and several liability of states and international organizations that act together. The ITLOS Chamber applied a broad interpretation to this provision. It held that states or international organizations are jointly and severally liable if they contribute to common damage.[86] It has been suggested that the ordinary meaning of 139(2) does not warrant shifting the trigger of joint and several liability from common action to contribution to common damage.[87] Moreover, the Chamber held that the actions of the sponsoring states or international organizations need not be concerted.[88] The ITLOS Chamber seems to have interpreted the requisite provision in a manner that departs both from the LOSC and from the ILC's take on the responsibility of multiple actors.[89] Article 47 of the ILC Articles on Responsibility of States for International Wrongful Acts utilizes the criterion of common wrongful act instead of that of contribution to the same damage.[90] Nevertheless, the Advisory Opinion did not explain the rationale behind its preference for the common damage criterion. According to the ITLOS Chamber, if the sponsoring states are indeed responsible (i.e. have breached their due diligence obligations) then '*full reparation can be claimed from all or any of them*'.[91] This interpretation of article 139(2) is important mainly because joint responsibility for common damage is a rare creature in international law.[92]

3.3 Bringing Cases Concerning Shared Responsibility Under Part XI Section 5 of the LOSC

3.3.1 Jurisdiction

The jurisdiction of the Seabed Disputes Chamber or the Arbitral Tribunal is determined in LOSC Part XI, section 5, article 186. There, it is stipulated that the general regime

[86] ITLOS Advisory Opinion, para 201.
[87] André Nollkaemper 'The Seabed Disputes Chamber clarified the meaning of joint and several liability (but also raised new questions)' available at <http://www.sharesproject.nl/the-seabed-disputes-chamber-clarified-the-meaning-of-joint-and-several-liability-but-also-raised-new-questions/>.
[88] ITLOS Advisory Opinion, para 192, see also Nollkaemper, 'The Seabed Disputes Chamber' (n 87).
[89] Nollkaemper, 'The Seabed Disputes Chamber' (n.87).
[90] Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission*, 2001, Volume II, A/CN.4/SER.A/2001/Add.1. (Part Two).
[91] ITLOS Advisory Opinion, para 201.
[92] See John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale J Intl L 225, ILC Commentary to Article 47 para 3.

applies to the Dispute Chamber. Article 288(3) expressly states that the specifics of the jurisdiction of the Disputes Chamber or any other tribunal that is referred to in Part XI section 5 shall be determined by that section. Therefore, while the general regime of the LOSC does apply to the disputes that might arise in the Area, a number of significant differences are to be found concerning the jurisdiction of the Dispute Chamber and the arbitral tribunals that have jurisdiction over such disputes. First, the Disputes Chamber has jurisdiction over states but also over the ISA and natural and juridical persons.[93] This is a significant departure from the general regime that confines jurisdiction *rationae personae* to states and international organizations that are parties to the Convention.

As far jurisdiction *rationae materiae* is concerned, most aspects of any dispute that could arise in the Area are covered in section 5. Most importantly, article 187 includes disputes concerning the interpretation or application of Part XI, disputes concerning the actions, omissions or misuse of power of the ISA, disputes concerning the interpretation or application of a contract or a plan of work, disputes concerning acts or omissions of a party to the contract. Moreover, section 5 offers the option to states parties of submitting a dispute to a special chamber of the ITLOS or an ad hoc chamber of the Seabed Disputes Chamber.[94] Finally, it should be noted that article 188(2)(a) stipulates that disputes concerning the interpretation or application of a contract shall be submitted, if a party to the dispute so requests, to international commercial arbitration. The key element of this provision is that the tribunal shall have no jurisdiction to decide on any issue concerning the LOSC. In such a case the tribunal must refer the issue to the Disputes Chamber for a ruling.[95] Since the environmental provisions examined here can be found not only in the contract but also in the Convention itself it is likely that it will be the Disputes Chamber – either directly or by a referral – that will decide on the dispute.

3.3.2 Invocation and Standing

[93] LOSC article 187 (c).
[94] LOSC art 188(1).
[95] The tribunal will have to render the award in conformity with the ruling of the Dispute Chamber, see LOSC article 188(2)(b). Also, in the absence of a provision of the procedure to be followed, the UNCITRAL Arbitration Rules or any other rules prescribed by the ISA shall apply, see LOSC article 188(2)(c).

In order to coherently examine the procedural problems emanating from the relationship among sponsoring states, the contractor and the ISA, the first question to be asked is who might have standing to bring a claim before a court or a tribunal against the sponsoring state(s). The ITLOS Chamber indicated that the ISA, entities engaged in deep seabed mining, other users of the sea and coastal states would be able to bring a claim against the sponsoring state.[96] In order to reach this conclusion the Chamber suggested that the Area is the common heritage of mankind and therefore an *erga omnes* obligation to protect the environment is in place.[97] The Chamber went on to quote article 48 of the ILC Articles on State Responsibility in order to substantiate its broad proposition regarding standing. The fact is that the Chamber took a novel approach by claiming that not only states – as article 48 posits – but also international organisations, entities engaged in deep seabed mining and other users of the sea can invoke the responsibility of the wrongdoing state.[98] It is readily admitted that the Chamber was correct in holding that even though there is no express provision allowing for standing of the ISA, this is implicit in article 137 (2) of the LOSC where it is stipulated that the ISA shall act '*on behalf*' of mankind.[99] This provision would ring hollow if the ISA were not permitted to invoke the responsibility of a state for damage caused in the Area. Still, it remains a bold move on behalf of the Chamber.

A sponsoring state may therefore be brought before the Disputes Chamber by another state party of the LOSC, a coastal state, or the ISA. This is also true in a shared responsibility scenario of multiple sponsoring states. The ITLOS Chamber, in its statement on the possible claimants, accepted that it could accord standing to entities engaged in deep seabed mining or other users of the sea. This aspect of the Chamber's statement is less remarkable than it seems if one takes into account the provisions of the LSOC. The Convention posits in articles 187 and 188 that the ITLOS Chamber can entertain a claim by or against a contractor.[100] Nevertheless, this possibility should, at

[96] ITLOS Advisory Opinion para 179.
[97] ITLOS Advisory Opinion para 180.
[98] Ibid.
[99] Ibid.
[100] According to LOSC article 187(c) the Seabed Disputes Chamber has jurisdiction in 'disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: i) the interpretation or application of

least in principle, exist only within the context of the contract. In other words, the contractor assumes international obligations and therefore can also bear international responsibility for the breach of those obligations strictly under the terms of the contract concluded with the ISA. Article 187 (c) is also clear as to the nature of the disputes over which the Chamber has jurisdiction. It refers to disputes between parties to the contract and it further limits its jurisdiction on the interpretation or application of a contract or a plan of work and to acts or omissions of a party to the contract. The Chamber also implicitly endorsed this interpretation in its Advisory Opinion.[101]

It must however be noted that the drafting history of what is now article 187 is somewhat controversial in this respect. Earlier versions of the article clearly envisaged the possibility of a state bringing a contractor before the Disputes Chamber.[102] Nevertheless, the relevant provisions where not kept in the final draft. It would be a great leap of the reasoning followed thus far in the course of establishing the international nature of the obligations of the contractor to also assume that they exist outside the contract he concludes with the ISA. The fact that the contract incorporates rules of the Convention and the secondary law of the ISA (i.e. the Mining Code) should not lead to the conclusion that a party not privy to the contract may invoke the responsibility of the contractor before the Chamber.

3.4 Absent Parties

It has already been noted that the LOSC does provide for a framework within which multiple sponsoring states can be held jointly and severally liable. This, however, does not mean that there are no procedural issues arising out of the shared responsibility of sponsoring states and sponsored entities. The most important problem in determining the responsibility of a sponsoring state is connected to the requirement of the causal link between the breach of the obligation and the damage. If the state breaches its obligations but there is no causal link between the breach and the damage caused then the state

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a relevant contract or a plan of work; or ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests.'

[101] ITLOS Advisory Opinion para 238.

[102] Myron Nordquist, Satya N Nanda, Michael W Lodge, Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. VI* (Martinus Nijhoff, 2002) 614-7.

cannot be held responsible.[103] Despite the fact that article 139(2) does not require the existence of a causal link, the Chamber interpreted it in the light of paragraph 139(1) according to which a link between the breach and the damage must be established. The Chamber did not give any reasons as to why it opted for that particular interpretation.

Causation is particularly relevant when not all parties who may have contributed to damage are before the court, and in particular when the actor that carries out the activity in question is not before the court. It seems that in the scenario where only co-sponsoring states are brought before a court, there will be no significant problems in the absence of one of them. Joint and several liability will enable a prospective claimant to choose among the possible respondents without facing a potential barrier by the Monetary Gold rule. However, considering that the contractor would be actually engaging in the activity and being directly involved with its operational modalities, the contractor's presence in the proceedings would be important, maybe vital, in determining the existence or not of a causal link between the breach of the sponsoring state's obligation and the damage. Yet, the contractor would not appear before the same tribunal as the state for the single harmful outcome that occurred in breach of their shared obligations unless it was the ISA who brought the claim against both, a case in which a possibility of joinder of cases may arise.[104]

Then the obvious issue becomes whether and under what circumstances the indispensable third party[105] rule would apply in order to protect private parties or international organizations. There are two pertinent questions. First, would a determination of the sponsoring state's responsibility require a determination of the responsibility of the absent contractor so that the Monetary Gold rule would apply? It seems that the principle in its classic formulation would not apply in this scenario. In order to examine the causal link the Chamber would not have to pass a judgment on the responsibility of the contractor. It would merely have to look into the connection between the, allegedly, wrongful act of the sponsoring state, the act of the contractor and the

[103] ITLOS Advisory Opinion, para 182.
[104] See *infra* p. 27.
[105] *Case of Monetary Gold Removed from Rome* (n 64). In the context of shared responsibility see, André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' *ACIL Research Paper No 2011-01 (SHARES Series)*, finalized 8 April 2011 (www.sharesproject.nl).

damage that occurred. It does not look likely that in this process, a determination of the legal position of the contractor is necessary. Also, the fact that there is no joint and several liability between the sponsoring state and the contractor means that a determination of the liability of the one would not imply the same for the other. The second question is whether the Chamber can make a causality inquiry while the contractor is absent from the proceedings. The Chamber can indeed determine the causality issue merely by calling the contractor as a witness.[106] Moreover, according to article 289 of the LOSC, the Tribunal is entitled to select no fewer than two experts to sit with it, either at the request of the parties or *proprio motu*. Article 15 of the Rules of the Tribunal expressly endorses the provision of article 289 of the LOSC, vesting thus the Tribunal with the power to select expert witnesses.[107] The same is true in a situation where the ISA is not present as a party in the proceedings. The Tribunal under article 84 of its Rules may request an international organization to provide information on the dispute. This provision can enable the ISA to be of significant practical assistance in proceedings in which it is not a party. It must be remembered that through its supervisory role the ISA will hold important information regarding the activities in the Area.[108]

The ISA of course would not have to be absent in case a claim was brought against it and a state or a contractor: the obligations of the ISA with regard to the Area do not stem only from the contract for exploration but are based in a number of other provisions of the LOSC.[109] Therefore, a claim could be brought against the ISA and a sponsoring state or against the ISA and a contractor without any procedural barriers.

3.5 Fragmentation of the regime

Assuming that all the requirements of the LOSC are present, including the causal link between the breach of an obligation by the sponsoring state and the damage caused, it is apparent that the DSP applicable in the Area becomes heavily fragmented. On the one

[106] ITLOS Rules arts 77 and 78(2).
[107] It is important to note in this context that the Rules of the ITLOS stipulate that article 15 applies *mutatis mutandis* to any chamber.
[108] LOSC arts 137(2), 156, 157. For a critical assessment of the ISA see Tullio Scovazzi, 'Mining, Protection of the Environment, Scientific Research and Bioprostecting: Some Considerations on the Role of the International Sea-Bed Authority' (2004) 4 IJMCL 383.
[109] LOSC arts 137(2), 156, 157.

hand, the state(s) will be brought either before an *ad hoc* Seabed Disputes Chamber or before a special chamber of ITLOS.[110] The ISA, on the other hand, will be brought before the Seabed Disputes Chamber or an Arbitral Tribunal. The contractor will be brought either before the national courts of the sponsoring state (by the persons or entities stipulated in the national law of the state), before an Arbitral Tribunal or before the ITLOS Seabed Disputes Chamber (by the ISA).[111]

The Chamber concluded that the obligations of the contractor and the obligations of the sponsoring state exist in parallel.[112] This effectively means that there can be no joint and several liability between the contractor and the sponsoring state. It is true that the Chamber could not infer from the LOSC the application of joint and several liability in this case. However broad the interpretation of LOSC article 139 might have been,[113] the concept of joint and several liability was included in the article concerning the relationship among sponsoring states and international organizations. It is nowhere to be found in the relationship between sponsoring states and contractors. Therefore if a state has not breached its obligations, the contractor might be brought before the national courts of the sponsoring state, which is under an obligation to have effective laws in place for such a scenario.[114] This leads to a problem of procedural fragmentation. If the ISA has also breached its obligations, there is an obvious fragmenting effect if the claimant opts to bring a case against the contractor before the national courts of the sponsoring state. In this scenario the national court will not look into the responsibility of the ISA. If, on the other hand, two separate claims are brought, one before national courts against the contractor and one against the ISA before an international court or tribunal, then the separation of proceedings for a single harmful outcome might have divergent and irreconcilable results.

[110] LOSC art 188(1).
[111] LOSC art 188(2).
[112] ITLOS Advisory Opinion, para 204.
[113] See *supra* p.18.
[114] ITLOS Advisory Opinion paras 218-9 and 236. Of course, when it is states themselves that have contracted with the ISA (eg the government of China or the government of Korea have contracted directly with the ISA) the absurdity becomes obvious: a state will seek to bring the case before its national courts so as to determine its own responsibility, see Karavias (n 82).

The problem of fragmentation persists even in the scenario in which both the ISA and the contractor have breached their obligations and, instead of the national courts, the case is pursued according to the LOSC DSP. The dividing line established by the Chamber between the state and the contractor is not enough to separate the contractor from the ISA. While article 139 does not provide for joint and several liability, the contribution to the damage by the ISA and the contractor will be in question in case either institutes proceedings before the an Arbitral Tribunal or, more likely, the Disputes Chamber.[115] Article 22 of the LOSC Annex III clearly stipulates that the contributory acts of either of them will be taken into account when determining the responsibility of the other. In fact, article 22 of Annex III, apart from providing the claimant with a defence, also forces the competent tribunal to make a determination on the responsibility of both claimant and respondent in case they have both contributed to the damage. What is important in this context is that if a state brings a claim against the ISA, the responsibility of the contractor comes into play through the back door.

If this analysis is correct, another fragmenting effect of the LOSC provisions is obvious. The contractor can be brought before the national courts of the sponsoring state by the entities that can bring such a claim according to national law. At the same time the ISA can bring the contractor before the Seabed Chamber on the basis of the contract for exploration and it can also bring the sponsoring state before the same Chamber on the basis of its duty to act '*on behalf of mankind*'.

Supposing that there is a single damage to the deep seabed and there are multiple actors contributing to this damage, the determination of the responsibility of each of these actors by different tribunals probably cannot result in an accurate allocation of loss. International environmental law is often plagued by the problem of multiple procedures (judicial or otherwise) seeking to establish responsibility or to award remedies with

[115] Article 188(2) posits that disputes concerning the interpretation of a contract shall be submitted to binding commercial arbitration unless otherwise agreed by the parties. However, it is only the Disputes Chamber that has jurisdiction to decide any question of interpretation of the LOSC, Part XI and the Annexes thereto. Since the environmental provisions examined here can be found not only in the contract but also in the Convention itself it is likely that it will be the Disputes Chamber – either directly or by a referral – that will decide on the dispute.

respect of a single damage.[116] The results have not been impressive.[117] Environmental damage in the Area, being caused by a breach of the respective obligations of the sponsoring state, the ISA and the contractor, would be best evaluated and attributed through a single, unified process. It must be borne in mind, however, that the fact that the obligations of the various actors, while shared, are based on distinct provisions means that if two cases are brought before different courts or tribunals by different claimants, in principle, there is no impediment in the way of these courts or tribunals to decide on the matter.[118]

Nevertheless, it would seem that much better results could be achieved had the deep seabed regime provided for a more coherent procedural approach. A more coherent procedural approach can be useful in addressing issues of shared responsibility under certain circumstances, yet it cannot effectively substitute for the lack of joint and several liability between the state and the contractor. It seems that the fragmenting effect will remain in the case of two different claims against the contractor, i.e. one against the contractor before domestic courts and one against the sponsoring state before the ITLOS Chamber. It is in this case where a rule of joint and several liability would help bypass the problem of parallel proceedings in two separate legal orders.

The situation might be different in the case where the ISA brings a claim against a contractor on the basis of the contract and a claim against a sponsoring state under the provisions of the LOSC. The question is can the ITLOS Chamber join the proceedings? As it has been shown above,[119] the rules of ITLOS leave a wide discretion as to the choice of joining proceedings. A joinder of a claim brought by the ISA against a

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[116] See for instance the MOX Plant series of cases, *Dispute concerning access to information under Article 9 of the Ospar Convention* (Ireland v. United Kingdom and Northern Ireland), Final Award, available at <http://www.pcacpa.org/upload/files/OSPAR%20Award.pdf>, *The MOX Plant case* (Ireland v. United Kingdom), Request for Provisional Measures, Order of 3 December 2001, available at <http://www.itlos.org/start2_en.html>, *Arbitral Tribunal Constituted Pursuant Annex VII of the Convention, In the dispute concerning the MOX Plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea*, Order of 6 June 2008 available at <www.pca-cpa.org> and before the ECJ, *Commission v. Ireland*, Case C-459/03 (n 43).

[117] Yuval Shany, 'The first MOX Plant award: The need to harmonize competing environmental regimes and dispute settlement procedures' (2004) 17 Leiden J Intl L 822.

[118] Absent the application of joint and several liability that would be the classic way to go if one disregards the procedural implications of the application of the *Monetary Gold* rule.

[119] See *supra* pp.11-12.

sponsoring state, on the one hand, and a contractor, on the other, would in fact bring before the Chamber all the relevant issues of shared responsibility. The Chamber would have to address the issue of common damage and form an opinion while taking into account the wrongful conduct of all actors involved, the conduct of ISA itself included.[120] Nevertheless, the potential choice the Chamber is, for the time being, only a matter of speculation. Therefore, while, as it has been shown, the Chamber does indeed possess the procedural tools so as to hold efficient hearing proceedings, it is not known whether this will in fact be the case.

4. Conclusions

The LOSC is an instrument whose DSP, to a great extent, does indeed facilitate adjudication among multiple parties. The LOSC DSP provides for compulsory binding adjudication for the majority of disputes that might arise. This renders bringing multiple parties before the court easier than it usually is in international law as it bypasses the issue of consent. Nevertheless, it is also true that the LOSC has exceptions to the compulsory DSP that could prove to be a serious impediment in achieving a multiparty judicial procedure. What is more, the exceptions to compulsory DSP seem to be closely related to the problem of shared responsibility. Fisheries disputes arising in the EEZ of a member state for instance is one of the subject areas where shared responsibility is of great significance. Overall, however, it is true that the general DSP of the LOSC is a regime that will, in most cases, provide for a procedurally adequate avenue to dispute settlement in the context of shared responsibility.

In contrast to the general LOSC DSP provisions, the procedures reserved for disputes arising in the Area are far more elaborate and intricate in terms of their shared responsibility aspects. They do provide for compulsory binding adjudication that includes not only parties to the Convention but also international organizations (other than the EU which is a party to the LOSC) as well as private parties. This is a major step towards effective adjudication of shared responsibility related disputes. It would seem that the inclusion of private parties in the process, which is a rare phenomenon in international

[120] LOSC Annex III, article 22.

law, as well as of the ISA would provide for a well-rounded and complete DSP. Nevertheless, as it has been demonstrated in the paper, the terms under which all relevant parties can appear before a tribunal are rather restrictive. This means that unless the tribunal in question makes use of its rules concerning joinder of cases it would be hard to see how this scenario would come to fruition. It must however be noted that the DSP applicable to disputes arising in the Area is one of the most effective and forward-looking procedures that can be found in international law.

Finally, the paper has shown that the LOSC can provide for a comprehensive, yet not complete, procedure for accommodating shared responsibility disputes. While the traditional problems of consent or the issue of prior agreement will indeed arise in a number of instances under the general regime, the contractual nature of the contract between private parties and the ISA could provide for a fragmenting effect in the special deep-seabed DSP. It can be concluded, however, that despite its drawbacks the LOSC provides for a solution in most of the problems associated with the adjudication of disputes arising in instances of shared responsibility.