7

Access to Remedies

7.1 INTRODUCTION

A major obstacle to ensuring that environmental harm in areas beyond national jurisdiction (ABNJ) is compensated is challenges associated with access to remedies. In relation to damage caused by pollution in the marine environment in ABNJ, article 235 (2) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) obliges states to provide recourse within their domestic legal systems as well as requires states to cooperate to implement and develop relevant rules of international law.[1] Access to remedies includes facilitating access to international and national courts to initiate claims for environmental harm, but also requires consideration of the associated rules that may constrain the ability of the court or tribunal in question to provide relief, such as jurisdiction over the subject matter of disputes and over certain defendants, rules on the choice of law and the recognition and enforcement of judgments rendered in such cases. As with other parts of this book, identifying the law addressing access to remedies depends on whether the claims for compensation are being pursued under international law or domestic law.

Under international law, liability and compensation for environmental harm will be determined by international dispute settlement mechanisms, and while such mechanisms include non-adversarial approaches (i.e. negotiation, mediation and conciliation), our focus here is on access to international courts or tribunals. In connection with domestic liability rules, the focus shifts to the competencies of domestic courts, which are, of course, principally a matter of national law. However, international law also places duties on states to ensure access to remedies within their domestic legal systems in order to ensure remedies are available to injured parties.[2] Pursuant to this general

[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

[2] See, for example, International Law Commission (ILC), 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with

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obligation, an important element of international civil liability rules is directed towards removing barriers to access to remedies within domestic legal systems through harmonized rules governing access to courts and the availability of effective remedies. Such rules have, to date, been enacted through civil liability treaties, which may provide useful lessons for implementing the general obligation to ensure access to remedies in the commons context.

This chapter begins with a discussion of the general rules and principles concerning access to remedies under the rules of state responsibility and domestic civil liability, respectively, before turning to the specific rules in ABNJ. This chapter addresses the substantial additional challenges that each of these sets of rules pose to realizing the goals of liability regimes, including the need to prevent environmental harm and restore the environment, to provide for effective deterrence of risky behaviour, to ensure a level playing field and to ensure adequate and prompt compensation.[3]

7.2 GENERAL APPROACHES TO ACCESS TO REMEDIES

7.2.1 *International Forums*

There are an increasing number of international courts and tribunals that can hear environmental disputes between states, including claims relating to environmental harm.[4] These include forums with general subject matter jurisdiction, such as the International Court of Justice (ICJ) and inter-state arbitral tribunals, as well as forums established under specialized treaty regimes or branches of international law, including international courts and tribunals with jurisdiction to hear disputes under Part XV of UNCLOS (UNCLOS forums).[5] Specialized claims commissions

Commentaries' (2006) UN Doc A/61/10 (Draft Principles), principle 4 and commentary to principle 4, 76–83, paras 1–39. Whether the principle of equal access to remedies and non-discrimination is an accepted principle in international law is debatable. The ILC observed that it is an 'aspect which is gaining increasing acceptance in State practice' (see Draft Principles, commentary to principle 6, 8, para 5). Birnie, Boyle and Redgwell have said that it is not possible to get a clear picture on state practice on the basis that equal access to remedies is difficult to reconcile with the 'principle of *forum non conveniens*, the denial of jurisdiction in actions affecting foreign land, or the refusal to allow transboundary access to administrative proceedings on the ground that national legislation does not have extraterritorial application'. Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, OUP 2021) 326. However, Birnie and others also state that 'it can probably be assumed that it already reflects existing international law'. ibid 325.

[3] See discussion in Chapter 2.

[4] See generally Tim Stephens, *International Courts and Environmental Protection* (CUP 2009) 21–61. He notes at 27 that the '[t]he expansion in the number of and variety of adjudicative options in international environmental law is in large part a function of the growth of international adjudicative bodies more generally'.

[5] UNCLOS (n 1) art 287. Under article 287, states parties can choose between four different forums: the International Tribunal for Law of the Sea (ITLOS); the ICJ; an arbitral tribunal

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with competence, *inter alia*, in relation to environmental claims have also been established, such as the United Nations Compensation Commission (UNCC).[6]

The fundamental principle in international dispute settlement is that states must consent to the jurisdiction of that court or tribunal. The ICJ will only have jurisdiction over an inter-state dispute relating to environmental harm in ABNJ if the disputing states have consented to refer such a dispute either by special agreement, in a treaty compromissory clause, or through acceptance of the Court's jurisdiction by way of declaration under article 36 (2) of the ICJ Statute.[7] The ICJ has had fourteen cases submitted to it that involved environmental elements and, to date, the majority of them have been via the optional clause declaration instead of special agreements.[8] As the ICJ is a court of general subject matter jurisdiction, it has broad competence to hear disputes concerning state responsibility for environmental harm to the global commons, albeit that such claims may raise questions relating to standing in the context of potential challenges to jurisdiction and admissibility.[9]

As an alternative to the ICJ, states could agree, either ad hoc or through a treaty compromissory clause, to submit a dispute concerning liability for environmental harm in ABNJ to inter-state arbitration. There are several examples of arbitration of environmental disputes,[10] and Stephens has suggested that within environmental arbitration practice, 'states favour the *ad hoc* determination of specific disputes rather than institutional arbitration where the procedures are agreed in advance'.[11] Numerous multilateral environmental agreements make reference to arbitration of disputes concerning the interpretation or application of the agreement, although submission of a dispute to arbitration under these provisions often requires additional specific consent of the states parties to the dispute.[12] It has been widely

constituted under Annex VII of UNCLOS; and an arbitral tribunal constituted under Annex VIII for special categories of disputes.

6 See UN Compensation Commission (UNCC) Website <www.uncc.ch/> accessed 27 August 2022.

7 Statute of the International Court of Justice (ICJ) art 36(1) (ICJ Statute). To date, seventy-four states have made optional clause declarations, some of which have included reservations excluding either environmental disputes or certain types of environmental disputes. See ICJ Website <www.icj-cij.org/en/declarations> accessed 27 August 2022.

8 See also Tim Stephens, 'The Development of International Environmental Law by the International Court of Justice' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (2nd edn, Edward Elgar 2022) 184.

9 On the standing of states to bring claims related to damage to areas beyond national jurisdiction (ABNJ), see Chapter 6.

10 Stephens, *International Courts* (n 4) 28. These include the *Bering Fur Seals Arbitration* Award RIAA vol XXVII, 263 (1893); *Trail Smelter Arbitration* (1949) RIAA vol III 1905 (1941); *Lake Lanoux Case* RIAA vol XII 281 (1957).

11 Stephens, *International Courts* (n 4) 29.

12 The most common dispute settlement mechanism found in environmental treaties is compulsory referral to conciliation of disputes not able to be settled by negotiation, with an ability for parties to optin by declaration to compulsory referral to the ICJ or arbitration: See Anais

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observed that states may prefer to submit disputes to arbitration, rather than judicial settlement, due to the perceptions of enhanced party control over arbitral proceedings – for example in terms of arbitrator selection and the specification of procedural rules.[13] In particular, arbitration might enable parties to a dispute to exclude rules allowing third party intervention or other forms of participation such as *amicus curiae* submissions. For this reason, while arbitration may be well-suited to bilateral disputes, one matter of principle that might arise in relation to claims for environmental harm in ABNJ is whether arbitration is appropriate for disputes that engage wider questions of interest to the international community.[14]

The most promising avenue for inter-state claims on environmental harm to the marine environment in ABNJ is recourse to UNCLOS forums to hear disputes on the interpretation or application of UNCLOS.[15] Under article 287, states parties can choose between four different forums: the International Tribunal for Law of the Sea (ITLOS); the ICJ; an arbitral tribunal constituted under Annex VII of UNCLOS; and an arbitral tribunal constituted under Annex VIII for special categories of disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation. Annex VII arbitration is the default procedure if the parties to a dispute have not accepted the same procedure or if the parties have not made a declaration.[16] Given that any dispute on responsibility for environmental harm to the marine environment will involve the application of provisions concerning state duties to protect the environment under UNCLOS, the UNCLOS forums have broad plenary jurisdiction to hear claims relating to environmental harm in ABNJ. The application of the UNCLOS compulsory dispute settlement to liability claims for environmental harm in specific regimes applicable in ANBJ is addressed in Section 7.3.

There are several points of general application to be considered in relation to the use of international courts and tribunals to litigate claims relating to environmental harm in ANBJ.

Kedgley Laidlaw and Shaun Kang, 'The Dispute Settlement Mechanisms in Major Multilateral Treaties', NUS Centre for International Law Working Paper 18/02 (2018) 40 <https://cil.nus.edu.sg/wp-content/uploads/2018/10/NUS-CIL-Working-Paper-1802-The-Dispute-Settlement-Mechanisms-in-Major-Multilateral-Treaties.pdf> accessed 25 August 2022.

[13] Loretta Malintoppi, 'Methods of Dispute Resolution in Inter-State Litigation – When States Go to Arbitration Rather than Adjudication' (2006) 5 LPICT 133.

[14] Neil Craik, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1997) 10 Geo Int'l Envtl L Rev 551.

[15] UNCLOS (n 1) art 286. There are both compulsory and optional exceptions to the submission of disputes to compulsory binding dispute settlement procedure under arts 297 and 298, respectively.

[16] ibid arts 287(3) and (4).

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7.2.1.1 Parties

The inter-state dispute settlement forums discussed above are only open to states. Only states have access to the contentious jurisdiction of the ICJ.[17] Similarly, the compulsory procedures in Part XV of UNCLOS (with the exception of disputes relating to activities in the Area) are only open to UNCLOS states parties,[18] and to international organizations that are parties to UNCLOS (presently, only the EU).[19] In general, arbitral proceedings are more flexible and there is scope for international organizations, non-governmental organizations (NGOs) and corporate actors to be parties to arbitral proceedings with states, subject to the agreement of the parties to the dispute.[20] Given that the primary perpetrators of environmental damage (in ABNJ or otherwise) are non-state actors, the ICJ and UNCLOS forums would primarily be used for claims to hold states accountable for oversight failures.[21] This substantive limitation means that recourse to inter-state claims will only capture a portion of potential environmental harm, and would on its own fail to hold other responsible parties accountable.[22]

While one-off instances of environmental harm in ABNJ may be attributable to one state, there may also be cases of cumulative harm attributable to the conduct of several or even multiple states (or the private actors over which they have to exercise due diligence), and hence it may be necessary to initiate proceedings against more than one state.[23] The ICJ Statute does envisage multi-party proceedings in cases where several parties have the same legal interest, and the ICJ may also direct that

[17] ICJ Statute (n 7) art 34. Under article 35(1) the Court is open to states parties to the ICJ Statute. Other states may also have access in accordance with article 35(2).

[18] UNCLOS (n 1) art 291. In consensual proceedings brought before the International Tribunal for the Law of the Sea (ITLOS), the statute of ITLOS recognizes that potential parties can also include international organizations, non-governmental organizations and private actors. Article 20(2) of the ITLOS Statute provides that '[t]he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI *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* (emphasis added)': Statute of the International Tribunal for the Law of the Sea, UNCLOS (n 1), Annex VI (ITLOS Statute).

[19] UNCLOS (n 1) art 305(1)(f) and Annex IX.

[20] See, for example, Dane P Ratliff, 'The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment' (2001) 14 LJIL 887 which *inter alia*, can be utilized by non-State actors (international organizations, NGOs and corporations).

[21] See discussion in Chapters 4 and 5.

[22] See discussion in Chapter 4.

[23] Note the *Monetary Gold* principle, whereby an international court or tribunal cannot resolve a dispute in which the legal interests of a state that is not a party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision', may also be a barrier to international courts and tribunals exercising jurisdiction (see *Monetary Gold Removed From Rome in 1943 (Italy v France, United Kingdom and United States)* Judgment [1954] ICJ Rep 19). However, this principle has been applied unevenly by courts and tribunals and has come under increasing criticism: see, for example, Zachary Mollengarden and Noam Zamir, 'The Monetary Gold Principle: Back to Basics' (2021) 115(1) AJIL 41.

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proceedings in two or more cases be formally joined or litigated together without formal joinder.[24] UNCLOS forums also envisage the possibility of multiple parties to proceedings.[25] The possibility of multiple parties either being claimants or respondents in state-to-state arbitration is also feasible if consent of all relevant parties is given,[26] but as the number of parties increase the likelihood of all parties consenting decreases. There is no doubt, however, that inter-state arbitration, the ICJ and to a large extent ITLOS are primarily designed for the resolution of bilateral disputes. As currently conducted, international adjudication appears ill-suited to determine liability for diffuse environmental harms to the commons, such as ocean acidification or marine plastics pollution, that is attributable to a multitude of different actors, and which clearly goes beyond the actions of state actors alone.

Claims grounded in *erga omnes* standing raise further issues as to which parties are entitled to participate in proceedings that involve shared legal interests.[27] Cases that seek to hold one or more states responsible for environmental harm in ABNJ may have legal consequences for the broader community of states that use or benefit from the resources found therein. One potential avenue to increase participation would be through the rules of intervention in proceedings in the ICJ or ITLOS.[28] Both bodies require states seeking intervention to have 'an interest of a legal nature which may be affected by the decision in the case', and confer broad discretion on the ICJ or ITLOS to decide upon the request.[29] Interventions do not generally confer party status on intervenors and would not broaden the availability of remedies to other affected states, but would allow states that have an interest in the judicial determination of collective interests to present their views to the court. States have in other contexts sought to intervene in cases where community interests are at stake. New Zealand, for example, successfully intervened in the *Whaling Case*,[30] although it relied on article 63 of the ICJ Statute, which allows intervention as of right to states in proceedings involving the construction of a convention to which they are a party.[31] In the dispute on the *Application of the Convention on the Prevention and*

[24] ICJ Statute (n 7) art 31(5); Rules of the ICJ Court (ICJ Rules) arts 36 and 47.

[25] For ITLOS, see ITLOS Statute (n 18) arts 17(5) and 47; For Annex VII Arbitration, see UNCLOS (n 1) Annex VII art 3(g); For Annex VIII Arbitration, see UNCLOS (n 1) Annex VIII art 2(g).

[26] For example, the various optional rules adopted by the Permanent Court of Arbitration (PCA) contain guidelines for their adaptation to multi-party proceedings: See Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes arising under Multilateral Agreements and Multiparty Contracts. The Optional Rules on Natural Resources also are designed to accommodate multi-party proceedings.

[27] This is further discussed in Chapter 6.

[28] ICJ Statute (n 7) arts 62 and 63; ITLOS Statute (n 18) arts 31 and 32.

[29] ibid.

[30] *Whaling in the Antarctic (Australia v Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3.

[31] ICJ Statute (n 7) art 63(2); the ITLOS Statute (n 18) contains a similar provision in art 32(3).

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Punishment of the Crime of Genocide (The Gambia v Myanmar), the Maldives,[32] Canada and the Netherlands indicated an intention (not yet pursued at the time of writing) to intervene in those proceedings 'which are of concern to all humanity', raising the potentiality of interventions rooted in obligations *erga omnes*.[33] The legal basis of the proposed interventions – article 62 or 63 ICJ Statute – was not stated. In *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)* dispute, by August 2022, four states had filed declarations of intervention under article 63 ICJ Statute.[34] More than forty states issued a joint statement indicating an intention to intervene.[35] Interventions in liability cases, even where the harm is alleged to have impacted a shared resource, may raise concerns about the equality of the parties, particularly where intervenors seek quite specifically to support one party or another.[36]

Non-state actors, such as intergovernmental organizations (other than parties to UNCLOS), NGOs and other non-state entities are unable to initiate proceedings in international courts against states alleged to be responsible for environmental harm in ABNJ in UNCLOS forums.[37] As discussed in Chapter 6, there are conflicting views on whether such non-state actors *should* have the right to initiate proceedings in international courts and tribunals. On the one hand, it is argued that relevant international organizations and NGOs should have standing or legal interest to bring claims on behalf of the environment as they represent the 'public interest' or that they are 'global guardians of environmental values'.[38] This is a logical extension of the principle of participation in environmental decision-making first articulated in Principle 10 of the Rio Declaration and entrenched in subsequent

[32] Ministry of Foreign Affairs, 'Maldives Welcomes the Joint Statement by Canada and the Kingdom of the Netherlands Announcing Their Intention to Intervene in *The Gambia v Myanmar* case at the International Court of Justice' (4 September 2020) <www.gov.mv/en/news-and-communications/maldives-welcomes-the-joint-statement-by-canada-and-the-kingdom-of-the-netherlands-announcing-their-intention-to-intervene-in-the-gambia-v-myanmar-case-at-the-international-court-of-justice> accessed 4 September 2020.

[33] 'Joint Statement of Canada and the Kingdom of the Netherlands Regarding Intention to Intervene in *The Gambia v Myanmar* case at the International Court of Justice' (2 September 2020) <www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice> accessed 29 August 2022.

[34] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)*. See Declarations of Intervention by Latvia, Lithuania, New Zealand and the United Kingdom <www.icj-cij.org/en/case/182/intervention> accessed 5 August 2022.

[35] UK Foreign, Commonwealth and Development Office, 'Support for Ukraine's Application before the International Court of Justice against Russia: Joint Statement', Press Release (13 July 2022), <www.gov.uk/government/news/joint-statement-of-support-for-ukraines-application-before-the-international-court-of-justice-against-russia> accessed 5 August 2022.

[36] See, for example, *Whaling* (n 30), Declaration of Judge Owada.

[37] See discussion in Chapter 6.

[38] Birnie and others (n 2) 266; Stephens, *International Courts* (n 4) 265.

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environmental treaties.[39] Indeed, this argument has some resonance for environmental harm in ABNJ where no state has suffered a direct injury – arguably giving international organizations and non-state actors' access to international courts or tribunals increases the chances that environmental harm will not go unaddressed. Indeed, in national jurisdictions, government agencies play a crucial role in protecting shared environmental resources, for example, through their *parens patriae* jurisdiction.[40] The closest analogy to this role is the trustee-like role conferred on the International Seabed Authority (ISA) under article 137 of the UNCLOS.[41] In some states, NGOs are increasingly the actors that are holding states (and private actors) accountable for failing to meet their environmental obligations, although in most cases it is because national legislation permits certain non-state actors to have access to national courts.[42] Quite aside from the standing of these entities to pursue claims for environmental harm, there remains a lack of capacity for non-state actors to initiate or participate in international adjudicatory processes. If states wanted to confer authority on international organizations, such as regional fisheries management organizations (RFMOs) or regional seas commissions, to play a greater role in protecting the ABNJ environment, access to international judicial forums would need to be addressed.

Another route to expanding participation in environmental liability disputes in international courts and tribunals would be through more liberal intervention rules that allow courts and tribunals to receive *amici curiae* submissions from non-state actors, which are said to 'improve the quality of judicial analysis and reduce judicial error, enhance the legitimacy and authority of international judicial decision-making and thereby strengthen the influence of these decisions on the behavior of governments and other actors'.[43] The ABNJ context, which is likely to involve novel legal and policy questions, would benefit from the diversity of perspectives that *amici curiae* could provide. Indeed, the concept of common heritage of humankind in Part XI of UNCLOS suggests a set of interests that transcend state interests and would provide an opportunity for those views to be presented to the court or tribunal in question. Presently, in contentious cases, the ICJ and ITLOS permit submissions from intergovernmental organizations only.[44] Arbitration, either ad hoc or under

[39] See, for example, the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, 38 ILM 517 (Aarhus Convention).

[40] See discussion in Chapter 6.

[41] ibid.

[42] ibid.

[43] Stephens, *International Courts* (n 4) 268. On *amicus curiae* submissions in international dispute settlement, see generally Astrid Wijk, *Amicus Curiae before International Courts and Tribunals* (Nomos/Hart 2018).

[44] See ICJ Statute (n 7) art 34(2); ICJ Rules (n 24) arts 69(2) and (4); ITLOS Rules, rule 84. Christine M Chinkin and Ruth Mackenzie, 'Intergovernmental Organizations as "Friends of Courts"' in Laurence Boisson de Chazournes, Cesare PR Romano and Ruth Mackenzie (eds),

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UNCLOS, does not expressly address *amici curiae* submissions.[45] Despite the lack of procedures authorizing *amicus curiae* interventions, NGOs have sought to participate in the proceedings before the ITLOS in the *Activities in the Area* Advisory Opinion and the *Arctic Sunrise* case. In both instances, the request for formal participation was refused but the briefs were circulated to the parties.[46] In some instances, international courts have invited or permitted specific *amicus curiae* submissions when called upon to address novel questions of international law, or when certain issues may not be argued by parties to the dispute.[47] This *amicus* function might be relevant in the context of ABNJ disputes where wider community or intergenerational interests may be invoked.

7.2.1.2 Available Remedies

The ICJ, arbitral tribunals and UNCLOS forums all clearly have the authority to order remedies for environmental harm that takes place in ABNJ.[48] Under the International Law Commission's (ILC) 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR), full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction.[49] Environmental disputes in international courts to date have generally focused on securing the prevention or cessation of activities giving rise to environmental harm and/or on satisfaction in the form of declarations of illegality, rather than on monetary compensation as such, but more recent practice may

International Organisations and International Dispute Settlement: Trends and Prospects (Brill 2002) 135, 140–141. The Court did not accept an NGO submission in the Gabčikovo-Nagymaros Case.

[45] Ruth Mackenzie, Cesare Romano, Yuval Shany and Philippe Sands, *The Manual on International Courts and Tribunals* (2nd edn, OUP 2010) 117, para 4.24. The question of possible *amicus curiae* submissions in UNCLOS Annex VII arbitration was raised in the *South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* (Award) (2016) Oxford Reports on ICGJ 495 (PCA) before an Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS (*South China Sea Arbitration*), paras 40–42.

[46] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011 10 (*Activities in the Area* Advisory Opinion) paras 17 and 182; *Arctic Sunrise Case (Netherlands v Russia)* (Order of 22 November 2013) ITLOS Reports 2013, para 18.

[47] See, for example, the International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone. See Wijk (n 43) 312–313, and Sarah Williams, Hannah Woolaver and Emma Palmer, *The Amicus Curiae in International Criminal Justice* (Hart Publishing 2020), at 118–120.

[48] The rules on state responsibility provide that 'it is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, an aspect of that jurisdiction, the power to award compensation for damage suffered': ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries,' (2001) UN Doc A/56/10 (ASR) commentary to art 36, 99, para 2.

[49] ASR (n 48) art 34, 95.

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indicate a move towards awards of such compensation.[50] The obligation to compensate for the damage caused (insofar as the damage is not made good by restitution) would 'cover any financially assessable damage including loss of profits insofar as it is established'.[51] As explored in Chapter 6, damages may not be available, however, in circumstances where the plaintiff is relying on *erga omnes* standing to bring claims for environmental harm.[52] The approach of the ILC is to allow for the possibility of reparations, but only where the state seeking reparations can demonstrate that the claim is being made in the interests of the beneficiaries of the obligation. The law on this point is unclear, with the ILC expressly noting that article 48(2)(b) of the ASR represents 'a measure of progressive development'.[53] The unanswered question is what steps a claimant state or states would need to take to show that the reparations are being used to protect the community interest.

7.2.1.3 Enforcement and Recognition

The ICJ, inter-state arbitral tribunals and ITLOS all provide for judgments or awards that are final and binding and that must be complied with.[54] That said, unlike the judgments of national courts, commercial arbitral tribunals and even investor–state dispute settlement, there is no overarching multilateral system of enforcement and recognition of judgments or awards issued by the ICJ, inter-state arbitral tribunals or UNCLOS forums, with the exception of the Seabed Disputes Chamber (SDC) of ITLOS.[55] The decisions of the SDC or any court or tribunal having jurisdiction over the rights and obligations of the ISA and the contractor (discussed in Section 7.3) are to be enforceable in the territory of the state party in the same manner as judgments or orders of the highest court of that state party.[56] While there is possible recourse to the Security Council in the event of non-compliance with an ICJ judgment, the Security Council's powers under article 94(2) UN Charter have

[50] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica* [2018] ICJ Rep 15; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, (Order of 8 September 2020) [2020] ICJ Rep 264, (Order of 12 October 2020) [2020] ICJ Rep 295; see also Chapter 3.

[51] ASR (n 48) art 36, 98.

[52] Discussed in Chapter 6.

[53] ASR (n 48) commentary to art 48, 127, para 12.

[54] United Nations Charter UKTS 67 (1946) art 94(1); UNCLOS (n 1) art 296(1), ITLOS Statute (n 18) art 33(1); UNCLOS (n 1) Annex VII art 11.

[55] See generally Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2009). Jan Kleinheisterkamp, 'Recognition and Enforcement of Foreign Arbitral Awards' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008).

[56] ITLOS Statute (n 18) art 39; UNCLOS (n 1) Annex III art 21(2); *Activities in the Area* Advisory Opinion (n 46) para 235.

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never been used.[57] The lack of enforcement and recognition of judgments and awards of the ICJ, ad hoc arbitral tribunals and UNCLOS forums undermines the utility of using these courts and tribunals to bring a claim for environmental harm in ABNJ.

7.2.1.4 Evidentiary Issues

Disputes concerning liability for environmental damage in ABNJ are likely to require consideration of complex scientific evidence. This has been discussed in Chapter 3 and will not be revisited here except to reiterate that based on practice to date, there have been questions about the extent to which international courts and tribunals are equipped to deal with such evidence.[58] These concern, amongst other things, the way in which expert evidence has been treated in international courts and tribunals, and the limited use that the ICJ in particular has made of its power to appoint its own experts to assist with evaluation of scientific data.[59] Further consideration is likely to be needed to improve this aspect of the practice and procedure of international courts.

7.2.1.5 An International Court for the Environment?

In light of the perceived shortcomings of existing international courts and tribunals in dealing with the nature and scope of environmental claims, as discussed above, there have been calls for the establishment of a specific international environmental court by academics, grassroots and environmental organizations, as well as some legal practitioners.[60] The arguments for an international environmental court relate to the ineffectiveness of existing dispute settlement forums in addressing the complexities of environmental disputes, the lack of scientific and technical knowledge on the part of judges and arbitrators and the lack of standing for non-state actors before such international courts and tribunals.[61] However, an international environmental court has not been established and seems unlikely to be established in the

[57] ICJ Statute (n 7) art 94 (2). Also see Mackenzie and others (n 45) 34.
[58] See Chapter 3, Section 3.4.
[59] For example, ICJ Statute (n 7) art 50.
[60] The call for an international environmental court began in the late 1980s led by Amedeo Postiglione, founder of the International Court of the Environment Foundation, which has now been succeeded by the International Court for the Environment Coalition. See <www.icecoalition.org/> accessed 27 August 2022. For a history of the movement for an international environmental court, see Ole W Pedersen, 'An International Environmental Court and International Legalism' (2012) 24(3) JEL 547, 547–553.
[61] Pedersen (n 60) 550–552. Also see Alexander M Solntsev, 'The International Environmental Court – A Necessary Institution for Sustainable Planetary Governance in the Anthropocene' in Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene* (Springer 2019) 129–137.

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near future.[62] Indeed, to date, even specialized chambers for environment-related disputes within existing courts, such as the ICJ or ITLOS, have either been abandoned or have not yet been utilized.[63]

7.2.1.6 Advisory Opinions?

An advisory opinion from either the ICJ or ITLOS is a non-binding court process open to states but their utility in determining liability and compensation for environmental harm in ABNJ may be limited.[64] Advisory opinions from ITLOS and its SDC have already contributed in elucidating the content of states' due diligence obligations, and aspects of the liability rules under Part XI UNCLOS. Undoubtedly, advisory opinions have certain advantages over contentious litigation in that they avoid procedural obstacles related to contentious jurisdiction and standing, allow states and relevant international organizations to participate and have an authoritative (yet non-binding) character.[65] This has led to them being one of the avenues explored to clarify the obligations of states in relation to climate change, including the impact of climate change on the oceans, as exemplified by the recent requests for advisory opinions to ITLOS and the ICJ from the Commission of Small Island States on Climate Change and International Law and General Assembly, respectively.[66] Notably, both advisory opinions explicitly or implicitly ask questions which may require ITLOS and the ICJ to decide on the existence of liability of states for breaches of obligations to protect the marine environment from anthropogenic greenhouse gas emissions. However, it is uncertain how these international courts will respond to such requests. Undoubtedly, advisory opinions can contribute

[62] For a discussion of why, see Stephens, *International Courts* (n 4) 58–61; Birnie and others (n 2) 267–268; Pedersen (n 60) 548–543.

[63] See, for example, the ICJ's special chamber for environmental cases established under article 26(1) of the ICJ Statute which was not utilized and eventually abolished; the special chamber for marine environmental disputes set up within ITLOS whose use was subject to the agreement of states in disputes on the interpretation or application of UNCLOS marine environmental protection provisions and disputes under treaties referred to in article 237 or that confer jurisdiction on ITLOS; the special arbitral tribunal established pursuant to Annex VIII of UNCLOS to hear disputes relating to the protection and preservation of the marine environment.

[64] ICJ Statute (n 7) arts 65–68; ITLOS Rules art 138.

[65] See, for example, *Dispute Concerning Delimitation of the Maritime Boundaries between Mauritius and Maldives* (Mauritius/Maldives), Preliminary Objections, ITLOS Judgment of 28 January 2021, Case No. 28, paras 140–215.

[66] Request for Advisory Opinion to ITLOS from the Commission of Small Island States on Climate Change and International Law, 12 December 2022; General Assembly, Request for An Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, A/77/L.58, 1 March 2023. See also, for example, Margaretha Wewerinke-Singh, Julian Aguon and Julie Hunter, 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinion' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) 393–414.

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significantly to clarifying primary obligations of states, any gaps in the law, and may also affirm the existence and/or principles of liability for breaches of these primary obligations, but courts rendering advisory opinions may be reluctant to go as far as determining which states are specifically liable, the extent of liability and corresponding compensation, particularly in relation to environmental harm in ABNJ.[67]

7.2.2 *Domestic Forums*

Another approach to access to remedies in respect of liability for environmental harm has been for recourse to be directed through domestic legal systems. In cases of transboundary harm, this approach has the principal virtue of allowing direct recovery to those who have sustained losses because of environmental harm from those most directly responsible for causing the harm. The challenge is, of course, that each system entails different rules and requirements that will impact the ability of victims of environmental harm from being able to pursue and recover damages (which will be explored in the following sections). A primary role of international law has been to seek greater consistency with domestic legal systems in how they approach the various elements of access to remedies.

7.2.2.1 International Obligation on Access to Remedies

The principle on access to remedies in domestic legal systems forms an integral part of the general requirement for states to put in place measures to ensure that prompt and adequate compensation is available. The ILC's 2006 Draft Principles on the Allocation of Loss (Draft Principles) require that

> [s]tates shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence to ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.[68]

Where the general obligation addresses the substantive requirements for redress, the access to remedies principle seeks to establish minimum procedural standards, at the heart of which is to ensure that the courts of the state that have jurisdiction or control over the activity resulting in harm have the competence to entertain claims for redress. This builds upon Principle 10 of the 1992 Rio Declaration which is

[67] For example, in the *Wall* Advisory Opinion, the ICJ considered it appropriate for Israel to pay compensation but refrained from specifying the quantum: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) [2004] ICJ Rep 136. See also Jason Rudall, *Compensation for Environmental Damage under International Law* (Routledge 2020) 13–14.

[68] 2006 Draft Principles (n 2) principle 6(1), 85.

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understood as laying the foundations of 'environmental democracy' consisting of access to information, access to public participation and access to justice in environmental matters.[69] Principle 10 specifically provides that 'effective access to judicial and administrative proceedings including redress and remedy, shall be provided'. While the Draft Principles are confined to transboundary harm, there is no principled reason to distinguish between transboundary harm and harm to the global commons in the context of access to remedies. The location of the activity or the harm, whether in another state or in ABNJ, should not impact the ability of the victim to seek redress.

The application of the obligation to provide access to remedies in the commons is reflected in article 235 (2) of UNCLOS, which as mentioned above, obliges states to ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction, without differentiating between damage within or beyond national jurisdiction.[70] The SDC identified the obligation to provide recourse under article 235 (2) as an element of a sponsoring state's due diligence obligation that serves the purpose of ensuring that the sponsoring state meets it broader liability obligations where its wrongful acts cause damage.[71] However, given that UNCLOS acknowledges the need for 'further development of international law relating to responsibility and liability for assessment of and compensation of damage', it is not clear how stringently this obligation would be interpreted.[72] The structure of article 235(2) suggests that the content of the obligation to ensure recourse must be assessed in light of the specific requirements of each state's domestic legal system, complicating the identification of minimum standards. Neither article 235 nor the Draft Principles enumerate minimum standards, leaving states with significant discretion in how this obligation is implemented.

The Draft Principles also include a non-discrimination requirement whereby foreign victims of transboundary damage should have non-discriminatory or equal access to remedies in the state of origin that are no less prompt, adequate and effective than those afforded to those that suffer damage within the state's territory.[73] The application of non-discrimination to the global commons could be designed to afford victims of harm in the commons that same treatment as that provided to

[69] United Nations Environment Programme, *Environmental Courts & Tribunals – A Guide for Policy Makers* (2016) 3–4 <https://wedocs.unep.org/handle/20.500.11822/10001> accessed 29 August 2022.

[70] The origins of all paragraphs of article 235 can be traced back to Principle 22 of the Stockholm Declaration: Myron H Nordquist, Shabtai Rosenne and Louis Sohn, *United Nations Convention on the Law of the Sea 1982, Volume V: A Commentary* (Martinus Nijhoff 1989) commentary to arts 235, 401.

[71] *Activities in the Area* Advisory Opinion (n 46) para 140.

[72] ibid paras 139–140, 236; UNCLOS (n 1) art 235(3).

[73] Draft Principles (n 2) principle 6 (2), 85; see also discussion in note 2 above.

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victims of non-transboundary harm. The difficulty, of course, is that non-discrimination only provides as much access to remedies as those available to domestic litigants, which may be insufficient to ensure an objective level of prompt and adequate relief, and to protect and restore the environment. As a central objective of UNCLOS is to provide a common standard of behaviour in relation to protection of the marine environment, an approach that seeks to harmonize domestic practice may be preferable. In this regard, it is noteworthy that article 235 does not contain a non-discrimination provision, and the prevailing approach within civil liability regimes has been the identification of harmonized standards governing domestic legal procedures. In considering what reasonable steps a state may have to take to ensure recourse in its domestic legal system, it is instructive to consider the types of obstacles that are likely to arise for litigants seeking damages for harm in ABNJ through domestic courts.

7.2.2.2 Choice of Forum

Private international law generally provides victims with some discretion in terms of where they can initiate proceedings. In the case of harm that occurs in ABNJ, claimants cannot initiate claims where the damage occurred, and would generally be restricted to their home courts or the jurisdiction of the defendant.[74] Article 235 (2) indicates that the *state of the operator* that caused damage to the environment is required to ensure within its legal system that there is recourse for prompt and adequate compensation or other relief. This is slightly different from the Draft Principles where the emphasis is on 'hazardous *activities* located within its territory or otherwise under its jurisdiction or control' rather than 'natural or juridical persons under its jurisdiction'. The benefit of requiring the state of the operator to provide access to its courts rests on the assumption that operators' assets are more likely to be located in their home state, thus avoiding the need for further recognition of any judgment in other jurisdictions. It may also reflect an ethical obligation on states that benefit from environmentally risky activities to ensure that operators can be held accountable where those risks manifest themselves. The approach in article 235, which focuses on 'natural or juridical persons under [the responsible state's] jurisdiction' requires that there must be some link (usually incorporation) between the perpetrator and the state. This is unlikely to be straightforward in many cases.

For example, states that would *prima facie* have the obligation to ensure that recourse is available in their domestic systems for pollution caused to the marine environment in ABNJ by natural or juridical persons under their jurisdiction are the

[74] Birnie and others (n 2) 332; Draft Principles (n 2) commentary to art 6, 87, para 8. The Draft Principles acknowledge that claims can be brought in the state of origin, that is, the state which in the territory or otherwise under the jurisdiction or control of which the hazardous activity is carried out.

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courts of the flag state if a vessel was involved in the incident leading to marine environmental harm.[75] However, the existence of flags of convenience means that the actual perpetrators may not have any link with the flag state, and may not have assets in the jurisdiction to satisfy a judgment. Moreover, the perpetrator may be a multinational corporation with subsidiaries in several jurisdictions.[76] The difficulty in unravelling causation may lead to multiple defendants, only some of whom the court in question may compel to participate in the proceedings, which in the absence of channelling, may lead to multiple proceedings. This could also open the possibility of courts using the doctrine of *forum non conveniens* to decline jurisdiction, since article 235 does not confer exclusive jurisdiction on the state with jurisdiction over the defendant which could result in the same defendant being exposed to several proceedings arising out of the same incident.[77] In determining whether it would accept jurisdiction, the court will look at contextual factors to see which legal system is better placed to decide the case.[78] The doctrine of *forum non conveniens* has been critiqued as directly impacting the access to justice of victims of environmental damage and allowing corporations (often the perpetrators of environmental damage) to escape liability, and is said to be 'obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet'.[79]

Harmonization through civil liability treaties can clarify choice of forum questions. For example, the 1992 Protocol to the 1969 Convention on Civil Liability for Oil Pollution Damage (1992 Oil Pollution Liability Convention) provides that 'where an incident has caused pollution damage in the territory including the territorial sea or exclusive economic zone of one or more contracting states, actions

[75] Sarah Gahlen, *Civil Liability for Accidents at Sea* (Springer-Verlag 2015) 283.

[76] While the place where the defendant is domiciled is often considered the most appropriate as the defendant is best able to defend itself in the courts of the state in which it is domiciled, coupled with the ease of enforcement of judgments, the question of whether that state is the domicile of the operator is usually left to the law of that state. Further, when multinational corporations with different subsidiaries established in several jurisdictions are responsible for environmental damage, determining the true domicile of the defendant becomes more difficult. Moreover, national courts are traditionally reluctant to 'pierce the corporate veil' to find the parent company liable, allowing parent companies in group structures to evade liability: See Amanda Perry-Kessaris, 'Corporate Liability for Environmental Harm' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 360.

[77] For example, the classic statement of the UK approach to *forum non conveniens* is found in the leading case of *Spiliada*, namely, that a case may be dismissed from a domestic court where there is another available forum with competent jurisdiction 'in which the case may be tried more suitably for the interests of the parties and ends of justice'. See *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10, [1987] AC 460.

[78] Accordingly, in the famous Bhopal litigation (the disaster happened in India), the US court referred the case against Union Carbide to Indian courts on the basis that the design, safety standards and management of the plant were based in India.

[79] *Dow Chemical Co v Aifares* 286 SW2d 674, 688–689 (Tex 1990) (Droggett J).

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for compensation may only be brought in the courts of any such contracting state'.[80] Other forums such as the domicile of the defendant or the place where the vessel was arrested have been excluded. Under article V (III), the shipowner has the right to establish the fund in any of the contracting states in which an action is brought against the shipowner, or if no claim is brought, in any of the contracting states in which a claim could be brought. Article IX (3) of the 1992 Oil Pollution Liability Convention states that only the court of the place where the fund has been constituted is competent to decide on the apportionment and distribution of the fund and all claims for payments must in the end be addressed to this court. Most claims addressed to the Fund are settled amicably without the necessity for the intervention of courts and courts will usually intervene for purposes of reviewing the initial decisions taken by the Fund.[81] The choice of forum and determination of parties is further simplified through the channelling of liability to operators.[82]

The 2010 Protocol to the 1996 Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (2010 HNS Convention) adopts different jurisdictional provisions due to its geographical scope.[83] The 2010 HNS Convention applies to (1) all damage on the territory and in the territorial sea of a state party; (2) to damage by contamination of the environment of a state party's exclusive economic zone (EEZ) or corresponding zone; (3) any damage *other than environmental impairment* outside the territory and territorial sea of any state if it has been caused by a substance carried on board a ship registered in a state party, or, in the case of an unregistered ship on board a ship entitled to fly the flag of a state party (emphasis added).[84] Thus, the 2010 HNS Convention also applies to property, personal injury and death claims that occur on the high seas but not to damage by contamination of the environment that occurs in the high seas. Where an incident has caused damage in the territory, territorial sea or EEZ of a state party, actions for compensation may be brought against the registered owner of the ship or other person providing financial security for the owner's liability only in *the courts of the state party that has suffered damage*.[85] Where an incident

[80] International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3, 9 ILM 45 (1970) (1969 Oil Pollution Liability Convention) art IX (1) as amended by the 1992 Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996) 1956 UNTS 255 (1992 Oil Pollution Liability Convention) art VIII.

[81] Gahlen (n 75) 75.

[82] See Chapter 4.

[83] Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted 3 May 1996, not yet entered into force) 35 ILM 1415 (1996 HNS Convention), as amended by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted 30 April 2010, not yet entered into force) (2010 HNS Convention).

[84] 2010 HNS Convention (n 83) art 3.

[85] ibid art 38(1).

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has caused damage outside the territory and territorial sea of any state, actions for compensation may be brought against the registered owner of the ship or person providing financial security for the owner's liability only in the courts of (a) the state where the ship is registered (or in the case of an unregistered ship, the state party whose flag the ship is entitled to fly); or (b) the state party where the owner has habitual residence or where the principal place of business of the owner is established; or (c) the state party where a fund has been constituted by the owner either where an action has been brought or if no action is brought, with any court in a state party in which an action can be brought under article 38.[86] The 1999 Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and Their Disposal (1999 Basel Liability Protocol) also recognizes that claims may be brought in the courts of a contracting party where (1) the damage was suffered; (2) the incident occurred; or (3) where the defendant has his habitual residence or his principal place of business.[87] These conventions provide a potential model for appropriate national courts for a civil liability regime for environmental harm in ABNJ, namely one which focuses on the nationality of the flag or where the defendant has his habitual residence.

7.2.2.3 Parties to the Proceedings

When one considers the likely plaintiffs in cases involving harm to the commons environment *per se*, further complications arise. As discussed in the previous chapter, non-state actors are less likely to have standing to pursue claims in relation to environmental harm *per se* to ABNJ. However, the ability of foreign states and international organizations to access domestic courts of another state may be affected by rules on judicial recognition of whether such international actors can pursue remedies in the national courts of another state, which will be unique in their application within each state. In the United States, for example, foreign states are granted access to US courts as a matter of comity, and as such access may be limited to 'governments recognized by the United States and at peace with [the United States]'.[88] While this is a fairly narrow constraint, there is also a line of cases in the United States that constrain the ability of sovereigns from bringing cases in foreign (US) courts where the standing of the government is rooted in their *parens patria* jurisdiction to pursue claims on behalf of their nationals.[89] Claims grounded

[86] ibid art 38(2).

[87] Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and their Disposal (adopted 10 December 1999) UNEP/CHW.1/WG/1/9/2 art 4 (1999 Basel Liability Protocol).

[88] *Pfizer, Inc v Government of India* 434 U.S. 308 at 319–320. See also Hannah Buxbaum, 'Foreign Governments as Plaintiffs in U.S. Courts and the Case against "Judicial Imperialism"' (2016) 73 Wash Lee L Rev 653.

[89] Buxbaum (n 88) 662–665.

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in a state or international organization's rights to claim on behalf of the international community appear to fall outside the basis of judicial recognition of foreign governments or international organizations' rights to pursue remedies. At a minimum, such claims would be dependent upon the rules of standing in relation to make claims on behalf of collective interests in the jurisdiction in question.

The international rules concerning sovereign immunities will also act to shield foreign governments and international organizations as defendants. Here the law quite clearly prevents foreign governments from being subject against their will to the proceedings of another state.[90] For example, UNCLOS contains a blanket immunity against claims for failing to protect the marine environment for 'any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on governmental non-commercial service'.[91] The restrictive approach to immunity would allow for a commercial exception, so a state agency or enterprise engaged in a commercial activity that causes harm in ABNJ may not be able to claim immunity.[92] However, characterizing activities as either commercial or governmental in ABNJ, such as scientific research, harvesting marine genetic resources or engaging in marine geoengineering activities, is not straightforward. Even seemingly commercial activities like deep seabed mining may be undertaken for non-commercial reasons, such as securing a supply of critical minerals for defence purposes.

Civil liability conventions can direct parties to ensure that domestic courts have jurisdiction over parties that may not otherwise be recognized by domestic courts. For example, the 1992 Protocol on the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention) has specific provisions requiring that states grant the International Oil Pollution Compensation Funds (IOPC Funds) the right to intervene in domestic legal proceedings and, as a corollary, provides that decisions undertaken with proper notice shall be binding on the Fund.[93] In relation to defendants, article XI of the 1992 Oil Pollution Liability Convention requires that state-owned ships used for commercial purposes be subject to suit in courts hearing

[90] The base rule is found in *The Schooner Exchange v McFadden* (1812) 7 Cranch 116.

[91] UNCLOS (n 1) art 236, although note art 31 which states that the flag state shall bear international responsibility for any loss or damage resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the provisions of UNCLOS or other rules of international law.

Warships and other state-owned non-commercial ships retain their immunity under the 1992 Oil Pollution Liability Convention.

[92] On the contours of the current approach to sovereign immunity, see Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015); James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 470ff.

[93] 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (adopted 27 November 1992, entered into force 30 May 1996) 1953 UNTS 330 (1992 Fund Convention) arts 7(4) and (6).

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compensation claims that the state 'shall waive all defences based on its status as sovereign state'.[94]

Some civil liability conventions also address multiplicity of proceedings. In the 1992 Oil Pollution Liability Convention, in cases where damage affects more than one state, claimants can choose where to bring their claims.[95] Although there is no *lis pendens* rule in the 1992 Oil Pollution Liability Convention (whereby proceedings in one contracting state could be stayed in favour of earlier proceedings in another contracting state), there will ultimately be a final bundling of claims when it comes to the distribution of the limitation fund established by the shipowner. In situations where damage affects more than one state, the claimant and the shipowner could potentially 'forum shop' and choose a forum that is favourable to them, given that there may be differing interpretations of the Convention's provisions in different contracting states, although the likelihood of this is said to be small.[96] The 1999 Basel Liability Protocol addresses the situation where there may be a multiplicity of proceedings in different forums. Related actions are those which are so 'closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[97] It gives courts (other than the court first seized) the power to stay proceedings while actions are pending at first instance as well as the authority to decline jurisdiction if another court has jurisdiction and the law of that court permits the consolidation of related actions.[98]

7.2.2.4 Choice of Law

Generally, the principle used to determine the law applicable to a tort is the place where the damage occurred (*lex loci delicti*). If the event leading to environmental harm took place solely in ABNJ, the *lex loci delicti* rule does not apply, as there is no state in which the tort was committed. There is no clear conflict-of-laws rule that has developed in relation to environmental harm in ABNJ, arguably because not many claims have been made in national courts.[99] Some parallels may be drawn from conflict-of-laws rules for other torts that occur on the high seas where national forums have adopted different types of rules for maritime torts on the high seas, depending on the type of tort and whether it is damage occurring outside the ship or on the ship.[100] For example, English courts apply the 'general maritime law as

[94] 1992 Oil Pollution Liability Convention (n 80) art XI.
[95] Gahlen (n 75) 72–73. 1992 Oil Pollution Liability Convention (n 80) art XI.
[96] ibid.
[97] 1999 Basel Liability Protocol (n 87) art 18(3).
[98] ibid arts 18(1) and (2).
[99] One case is the 'Red Sludge Case' which concerned Italian flagged vessels dumping waste into the high seas of the Mediterranean, 40 km from the French island of Corsica, which gave rise to proceedings in the courts of Italy and France: See Gahlen (n 75) 284.
[100] Gahlen (n 75) 317–320.

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administered in England', which under English law happens to be the *lex fori* and this is also applied to collisions on the high seas involving two flags.[101] In France, maritime torts involving one ship are governed by the law of the flag.[102] Other jurisdictions determine the applicable law based on the law which has the most connection with the case, which would lead to different results depending on the circumstances of the case.[103] A different outcome might occur if the event giving rise to environmental harm in ABNJ occurred in areas under the national jurisdiction of the coastal state.

The willingness of a court to entertain a case or apply the law of the forum will also depend on the nature of the rights being protected. Rights of an economic nature, such as a right to engage in fisheries or to conduct certain scientific research, may have a close connection to the issuing jurisdiction despite the activity being undertaken in ABNJ. On the other hand, protecting the collective interests in the environment outside the territory of the state raises complex questions on the extraterritorial application of domestic law to what may amount to a shared property interest.[104]

Civil liability conventions can clarify the determination of applicable law in two ways. First, the treaty or subsidiary rules often provide substantive rules, governing the claim. Second, the treaty may identify the applicable domestic law that is to be applied to matters not specifically regulated by the treaty itself.[105]

7.2.2.5 Recognition and Enforcement

Finally, there may also be issues related to recognition and enforcement of judgments, the rules of which will differ from jurisdiction to jurisdiction and will also depend on whether there is a bilateral or multilateral instrument between the relevant countries. Recognition of foreign judgments is a matter of judicial comity, which injects a degree of discretion into proceedings for recognition.[106] Awards for damage to ABNJ areas may be perceived as raising public policy issues that may influence the receiving court's determination of recognition. For example, awards for damages may turn on a foreign court's understanding of the legal status of a

[101] ibid 320.
[102] ibid 321.
[103] ibid 324–325.
[104] In the event the interests in the commons are characterized as interests in immovable property, the spectre of the *Mozambique Rule* is raised, where the House of Lords held that it had no jurisdiction to entertain certain claims in respect of foreign land, including for the recovery of damages for trespass to immovable property, *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL).
[105] 1999 Basel Liability Protocol (n 87) art 19 (providing that the applicable law for matters of procedure or substance which are not specifically addressed under the Protocol and to be governed by the law of the competent court).
[106] See, for example, *Hilton v Guyot* (1895) 159 US 113.

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particular commons resource that may not be universally held. Moreover, would a court recognize a judgment awarded to an officious state or private actor that initiated an environmental clean-up that it was under no legal duty to undertake? Civil liability conventions, on the other hand, contain provisions on mutual recognition and enforcement of judicial decisions rendered by a court within the jurisdiction of a contracting party.[107]

There are several key lessons for ABNJ liability regimes that may be drawn from the experience of other civil liability regimes. First, there is a clear recognition of the need to address access to remedies issues through the establishment of harmonized rules. In the context of elaborating on the content of what steps may amount to due diligence in ensuring access to remedies, the approaches adopted within civil liability regimes provide a useful indication of reasonable steps states are willing to take to facilitate claims. Second, there are likely limits on the degree of generalizability of such rules, as the approaches adopted will reflect the structural features of the civil liability regime in question, such as the degree of channelling and the presence of a fund.

7.3 SPECIFIC APPROACHES TO ACCESS TO REMEDIES IN ABNJ

7.3.1 *Antarctic*

Annex VI to the Environmental Protocol on Liability Arising from Environmental Emergencies (Liability Annex)[108] adopts a dual system of forums, providing for international forums to address inter-state claims and domestic forums for claims against non-state operators. Until such time as the Liability Annex comes into force, any incident arising in the Antarctic will be governed by the general principles discussed in Section 7.2. The discussion in the following sections therefore focuses on how the Liability Annex addresses access to remedies.

7.3.1.1 International Forums

Claims against state operators by another state party to the Liability Annex for reimbursement costs responding to an environmental emergency are to be decided by state-to-state dispute settlement mechanisms including any enquiry procedure decided by the parties, as well as any dispute settlement procedures provided for in articles 18, 19 and 20 of the Protocol on Environmental Protection to the Antarctic

[107] 1992 Oil Pollution Liability Convention (n 80) art X; 1999 Basel Liability Protocol (n 87) art 21.

[108] Annex VI to Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies (adopted 17 June 2005, not entered into force) 45 ILM 5 (Liability Annex).

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Treaty (1991 Antarctic Protocol).[109] Article 18 stipulates that if a dispute arises out of the Antarctic Protocol, the parties to the dispute shall, at the request of any one of them, consult amongst themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means to which the parties agree. In the event that the parties cannot agree to a form of dispute settlement, the Antarctic Protocol provides for mandatory dispute settlement in articles 19 and 20. These provisions address, *inter alia*, the interpretation or application of article 15, which relate to emergency response action taken by the parties, and any Annex, including the Liability Annex, in the event that it enters into force, and provides that if states parties have not agreed on a means of resolving the dispute within twelve months of the request for consultation pursuant to article 18, they can choose either the ICJ or an Arbitral Tribunal to be established pursuant to the Schedule to the Antarctic Protocol.[110] The Arbitral Tribunal is the default option if a state party has not made a declaration on choice of procedure or if the parties to the dispute have not chosen the same procedure.

The application of the Antarctic Protocol's mandatory dispute settlement provisions is confirmed in the Liability Annex,[111] but is restricted to circumstances, anticipated under article 6(1) of the Liability Annex, where a party has undertaken a response action to address an environmental emergency arising from the activities of another state operator that failed to take a response action. Regarding liability of state operators for payment of the costs of response action into the fund, the identification of the state which has standing to initiate proceedings is more complex. Since there is no injured state *per se*, the negotiating states 'thought it undesirable to allow all other [States] Parties the simultaneous ability to bring dispute settlement actions against the responsible State operator'.[112] Therefore, rather than identifying the state that could invoke dispute settlement procedures, the Liability Annex leaves the settlement of disputes to the Antarctic Treaty Consultative Meeting (ATCM). The amount of the costs of the response action is to be approved by a decision of the ATCM with advice of the Committee on Environmental Protection where appropriate.[113] Further, the

[109] Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1461 (1991 Antarctic Protocol). It remains an open question whether the dispute settlement provisions in the Antarctic Protocol would provide an avenue for liability claims outside the procedures of the Liability Annex. The reference to article 15, on response actions, in the dispute settlement provisions indicates that the parties contemplated that the duty to provide for prompt and effective response action to environmental emergencies could give rise to a claim. Although the obligation in article 15 does not clearly identify responsible parties or indicate to whom the duty is owed, making the formulation of a claim that involves the 'interpretation or application' of article 15 difficult at best.

[110] ibid art 20.

[111] Liability Annex (n 108) art 7(4).

[112] Michael Johnson, 'Liability for Environmental Damage in Antarctica: The Adoption of Annex VI to the Antarctic Protocol' (2006) 19(1) Geo Int'l Envtl L Rev 33 at 48. Also see Chapter 6.

[113] Liability Annex (n 108) art 7(5)(b).

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determination of liability of the state operator is to be resolved by the ATCM.[114] Decisions of the ATCM are taken by consensus so there is the possibility that a Consultative Party can block a decision related to its own liability. However, if a dispute remains unresolved, the dispute can go to the dispute settlement mechanism in articles 18, 19 and 20 of the Antarctic Protocol, although the Liability Annex still does not identify which state would have standing to invoke the dispute settlement mechanism.[115]

The jurisdiction to pursue claims against state operators appears to be exclusive to the international forums discussed above and precludes the initiation of proceedings against state operators in domestic forums. There is also no provision for the ATCM to be held liable in any way, which reflects the ATCM's lack of legal personality, (unlike the ISA), as well as the absence of any clear legal duties on the ATCM to protect the Antarctic environment (again, unlike the ISA).

7.3.1.2 Domestic Forums

With regard to non-state operators, the issue of which actor has standing to bring an action depends on whether it is an action for liability for reimbursement costs or if it is an action for liability for payment of costs of response actions into the fund.[116] In connection with liability for reimbursement costs, the only actor that can bring a claim against the non-state operator is the state party which has taken a response action.[117] The forum where such action could be taken was subject to debate and ultimately, two options were established in the Liability Annex. First, a state party can bring an action in the state where the non-state operator is incorporated or has its principal place of business or his habitual place of residence.[118] Second, if this fails because the non-state operator is not incorporated in a state party or does not have its habitual residence in a state party, then states parties can bring an action in the courts of the state party that authorized the activity.[119] States parties shall ensure that its courts possess the necessary jurisdiction to entertain these actions, although the precise requirements are not identified.[120]

With regard to actions for payment of the costs of response actions into the fund, it was also not immediately clear which actor would have standing to bring a claim

[114] ibid art 7(5)(a).
[115] ibid. Johnson notes that recourse to the dispute settlement mechanisms in the Antarctic Protocol was included late in negotiations and this may be why the issue of the state which could invoke dispute settlement mechanisms was not elaborated on, but that it should be possible for the ATCM to determine how the mechanism will be invoked. See Johnson (n 112) 49.
[116] See Chapter 6.
[117] Liability Annex (n 108) art 7(1).
[118] ibid.
[119] ibid art 7(2).
[120] ibid.

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and therefore the issue of standing is not explicitly addressed.[121] Instead, states parties only have an obligation to ensure that there is a domestic law mechanism that exists for the enforcement of a claim against a non-state operator that did not undertake a response action and is therefore liable to pay an amount equal to the costs of the possible response action into the Fund.[122] The Liability Annex contemplates that such actions may be brought by the party of the operator or another party, leaving it to the relevant parties to determine who should take the enforcement action.[123]

The limited scope of the Liability Annex leaves the question of recovery of damages for harm that falls outside a response action unaddressed. There is clear potential for general losses to be suffered. For example, oil spills from ships could interfere with tourism operators or with the conduct of scientific research. In such instances, access to remedies would be governed by general principles.

7.3.2 *Deep Seabed*

Claims for liability for environmental harm arising out of activities in the Area can be brought under special dispute settlement mechanisms established under section 5 of Part XI of UNCLOS. There is also the possibility of domestic courts hearing such claims but as discussed below, domestic courts face the same challenges here as domestic forums discussed in Section 7.2.2.

7.3.2.1 International Forums

The SDC is the primary forum to decide disputes relating to activities in the Area.[124] While article 187 of UNCLOS describes the SDC's jurisdiction in considerable detail, the only reference to claims for liability is found in article 187 (e), which refers to disputes between the ISA, a state party and a contractor where it is alleged that the ISA has incurred liability 'for any damage arising out of wrongful acts in the exercise of its powers and function'. However, article 187 could be interpreted broadly to cover most claims for compensable damage for environmental harm. For example, damage resulting from the 'wrongful acts' of the contractor and the ISA will necessarily require an interpretation of Part XI, the Annexes, the regulations, rules and procedures of the ISA, as well as any contractual arrangements, all of which are *prima facie* covered by articles 187(a) to (e). The SDC determines its own

[121] Johnson (n 112) 48.
[122] Liability Annex (n 108) art 7(3).
[123] Johnson (n 112) 48. See art 7(3) which provides 'where there are multiple *Parties* that are capable of enforcing art 7(2)(b)' against non-State operators: Liability Annex (n 108) art 7(3).
[124] UNCLOS (n 1) art 87, but see also art 188, which provides for the possibility of a more limited role for other disputes settlement bodies, such as a special chamber of the ITLOS, an ad hoc Chamber of the SDC or commercial arbitration.

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jurisdiction and may be inclined to take a broad approach to the jurisdictional provisions of section 5 given that the objective of section 5 of Part XI is to confer primary jurisdiction on the SDC to promote uniformity in jurisprudence.[125] This remains, however, an untested question of interpretation.

Accepting that the SDC has jurisdiction over certain disputes concerning environmental liability arising from activities in the Area, the question then becomes which actor can utilize the SDC to bring claims against the actor responsible for environmental harm. States parties, the ISA, the Enterprise and the contractors have access to the SDC, making the SDC unique amongst international courts.[126] In the event that a contractor has suffered direct losses as a result of environmental harm because of the actions of the ISA, it could potentially fall within articles 187 (c) and (e) of UNCLOS and the SDC would have jurisdiction. Sponsoring states and other states parties could bring claims against the ISA in the event ISA's actions have resulted in environmental harm, and could do so for direct losses they have suffered or potentially for pure environmental damage in light of the SDC's finding that 'each state party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area'.[127] Claims against sponsoring states for their failure to exercise due diligence were expressly noted by the SDC to fall under the SDC's jurisdiction under article 187(b)(1).[128] The ISA can also initiate claims in the SDC against contractors and sponsoring states for environmental harm, including pure environmental damage, given its broad mandate to protect and preserve the marine environment.[129]

However, the SDC does not have jurisdiction over all claims between the abovementioned actors. A contractor that has suffered losses as a result of environmental harm due to the actions of another contractor would not be able to utilize the SDC, unless both contractors are states parties, in which case, article 187 (a) could conceivably be relied upon. It is also not clear whether the SDC would have jurisdiction over disputes between contractors and other sponsoring states with

[125] As observed by Alan Boyle, '[E]verything turns in practice not on what each involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside'. Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46(1) ICLQ 37, 38. One of the primary concerns of the group of legal experts, as well as negotiators of UNCLOS, was to ensure uniformity of jurisdiction and jurisprudence. See in general, Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text, Doc No. A/CONF.62/C.1/L.25 and Add. 1, Official Records of the Third United Nations Conference on the Law of the Sea, Volume XI, 117.

[126] UNCLOS (n 1) Annex VI art 37.

[127] *Activities in the Area* Advisory Opinion (n 46) para 180. UNCLOS (n 1) arts 187(b) and (e).

[128] ibid para 230.

[129] UNCLOS (n 1) arts 187(b) and (c). Also see discussion in Chapter 6.

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whom they are not in a contractual relationship.[130] The SDC does not have jurisdiction over claims for environmental harm brought by states that are non-parties to UNCLOS, or by non-state actors (such as shipowners, fishermen, cable owners, owners/operators of installations operating in the high seas or in areas under national jurisdiction) or jurisdiction over claims brought against other non-state actors that may actually be responsible for the damage (such as subcontractors, agents, employees of contractors; owners or operators of vessels or installations involved in activities in the Area; manufacturer of equipment or parent corporations of contractors that are privately owned). Moreover, the jurisdiction of the SDC might give rise to incomplete or fragmented jurisdiction where a single incident gives rise to environmental damage to the Area and to the high seas water column.

Nonetheless, the SDC does have its advantages as a forum to hear disputes relating to environmental harm. Not only does it have jurisdiction over the primary actors involved in activities in the Area, including (importantly) the ISA, but it can appoint experts to give expert and technical advice on the complex issues relating to determining environmental harm.[131] Referring claims to the SDC would also have the benefit of developing uniformity in jurisprudence, particularly given the centrality of the SDC in disputes relating to activities in the Area.[132] Moreover, with regard to recognition and enforcement, UNCLOS affirms that any final decision rendered by the SDC relating to the rights and obligations of the ISA and the contractor (notably excluding the sponsoring state) shall be enforceable in the territory of each state party.[133] The SDC in its Advisory Opinion observed that legislation of sponsoring states should include provisions to ensure that any final decision rendered by a court or tribunal under UNCLOS relating to the rights and obligations of the ISA and contractor shall be enforceable in the territory of each state party.[134]

One potential restriction of the SDC's jurisdiction to hear claims is the limitation found in article 189, which provides that the SDC 'shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this part'.[135] The nature of a liability claim against the ISA for its failure to exercise due diligence in its duty to protect the marine environment may require the SDC to determine whether actions taken by the ISA, which could be understood to be discretionary, meet the requisite standard. The analogy would be to restrictions in common law courts in reviewing the policy decisions of public authorities as a

[130] ibid art 187(c) which covers disputes between states parties and contractors and only applies to contractual disputes.

[131] UNCLOS (n 1) art 289. See Section 7.2.1.4, and Chapter 3, Section 3.4.

[132] Indeed, even if disputes are referred to commercial arbitral tribunals, the SDC retains essential jurisdiction over disputes that involve a question of interpretation of Part XI and the annexes thereto: UNCLOS (n 1) art 188(2).

[133] ibid Annex III art 21(2); ITLOS Statute (n 18) art 39.

[134] UNCLOS (n 1) Annex III art 21(2); *Activities in the Area* Advisory Opinion (n 46) para 235.

[135] UNCLOS (n 1) art 189.

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source of tort liability.[136] The rationale for this limited immunity is to avoid judicial interference with the legislative branches of government; a rationale that appears to underlie article 189. The wording of article 189, which affirms the jurisdiction of the SDC to decide cases involving 'claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention', which would allow for claims against the ISA where it exceeds its jurisdiction. However, the SDC may still be constrained in reviewing the actions of the ISA on a reasonableness standard, which is in effect what a claim for a failure of the ISA to exercise due diligence would require.[137]

7.3.2.2 Domestic Forums

UNCLOS does not explicitly mention domestic courts as a forum for deciding claims related to activities in the Area. However, article 235 (2) would, at the very least, require sponsoring states to ensure recourse within their courts for victims of environmental damage caused by sponsored contractors; a point confirmed by the SDC in its Advisory Opinion.[138] According to the SDC, the sponsoring state has a certain measure of discretion with regard to the adoption of laws and regulations and the taking of administrative measures in support of its general obligation of due diligence, but its discretion is not absolute – it must act in good faith, taking 'the relevant options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole'.[139]

In principle, national courts of sponsoring states should have jurisdiction to decide claims relating to activities in the Area, including those related to environmental harm. They may prove particularly useful for actors that do not have access to the SDC, ITLOS special chamber or SDC ad hoc chamber or commercial arbitral tribunals constituted under section 5 of Part XI. These include the vessel owners, cable owners, fishing companies and non-party states to UNCLOS, as well as subcontractors, agents, employees of contractors; owners or operators of vessels or installations involved in activities in the Area; manufacturer of equipment or parent corporations of contractors that are privately owned. However, the same issues relating to the implications for access to remedies of non-harmonization of liability

[136] *Anns v Merton London Borough Council* [1977] UKHL 4; *Just v British Columbia* [1989] 2 SCR 1228.

[137] For a general discussion, see James Harrison, 'Checks and Balances on the Regulatory Powers of the International Seabed Authority' in A Ascencio Herrera and MH Nordquist (eds), *The United Nations Convention on the Law of the Sea Part XI Regime and the International Seabed Authority: A Twenty-Five Year Journey* (Brill 2022) 151–173.

[138] *Activities in the Area* Advisory Opinion (n 46) para 139.

[139] ibid paras 227 and 230.

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for environmental harm in the commons generally (as outlined in Section 7.2.2) would also apply to activities in the Area.

There are also specific challenges related to having two levels of forums to decide environmental harm claims. It may lead to inconsistent decisions relating to deep seabed mining and a fragmentation of interpretation of 'the constitution' of the oceans. The drafters of UNCLOS felt it important enough to reserve the jurisdiction of the SDC to decide issues of interpretation or application of UNCLOS even in the context of commercial arbitration. There is no such review by the SDC when it comes to decisions of national courts even if they may decide matters that address UNCLOS and/or activities in the Area that are carried out for the benefit of humankind. Indeed, it has been argued that 'it should be recognized that if jurisdiction over "activities in the Area" is fragmented, the importance of the Chamber and the authority of its decisions risks being diluted'.[140] Moreover, having two forums may result in actors such as the contractor being potentially exposed to liability in two different forums for the same wrongful acts.

7.3.3 *High Seas*

Absent a specific international regime, or sectoral regimes for specific hazardous activities applicable in relation to the high seas, liability for environmental harm in the high seas is currently subject to the general rules and considerations concerning access to remedies discussed in Section 7.2 of this chapter, particularly the discussion relating to Part XV dispute settlement procedures under UNCLOS.

The recently agreed upon text of the agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (2023 BBNJ Agreement) provides that disputes concerning the interpretation or application of the 2023 BBNJ Agreement shall be settled in accordance with Part XV of UNCLOS, and again the discussion in Section 7.2 of this chapter is relevant.[141] One potential issue is that the delimitation of jurisdiction between the SDC conferred pursuant to Part XI of UNCLOS and dispute settlement mechanisms in the 2023 BBNJ Agreement may be complex in relation to cases involving both harm to marine biodiversity and to the Area and its resources. For example, one suggestion has been that the negotiators, or ITLOS on its own initiative, might establish a standing chamber in ITLOS for disputes on marine biodiversity in ABNJ

[140] Herbert Smith Freehills, 'Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations' (Discussion Paper No 1, ISA, 12 February 2016) 9 at para 4.7 <www.isa.org.jm/wp-content/uploads/2022/12/DP1.pdf> accessed 29 August 2022.

[141] Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Advance, Unedited text, 4 March 2023 ('BBNJ Agreement'), Part XI.

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jurisdiction, but this may lead to additional questions concerning which body has jurisdiction to determine disputes.[142]

A new dimension has been added to the 2023 BBNJ Agreement in terms of non-adversarial dispute settlement mechanisms. An Implementation and Compliance Committee will be established 'to facilitate and consider the implementation of and promote compliance with' the provisions of the BBNJ Agreement, along with a provision that parties may refer disputes concerning a matter of a technical nature to an ad hoc expert panel which shall 'confer with the Parties concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures' established under Part XV of UNCLOS.[143] These non-adversarial processes could present possible opportunities for consideration of issues relating to liability for environmental harm in the high seas if it relates to the interpretation or application of the 2023 BBNJ Agreement, or its implementation and compliance.

It is also worth noting the 2023 BBNJ Agreement endows the conference of parties with competence to request advisory opinions from ITLOS 'on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence'.[144] As in the case of the SDC's advisory jurisdiction, such requests may provide an opportunity to seek elucidation of relevant rules concerning liability for environmental harm in the high seas.

7.4 CONCLUSIONS

While claimants for environmental harm in ABNJ potentially have both international and national forums in which they can pursue remedies, both sets of forums present numerous challenges. International and national forums are not mutually exclusive and the suitability of either will depend on a range of factors. However, what is clear is that neither are perfect solutions to address claims in respect of environmental harm in the ABNJ. Undoubtedly, international forums specifically catered to address activity-based harm (such as activities in the Area and activities in Antarctica) and which have an institutional mechanism or structure that

[142] Liesbeth Lijnzaad, 'Dispute Settlement for Marine Biodiversity beyond National Jurisdiction: Not an Afterthought' in Helene Ruiz Fabri, Erik Franckx, Marco Benatar and Tamar Meshel (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill 2020) 169–171. In respect of the division of competence, Lijnzaad notes that '[w]hether the environmental *consequences* and harmful effects *directly resulting* from "activities in the Area" – such as mining activities having a direct impact on marine biodiversity – therefore also fall within the jurisdiction of the [SDC], or should be addressed by the Tribunal (as pertaining to Part XII), or could indeed be under the jurisdiction of a future "BBNJ Chamber" is – to my mind – not fully clear' (at 176).

[143] BBNJ Agreement (n 141) arts 53 ter and 54 ter.

[144] ibid art 48 (6); and see ITLOS Statute (n 18) art 21; ITLOS, Rules of the Tribunal, ITLOS/8 25 March 2021, art 138.

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can initiate claims for environmental harm have specific advantages over regimes which lack such an institutional mechanism. However, it is inescapable that the utilization of any of these forums for litigating claims depends on the willingness of states (or the relevant institutional mechanism) to bring such claims. Indeed, 'states have historically shown a great reluctance to initiate proceedings even where environmental damage is very severe'.[145] The practice of civil liability regimes demonstrates that many of the issues associated with domestic claims can be addressed through harmonization of claims procedures. However, there is little appetite to develop civil liability regimes that would cover environmental harm in ABNJ. This raises larger questions of whether courts and tribunals (whether national or international) are appropriate to address environmental harm in ABNJ given problems associated with standing, an absence of interest in utilizing them, issues relating to expertise in evaluating environmental harm and recognition and enforcement of judgments. Indeed, courts and tribunals may be particularly unsuitable for addressing cumulative, long-term environmental harm and other mechanisms such as funds (explored in the next chapter) may provide an appropriate alternative.

[145] Stephens, *International Courts* (n 4) 69.

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