

# Deep-Sea Minerals

Briefing, February 2019

## Focus on Legal Liability for Environmental Harm from Seabed Mining Activities in 'the Area'

**AT A GLANCE:** Exploitation Regulations can be drafted to fill liability gaps in the ISA's regime, by setting rules to cover:

- who can claim for damages,
  - who can they claim against,
  - where can they claim, and
  - what do they have to show to receive compensation,
- if harm is caused by seabed mineral activities in the Area.

### 1. Why is this an issue?

The ISA is currently drafting a regulatory regime to cover deep seabed mining beyond national jurisdiction. While strong regulations and governance should aim to ensure no serious environmental harm results from future mining activities, there are many unknowns as to how the industry will unfold. ISA rules should aim to cover all eventualities and provide legal certainty for all stakeholders.

Liability means being legally responsible for compensation or remedy for damage caused. A clear liability regime should assist with the peaceful

resolution of disputes, and provide equitable, expeditious and cost-effective compensation to an injured party<sup>1</sup>. Liability rules may also provide an incentive for parties to comply with obligations, and prevent harm occurring in the first place. UNCLOS provides some basic principles regarding liability<sup>2</sup>, but no operational detail.

UNCLOS sets a dual regulatory regime for seabed mining in the Area, where some oversight responsibilities are undertaken by the ISA itself (with the rules set out by the contract and

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regulations), and others by the State who sponsors a particular contract (with rules set out by domestic

### Glossary

**The Area** the seafloor beyond national jurisdiction

**The Enterprise** the in-house mining arm of the ISA (yet to exist)

**ISA** International Seabed Authority

**ITLOS** International Tribunal of the Law of the Sea

**LTC** Legal and Technical Commission of the ISA

**UNCLOS** United Nations Convention on the Law of the Sea

laws). As such, there is a risk of liability rules and procedures falling into the cracks between the two regimes, and not being properly covered in either jurisdiction. The existing ISA Exploration Regulations do not address liability mechanisms. ITLOS has also noted a possible legal lacuna whereby all parties (the ISA, the sponsoring State, and the contractor) meet the requirements of UNCLOS, but harm occurs as a result of a contractor's operations nonetheless<sup>3</sup>. Without a mechanism to prevent this, victims might also be left in the lurch if a liable party does not have financial means to compensate.

The risk of environmental harm increases when exploitation commences. It is therefore timely now, as the ISA's Exploitation Regulations are being negotiated, for the ISA to settle its liability rules. The LTC of the ISA has identified "responsibility and liability" as a priority deliverable<sup>4</sup>, and will be considering the same issues raised in this Briefing at its March 2019 meeting.

## 2. Who is liable?

UNCLOS (Article 22 of Annex III) provides that the contractor and the ISA are liable for any damage arising out of their own wrongful acts, account being taken of contributory acts or omissions by the ISA or contractor, respectively.

UNCLOS Article 139 requires States parties to ensure that their sponsored contractor conforms with the rules of the ISA, and if damage is caused as a result of the State's failure to do this, liability for that damage falls to the sponsoring State, in parallel with the contractor's own liability. However, a sponsoring State will be absolved of such liability if it can show that it has made best efforts via its domestic legal system to secure effective compliance (even if non-compliance and/or damage occur nonetheless). This 'responsibility to ensure'<sup>4</sup> contractor compliance includes enacting appropriate laws to oversee mining activities, and developing administrative measures for effective implementation and enforcement of those rules<sup>5</sup>.

How the Enterprise, as both contractor and ISA, with no sponsoring State, fits into the liability matrix is not completely clear.

Civil liability regimes often identify one actor as holding liability ('channelling'). The principle behind channelling is that the entity with most to gain from

an activity, should bear the burden of any adverse consequences. Channelling usually focuses on the entity conducting the operations, as the entity most able to prevent damage. Clearly designating an actor as liable, can incentivise compliance and harm prevention. Channelling also facilitates the claim process for injured parties, avoiding disputes about who should be claimed against.

On the other hand, a regime that uses channelling may be unfair: to contractors (e.g. where a sub-contractor or supplier was responsible for the harm caused) unless it enables contractors themselves to claim against other parties; or to claimants (e.g. where the contractor is insolvent, or liability is capped) unless it is coupled with adequate insurance or compensation-fund requirements.

**POLICY QUESTION: Is channelling of liability to contractors (so that they are automatically held legally responsible for harm caused) the approach that should be adopted in the ISA regime?**

There may be corporate structure questions, for example if contractors are small operators who are controlled by parent companies or largely operated through sub-contractors<sup>7</sup>. Should parent companies, which benefit economically from the activities of their subsidiaries, owe residual

obligations to those damaged by the subsidiary's activities in case the subsidiary is unable to pay compensation? Are sponsoring states expected or able to regulate parent companies? Where the home State of the parent company is different to the sponsoring State, should that home State have any role or responsibilities within the ISA regime?

### 3. Liable for what?

It seems obvious that "activities in the Area", or "exploration" and "exploitation" of the resources in the Area, should fall within ISA liability rules, and other activities should fall outside; but less obvious what this precisely includes. Are activities such as ore processing, transport, and marketing included within that definition?<sup>8</sup> Does it depend where or when such activities take place? Where operations are run from a vessel, what is the delineation between seabed mineral activities (governed by the ISA regime), and shipping activities (governed by the flag state regime)?

**POLICY QUESTION: Is it possible to specify which activities should fall within, or be excluded from, the ISA liability regime?**

It is necessary in a legal system to determine the degree of fault required to impose liability. This could be negligence-based (requiring a failure to exercise a specified standard of care in conducting the activities), or based simply on causation, with no carelessness or mistake required ('strict liability'). Liability can also be subject to certain caps or exclusions (e.g. in the event of a natural disaster, contributory negligence, armed conflict).

While UNCLOS' use of 'wrongful' terminology could be interpreted to suggest the negligence standard for ISA and contractor liabilities, Articles 139(2) and 304 of UNCLOS clarify that the provisions on liability can be varied by other or future rules of international law. Other civil liability regimes use the 'strict liability' standard. If the system is fault-based only, this could lead to harm, with no remedy available. Generally in law, more risky activities tend to be subject to a strict liability standard. This can also incentivise risk reduction—which is important in a context where the harm (to the marine environment) may be non-reversible.

**POLICY QUESTION: Should ISA contractors be held to a strict liability standard?**

**POLICY QUESTION: Does the definition of "effective control" (the required relationship between a sponsoring State and its contractor) need further scrutiny by the ISA to ensure there is a meaningful link and enforceable regulation between the sponsoring State and the entity that manages the operations and/or holds the assets of the contractor?**

It is possible that seabed mining in the Area could cause damage to persons and property, or environmental damage; and that this might occur in the Area, or the water column above, or in neighbouring areas of national jurisdiction.

UNCLOS does not specify what types of loss can be claimed for, and how damage is to be assessed and quantified. Recent international law commentaries appear to suggest that pure environmental loss might be recoverable, where there is no identified financial loss attached<sup>9</sup>. But it is not clear how a price should be placed upon, for example, loss of ecosystem goods and services.

**POLICY QUESTIONS:**

- **Should the ISA regime permit claims for pure ecological loss? How will this be quantified?**
- **Should there be a minimum threshold for a claim (for example 'serious harm')?**

Answers to these questions would inform risk assessments by contractors and insurers (as well as the design of any additional ISA mechanisms, such as compensation funds).

ITLOS suggested that compensation claimable should be adequate to support reasonable restoration efforts, where environmental harm has occurred<sup>10</sup>. UNCLOS (Article 22 of Annex III) notes that for the ISA and contractors, "*liability in every case shall be for the actual amount of damage.*", which appears to mean full restitution. But what other elements of loss could be claimed is not clear.

**POLICY QUESTIONS:**

- **What type of damage should be claimable: reinstatement, lost profits, reasonable measures to prevent further harm, pay-out in lieu of actual reinstatement?**
- **Should there be liability caps: where the amount of damages available per claim is limited?**

## 4. Who can make a claim?

A variety of actors could potentially sustain damage as a result of seabed mining activities, and it seems reasonable that any injured party should have legal standing to bring a claim. This could include: ship owners; marine scientific research institutions; fishing companies; cable owners; vessel crews; owners/operators of installations and artificial islands; and State parties, including flag States. But damage may also occur to property that is not individually owned e.g. to the Common Heritage of Mankind, or the marine environment beyond national jurisdiction.

## 5. Where can a claim be brought?

Existing dispute settlement mechanisms do not seem adequate to settle the type of complex and multi-party liability claims that could arise for seabed mining in the Area. There is potential for a multiplicity of proceedings, or lack of an available forum for claims.

The Seabed Disputes Chamber of ITLOS only has jurisdiction over certain disputes between States, the contractor and/or the ISA. Claims involving non-state actors would need to be settled elsewhere, e.g. a national court. UNCLOS (Article 235) requires sponsoring States to ensure "*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*". It follows that claims against contractors could proceed under the relevant sponsoring State's domestic legal frameworks. However, very few of the existing 20 sponsoring States currently have relevant legal procedures in place<sup>12</sup>. There is also much divergence in the laws

### POLICY QUESTIONS:

- **Is the ISA, as a kind of trustee for humankind, the correct entity to bring a claim for pure environmental loss, or damage to the resources of the Area?**
- **What if the ISA is the defendant claimed against, or otherwise conflicted<sup>11</sup> – who else could represent humankind collectively, from a legal point of view?**

adopted by sponsoring States, setting a patchwork of rules at the domestic level which may vary greatly from one jurisdiction to the next. Suing States or the ISA in a domestic court may be difficult, due to immunity rules.

In other areas, such as oil pollution and nuclear accidents, the preferred approach has been to set a civil liability regime through international rules. Such schemes usually involve channelling liability to the operator, and use of insurance and compensation funds to ensure access to money to cover third-party losses. Domestic legal systems may then be used to implement the scheme, but much of the administration and rule-making emanates from the international bodies.

### POLICY QUESTIONS:

- **Should domestic courts of sponsoring States be a principal forum for settling liability disputes?**
- **If so, should the ISA set rules aimed to harmonise national processes<sup>13</sup>?**

## 6. Administrative mechanisms that could support a liability regime

There are mechanisms other than liability rules and court processes that can be used to meet the cost of damages. Regulatory tools like emergency orders, or use of a security bond, can enable remediation, outside of liability rules.

UNCLOS (Article 235) envisions "compulsory insurance or compensation funds". This is in keeping with other sector-specific civil liability regimes in operation (e.g. for: bunker oil pollution,

transportation of hazardous substances, nuclear installation and the Antarctic). A fund may be financed by contributions from all mining contractors, and used for remediation in the event of environmental harm, without requiring a causal link to be established between one party's wrongdoing and the harm caused.

## POLICY QUESTIONS:

- Are regulatory tools that could facilitate expeditious clean-up or compensation in place?
- Are insurance policies, suitable in scope and cost, available for seabed mining activities?
- How would an ISA compensation fund be resourced and administered?

## 7. Concluding comments

While it may be premature to signal specific recommendations at this point, it is clear that there are a number of options that need ISA consideration, and some useful precedents for how the same issues have been addressed in other sectors. Perhaps the first key policy decision is to what extent the ISA will take a lead on setting a liability regime at the international level.

**POLICY QUESTION: Should the rules respecting liability be formulated by individual States within domestic legal systems, or be more centrally driven by ISA rules and mechanisms for compensation?**

## 8. Acknowledgements

This Briefing Paper builds upon and summarises the work of the Legal Working Group on Liability for Environmental Harm from Activities in the Area, a small group of academic expert lawyers convened in 2017-2018 by the Centre for International Governance Innovation (CIGI), the Commonwealth

Secretariat, and the Secretariat of the International Seabed Authority (ISA). A series of papers that investigate in depth the subject of this Briefing Note can be found here: <https://www.cigionline.org/series/liability-issues-deep-seabed-mining-series>

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## Endnotes

1. International Law Commission, Draft Principles on Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities adopted 2016, Principle 3, commentary 10 (available here: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_10\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf))
2. Articles 139(2), 235 and 304; and Annex III, Articles 4 and 22
3. Seabed Disputes Chamber of ITLOS, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (2011), Advisory Opinion, No 17 online: [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf)
4. ISBA/22/C/17, Annex II
5. UNCLOS Article 139; and paragraphs 107ff Advisory Opinion of 2011, *supra*. note 3
6. Advisory Opinion of 2011, *supra*. note 3
7. The ISA's Exploration Contract channels liability to contractors for damages arising from the wrongful acts of its "employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this contract." (ISA Exploration Regulations, Annex IV s.16)
8. These matters were considered in the ITLOS Advisory Opinion of 2011, e.g. paras 93-96, where it was noted that the definition of exploration and exploitation in the ISA's Exploration Regulations seemed broader than envisaged in UNCLOS, *supra* note 3.
9. For example, United Nations Compensation Commission 'Report and Recommendation' UN Doc/S/AC.26/2005/10 at para 58; International Law Commission *supra*. n.1, Article 36, commentary 15; International Court of Justice *Costa Rica v Nicaragua*, 2 February 2018, at para 41.
10. Advisory Opinion of 2011, *supra*. note 3, at para 197
11. Given the ISA's multiplicity of roles, including: mining contract issuer, the Enterprise (contractor), entity responsible for environmental protection, collector of royalties, and distributor of benefits.
12. Lily, H 'Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining': [https://www.cigionline.org/sites/default/files/documents/Deep%20Seabed%20Paper%233\\_1.pdf](https://www.cigionline.org/sites/default/files/documents/Deep%20Seabed%20Paper%233_1.pdf). This review confirmed that 11 of the 20 sponsoring states had sponsorship laws in place as of March 2018, and found little evidence that sponsoring states have sought to create specific rules or procedures addressing liability or the UNCLOS Article 235 obligation to ensure prompt and adequate compensation.
13. There is other international precedent that could be drawn upon here, for example ILC Principles on Allocation of Loss, *supra* note 1



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