



# **Seabed Mining: Legal Risks, Responsibilities and Liabilities for Sponsoring States**

Duncan Currie LL.B. (Hons.) LL.M.  
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Mining of the deep seabed beyond national jurisdiction, known as the Area, is administered by the International Seabed Authority (ISA) and may be carried out by a contractor sponsored by a State Party. It is vital that States consider the complex legal risks, responsibilities and potential liability for damage that can arise from the sponsorship of seabed mining activities in the Area.

## **Potential impacts of seabed mining**

Seabed mining's effects can include:

- habitat destruction;
- damage to or elimination of organisms and biodiversity including species extinctions and loss of biodiversity;
- sediment plumes;
- noise pollution from pumps, platforms and vessels;
- toxic pollution;
- harm to the water column and species therein, including migratory species (e.g. cetaceans, sea turtles) and/or species of importance to commercial, recreational or subsistence fisheries;
- degradation of ecosystem goods and services ('natural capital');
- harm to persons or property;
- damage to another seabed mining contract area; and
- damage to areas, species or resources within national jurisdiction, such as those of coastal States near the mining.

## **Liability of the Sponsoring State**

Each seabed mining operation would be governed by a set of terms and conditions which will be incorporated in a contract with the ISA, thereby determining the extent to which any impacts are authorized. In the event of damage beyond the scope and severity allowed in the contract, the contractor could be liable for the costs of reparation or compensation for harm. Liability would be determined by the actual amount of damage, while the type of reparation would depend on both the damage itself and the technical feasibility of restoration.

In the event of damage, an injured State might make a claim for economic or environmental loss. For example, a flag State, a coastal State or other might make a claim for losses associated with fisheries, minerals, or marine genetic resources damaged, displaced or disrupted by mining activity. Compensation might also be claimed for purely environmental loss. Moreover, because the seafloor beyond national jurisdiction is designated the ‘common heritage of [hu]mankind’ under the United Nations Convention on the Law of the Sea (UNCLOS), a State might also make a claim for losses under on behalf of [hu]mankind could be claimed if valuable minerals located in the Area are impacted by mining – whether the minerals are in a area of another contractor or an area not under contract.

The sponsored contractor is the primary actor liable for its own failure to comply with its obligations under its contract with ISA. However, if the contractor causes harm, the sponsoring State may also be liable if the State has not upheld its own legal responsibilities, which can be classified into two categories: (i) indirect obligations of due diligence and (ii) direct obligations.

### **State Obligation of Due Diligence**

Sponsoring States are responsible for ensuring that their contractor’s seabed mineral activities are carried out in conformity with Part XI of UNCLOS. This is described by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea as an obligation of ‘due diligence’.

The obligation of due diligence requires that sponsoring States implement laws and establish national administrative measures that are “reasonably appropriate” for securing compliance by persons under their jurisdiction, in this case the mining contractor. Moreover, a sponsoring State must actively monitor the operations of its contractor, in co-ordination with the ISA, and keep legislation, regulations and administrative measures under review. If it fails to carry out any of these as required, it may be liable for any resulting damage. The standard is high: due diligence requires a sponsoring State to deploy adequate means, to exercise best possible efforts, to obtain the result, and in doing so, to do the utmost.

Due diligence is an obligation ‘of conduct’ not ‘of result’. This means that a State is not obliged to always achieve a specified outcome, provided it does what it is required to do, such as adopt and enforce administrative measures. But the standard of due diligence is more severe for riskier and untested activities like seabed mining. In the event of any damage, a sponsoring State must be able to demonstrate that they took all required and reasonable steps to make sure the mining operation complied with Part XI of UNCLOS, including the rules and regulations adopted by the ISA. The sponsoring State must discharge this burden whether or not the ISA undertakes its own monitoring, compliance, or enforcement. Failure to discharge this obligation exposes the sponsoring State to liability for reparations or compensation from any resulting damage.

### **Direct State Obligations**

A sponsoring State is further required by international law to:

- assist the ISA in the exercise of control over activities in the Area
- apply a precautionary approach
- apply best environmental practices;

- conduct environmental impact assessments; and
- ensure its national legal system offers recourse to third parties for compensation in respect of pollution caused by its sponsored contractor

These are independent requirements, but additionally may also be factors in determining whether a State has met its “due diligence” burden. If a sponsoring State fails to discharge these duties in relation to a sponsored contractor, it will be liable to cover the costs of any unlawful damage.

The existence of these direct obligations means that a sponsoring State cannot just focus on making sure a contractor complies with ISA rules. This is because there is no guarantee that ISA Regulations, standards and guidelines - or the way they are implemented, monitored or enforced - will meet the standards required by international law will meet standards required (by international, regional or domestic laws or policy) of the sponsoring State. The fact that ISA Regulations cannot be relied upon to avoid potential damage and liability was made apparent when Belgian and German-sponsored ISA contractors conducted an environmental impact assessment (EIA) for the testing of mining equipment and it emerged that the ISA’s current regime lacked sufficient procedural rules to guide either the conduct of the EIA, the submission and review of the EIA.

Domestic-level issues, like consulting the population of the sponsoring State, or domestic court procedures for bringing seabed mining claims, may not be covered in ISA Regulations. Failure by the sponsoring State to address these matters could lead to a breach of their direct obligations and exposure to liability.

As another example, the Legal and Technical Commission of the ISA has repeatedly reported that contractors in a number of cases have violated the terms of their contracts, although the nature of the violations and the names of the contractors concerned are kept confidential. Yet the ISA has never taken punitive action. If any of these or other violations under either exploration or exploitation contracts go (or have gone) ‘unpunished’ and are subsequently found to have caused damage to the marine environment, then the sponsoring State could be held responsible and liable where the ISA has failed to act to ensure compliance.

The direct responsibilities of a State to ensure that seabed mining complies with specific requirements of international and national law are an additional burden and risk associated with becoming a sponsoring State.

### **Examples of direct sponsoring State obligations:**

**The obligation to apply the precautionary approach** is an integral part of a sponsoring State’s general duty of due diligence and it applies beyond the scope of ISA regulations. The obligation to take a precautionary approach is related to the “responsibility to ensure” that sponsored contractors comply with UNCLOS. This includes an obligation to take a precautionary approach, as reflected in Principle 15 of the Rio Declaration, in order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area.

Sponsoring States are required to take all appropriate measures to prevent damage resulting from the activities of contractors in situations where, although scientific evidence about the potential

negative impact of the activity is insufficient, there are plausible indications of risks. If a sponsoring State disregards these risks, it amounts to a failure to comply with the precautionary approach.

Where the risks are sufficiently high, a lack of full scientific certainty cannot be used by a sponsoring State as an excuse for postponing or failing to take necessary precautionary measures. This can mean that a State is obliged to prohibit activities, if there are scientific uncertainties and a threat of serious or irreversible damage. In light of the extensive scientific uncertainties surrounding the deep-sea marine environment, seabed mining and its impacts, States must be proactive in preventing environmental harm – or risk liability for serious or irreversible damage to the marine environment.

**The obligation to apply best environmental practices** is part of ISA's exploration regulations and has become a part of sponsoring States' obligations. Failure to apply such practices will give rise to liability by the sponsoring State. This includes requiring the contractor to adopt best environmental practices, requiring the regulatory authorities to promote best environmental practices, and ensuring that they actually follow through in practice.

**The obligation to ensure the availability of recourse for compensation** in the event of damage caused by pollution of the marine environment requires that a process and resources are in place, in accordance with the sponsoring State's legal systems, for prompt and adequate compensation or other relief. This applies to situations where a sponsored contractor causes damage by pollution. If such damage occurs but recourse for compensation or other relief is not available, the sponsoring State itself could be held liable for damages.

**The obligation to conduct EIAs** is both a direct obligation under UNCLOS and a general obligation under customary international law. The sponsoring State is under a direct obligation to: (1) cooperate with ISA in the establishment and implementation of EIAs; and (2) ensure that its contractor complies with its obligation to conduct an EIA, both according to ISA Regulations and consistently with the ISA Legal and Technical Commission (LTC) Recommendations. This would include EIAs for the testing of mining components, and carrying out environmental monitoring prior to, during and following test mining activities.

If a sponsoring State does not meet these EIA and monitoring obligations, it could be held liable for harm caused by any resulting damage.

### **The Need for Adequate and Appropriate Financial Security**

Situations could arise where a contractor fails to meet its liability in full, leaving the sponsoring State liable. If a contractor does not or cannot pay compensation ordered and the sponsoring State does not hold an adequate bond from its contractor, then it could be pursued for compensation. Belgium's law, for example, does not currently require such a bond. This means that the Belgian Government would not be able to rely on a financial bond if a contractor defaults, leaving Belgium potentially exposed to liability. An insurance policy may not give adequate protection, particularly for regulatory failures, for uninsurable harms or for harms caused by planned activities. Insurance policies, in addition, restrict cover to specified limits.

## **Conclusion**

Becoming a sponsor of seabed mining places multiple obligations and responsibilities on a State. Considering the wide range of potential impacts seabed mining could have on the marine environment, on resources such as fisheries and minerals, and even on people and property, the need for proactive monitoring of the mining activities of the contractor and the high level of scientific uncertainty about the extent of harm that could occur there is significant risk that sponsoring States could be held liable for substantial costs for damage caused by the activities of their mining contractor.