



Summary of Some Liability Issues

A Briefing to the International Seabed Authority for the 23rd Session

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Introduction

This brief addresses the issue of liability consequent on seabed mining.¹ There are at least five different *foci* or types of liability for seabed mining: liability of the contractor, liability of the sponsoring State, liability of the Authority, flag State liability, and potential liability gaps.

Following a proposal by Nauru in 2010,² the Council took a decision to request an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.³ Greenpeace and WWF jointly submitted an *amicus curiae* brief, but their brief was not included in the case file but would be transmitted to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements, and it would be posted on a separate section of the Tribunal's website.⁴ Likewise, a petition to participate in the proceedings as *amici curiae* was rejected.⁵ The Advisory Opinion was delivered on 1 February 2011.⁶

Liability of the Contractor

The liability of the sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder.⁷ Under Article 22 of Annex III of UNCLOS, the contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage. ITLOS observed⁸ that “No reference is made in this provision to the liability of sponsoring States. It may therefore be

¹ Appreciation to Hannah Lily of the Commonwealth Secretariat for comments and suggestions. All errors are the responsibility of the author.

² ISBA/16/C/6

³ ISBA/16/C/13, adopted by the Council at its 161st meeting on 6 May 2010. The questions asked were:
1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

⁴ AO para. 13.

⁵ AO para. 14.

⁶ Case 17: Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area. At <https://www.itlos.org/en/cases/list-of-cases/case-no-17/>. Hereafter “AO”.

⁷ AO para. 204.

⁸ AO para. 200.

deduced that the main liability for a wrongful act committed in the conduct of the contractor's operations or in the exercise of the Authority's powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State. In the view of the Chamber, this reflects the distribution of responsibilities for deep seabed mining activities between the contractor, the Authority and the sponsoring State."

Liability of the Sponsoring State

The liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor.⁹ But this is merely a trigger mechanism: such damage is not automatically attributable to the sponsoring State. The liability of the sponsoring State arises from its own failure to comply with its responsibilities under the Convention and related instruments,¹⁰ whereas the liability of the sponsored contractor, as noted, arises from its failure to comply with its obligations under its contract. The liability of the sponsoring State depends on the occurrence of damage resulting from the failure of the sponsored contractor, but this does not make the sponsoring State responsible for the damage caused by the sponsored contractor: the sponsoring State's liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities.¹¹ In order for the sponsoring State's liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities.¹²

There are two possible sources of liability for sponsoring States: failure to comply with direct obligations and failure of due diligence. Liability for violation of direct obligations is covered by the first sentence of article 139.2 of UNCLOS.¹³ In the event of failure to comply with direct obligations, the sponsoring State cannot claim exemption from liability, as the second sentence of article 139.2, of the UNCLOS does not apply.¹⁴

⁹ AO para. 201 and see paragraph 181.

¹⁰ AO para. 204.

¹¹ ITLOS paragraph 182.

¹² ITLOS paragraph 182. "Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility). As explained in the present paragraph, the liability regime established in Annex III to the Convention and related instruments does not provide for the attribution of activities of sponsored contractors to sponsoring States."

¹³ UNCLOS art. 139.2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability, States Parties or international organizations acting together shall bear joint and several liability.

¹⁴ UNCLOS art. 139.2.A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

Direct Obligations

Direct obligations are obligations with which sponsoring States have to comply, arising under UNCLOS and related instruments, have independently of their obligation to ensure a certain behaviour by the sponsored contractor.¹⁵ These include:¹⁶

- the obligation to assist the Authority in the exercise of control over activities in the Area;¹⁷
- the obligation to apply a precautionary approach;¹⁸
- the obligation to apply best environmental practices;¹⁹
- the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment;²⁰
- the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution;²¹ and
- the obligation to conduct environmental impact assessments.²²

Liability for breach of direct obligations arises under art. 139.2 of UNCLOS: damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability.²³ There is no exemption for cases where the State Party has taken all necessary and appropriate measures to secure effective compliance.²⁴

Indirect Obligations: Due Diligence

The Chamber said that “The sponsoring State’s obligation “to ensure” is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the

¹⁵ AO para. 121.

¹⁶ AO para. 122.

¹⁷ UNCLOS art. 153.4.

¹⁸ Nodules Regulations R. 31.2, Sulphides Regulations R 33.2 and see Rio Declaration Principle 15. the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor: AO para. 131.

¹⁹ Nodules Regulations R 5.1, Sulphides Regulation R. 33.2 and Annex 4 Section 5.1.

²⁰ Nodules Regulations R. 32.7, Sulphides Regulations R. 35.8.

²¹ UNCLOS art. 235.2: States shall 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.

²² 1994 Implementing Agreement Section 1 para. 7: “An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities. Nodules Regulations R. 31.6; Sulphides Regulations R. 33.6; UNCLOS art. 206. “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.”: AO para. 145 “the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.”: AO para. 150.

²³ AO para. 206.

²⁴ AO para. 207.

aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation “of conduct” and not “of result”, and as an obligation of “due diligence”.²⁵ An example is article 194.2 of UNCLOS: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment ...”.²⁶ The standard of due diligence has to be more severe for riskier activities. The “due diligence” obligation “to ensure” requires the sponsoring State to take measures within its legal system and that the measures must be “reasonably appropriate”.²⁷

Liability of the Authority

The main liability for a wrongful act committed in the conduct of the contractor’s operations or in the exercise of the Authority’s powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State.²⁸

The Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage.²⁹

What Constitutes Damage?

The Chamber said that “It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment.

Who May Claim for Damage?

Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.”³⁰ Each State Party may also be entitled

²⁵ AO para. 110.

²⁶ AO para. 113.

²⁷ AO para. 120.

²⁸ AO para. 200. This conclusion rests on Annex III, article 22 of UNCLOS:

The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage.

²⁹ UNCLOS, Annex III, article 22.

³⁰ AO para. 179.

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.³¹

Causation

In order for the sponsoring State's liability to arise, there must be a causal link between the failure of that State and the damage caused by the sponsored contractor:³² it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities.³³

Exemption from Liability, Standard and Scope of the Exemption.

Article 139.2 provides that a State Party shall not however be liable for damage caused by any failure to comply with Part XI by a sponsored person if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153.4, and Annex III, article 4.4,³⁴ so in the event that the sponsored contractor fails to comply with UNCLOS, the Regulations or its contract, and such failure results in damage, the sponsoring State cannot be held liable.³⁵

Standard and Requirements

A contract is not enough: laws and regulations and administrative measure are needed.³⁶ Moreover, laws and regulations by themselves may not provide a complete answer: Administrative measures aimed at securing compliance with them may also be needed.³⁷ Laws, regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor, and may also provide for the co-ordination between the various activities of the sponsoring State and those of the Authority with a view to eliminating avoidable duplication of work.³⁸ Adoption of laws and regulations and the taking of administrative measures are necessary. The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State.³⁹ One reason for this arrangement is transparency: A contractual approach would lack transparency: it will be difficult to verify, through publicly available measures, that

³¹ AO para. 180. "In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides:

Any State other than an injured State is entitled to invoke the responsibility of another State ...if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole."

³² AO para. 181.

³³ AO para. 182.

³⁴ UNCLOS para.139.2. second sentence.

³⁵ AO para. 186.

³⁶ ITLOS paras. 223, 224.

³⁷ AO para. 218.

³⁸ AO para. 218.

³⁹ ITLOS para 218, citing Annex III, article 4.4.

the sponsoring State had met its obligations.⁴⁰ Another reason is the common heritage of mankind: the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining.⁴¹ This is an important role which sponsoring States, and indeed the Authority, needs to bear in mind.

The measures taken must be “reasonably appropriate”. The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.⁴² The obligation is to act within its own legal system, taking into account, among other things, the particular characteristics of that system.⁴³ But there are further constraints: the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole.⁴⁴

The rules, regulations and procedures concerning environmental protection adopted by the Authority are used as a minimum standard of stringency for the environmental or other laws and regulations that the sponsoring State may apply to the sponsored contractor.⁴⁵ Moreover, while a State Party may not impose conditions on a contractor that are inconsistent with Part XI, it may impose environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority.⁴⁶

The Chamber noted that the sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under UNCLOS, which may concern, for instance, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance.⁴⁷

The applicable contract is a contract between the Authority and the contractor only - and so does not bind the sponsoring State – but the sponsoring State is under an obligation to ensure that the

⁴⁰ AO para. 225: Annex III of the Convention, and the Nodules Regulations and the Sulphides Regulations contain no requirement that a sponsorship agreement, if any, between the sponsoring States and the contractor should be submitted to the Authority or made publicly available. The only requirement is the submission of a certificate of sponsorship issued by the sponsoring State.

⁴¹ AO para. 226.

⁴² AO para. 228.

⁴³ AO para. 229.

⁴⁴ AO para. 230. Any failure on the part of the sponsoring State to act reasonably may be challenged before this AO under article 187 (b) (i) of the Convention. AO para. 230.

⁴⁵ AO para. 240.

⁴⁶ adopted pursuant to Annex III article 17.2(f), dealing with protection of the marine environment. Annex III article 21.3. See AO para. 231, 232.

⁴⁷ AO para. 234.

contractor complies with its contract,⁴⁸ and it is inherent in the “due diligence” obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.⁴⁹

Standard of Liability

For sponsoring States, the Chamber held that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence⁵⁰ and that this rules out the application of strict liability:⁵¹ but this was said, it should be noted, with respect only to sponsoring States, and to breaches of due diligence, not necessarily of direct obligations.

Multiple Sponsorship and Joint Liability

The Chamber said that the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.⁵²

Amount and Form of Compensation

Liability in every case shall be for the actual amount of damage,⁵³ both for contractors and Sponsoring States.⁵⁴ The form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*.⁵⁵ The contractor and sponsoring State remain liable for damage even after the completion of the exploration phase.⁵⁶

The Chamber made it clear that both the contractor and the sponsoring State remain liable for damage after completion of the exploration phase.⁵⁷ Once exploitation regulations are developed, it may be assumed that the same would apply to exploitation *a fortiori*.

Gap and Need for a Fund

ITLOS pointed out that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full.⁵⁸ Secondly, ITLOS pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage.⁵⁹

⁴⁸ ILOS para. 238.

⁴⁹ ILOS para. 239.

⁵⁰ AO para. 189.

⁵¹ AO para. 189.

⁵² AO para. 192.

⁵³ AO para. 193 citing UNCLOS Annex III art., and Nodules Regulations R. 30 and Sulphides Regulations R.32.

⁵⁴ AO para. 195.

⁵⁵ AO para. 197.

⁵⁶ AO para. 198.

⁵⁷ AO para. 197.

⁵⁸ AO para. 203.

⁵⁹ AO para. 203.

Therefore, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139.2, of the Convention. ITLOS therefore suggested that the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. Article 235.3 of UNCLOS refers to such possibility.⁶⁰ ITLOS went on to say that the Chamber is aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law, but that such efforts have not yet resulted in provisions entailing State liability for lawful acts. So again, the Chamber drew the attention of the Authority to the option of establishing a trust fund to cover such damages not covered otherwise.⁶¹

Further Elaboration of a Regime

The Chamber pointed out that article 304 of UNCLOS refers not only to existing international law rules on responsibility and liability, but also to the development of further rules: the regime of international law on responsibility and liability is not static. Article 304 thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.⁶²

Conclusions, Some Questions and Implications for Further Implementation

Bonds and insurance are two ways of ensuring that funds are available to satisfy liability which arises. Bonds may be posted by contractors, but suffer from the potential shortcoming that they would be for specified and limited amounts, and would be subject to the terms specified in the bond. Insurance policies are subject to the provisions specified in the insurance policy, including terms and conditions, to the events specified in the policy, are limited to specified amounts and are commonly subject to conditions such as *force majeure*.

While the Chamber did not discuss bonds or insurance specifically, it did make it clear that it is for the sponsoring State to enforce compliance with contracts. One question is whether bonds and/or insurance policies to underpin liability for damage are to be implemented by sponsoring States, as parties responsible for ensuring compliance, or by the Authority, as contracting Party. But what is clear is that a Fund as suggested by the Chamber is essential to fill the two gaps that it identified: (1) if the sponsored contractor has caused damage and is unable to meet its liability in full and (2) if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage. And there may be other gaps. These, and some scenarios, can include:

- a disaster emergency response where no party admits fault or fault cannot be assigned within the urgent timeframe;

⁶⁰ AO para. 205.

⁶¹ AO para. 209.

⁶² AO para. 211.

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- where damage is caused, such as a plume covers another contractor's claim, having environmental and possibly economic impacts on that claim, or a plume covers an Area of Particular Environmental Interest, Preservation Reference Zone, Impact Reference Zone or other protected area, either of the contractor or outside the claim, despite compliance by a contractor with its contract and due diligence having been carried out by the sponsoring State;
- where damage occurs as a result of a third party actor whose insurance does not cover it and which does not have sufficient funds (e.g. a collision);
- where damages occur as a result natural events such as a tsunami, unusual storm, meteor strike etc but a potentially liable party or insurer may claim an exemption such as force majeure or act of God;
- where damage occurs as a direct result of a sponsoring State failure of due diligence, but the sponsoring State cannot or does not meet the liability.

Secondly, further specificity requires development of further rules on responsibility and liability, to specify rules around responsibility and liability for the Authority, sponsoring States and contractors. Some issues are what is the standard of care for the Authority, for Sponsoring States and for Contractors? Some guidance has been given for liability for due diligence for Sponsoring States, but questions remain over the standard of liability for breach by sponsoring States of direct obligations and what is the meaning of 'wrongful' acts by contractors: does that term encompass breaches of regulations, breach of contract, negligence, or liability for all damage, whether caused by negligence or however caused? Other questions are what form reparation may take: restitution, compensation, satisfaction or a combination of the three.

Extracts from UNCLOS

Annex III Article 22 Responsibility

The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage.

ARTICLE 139 RESPONSIBILITY TO ENSURE COMPLIANCE AND LIABILITY FOR DAMAGE

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.
2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability, States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.
3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.

ARTICLE 168 INTERNATIONAL CHARACTER OF THE SECRETARIAT

2. The Secretary-General and the staff shall have no financial interest in any activity relating to exploration and exploitation in the Area. Subject to their responsibilities to the Authority, they shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their employment with the Authority.

ARTICLE 235 RESPONSIBILITY AND LIABILITY

Aspects of Liability for Seabed Mining

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall 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.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

ARTICLE 304 RESPONSIBILITY AND LIABILITY FOR DAMAGE

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.