



Dispute Settlement and the Protection of “Investors” under Part XI of UNCLOS

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A unique international organisation

- Legislative powers
- Administrative powers
- Enforcement powers





Deep seabed mining: the story so far...

- 30 contractors (states, state companies and private companies)
- Exploration for polymetallic nodules, polymetallic sulphides and cobalt-rich crusts in the Pacific Ocean, Indian Ocean and Atlantic Ocean

Questions

- To what extent can the Authority be held accountable by aggrieved contractors for the alleged misuse of its regulatory powers?
- What forum will decide such disputes?
- What types of decisions may be protected from challenge?
- What are the possible grounds of challenge?

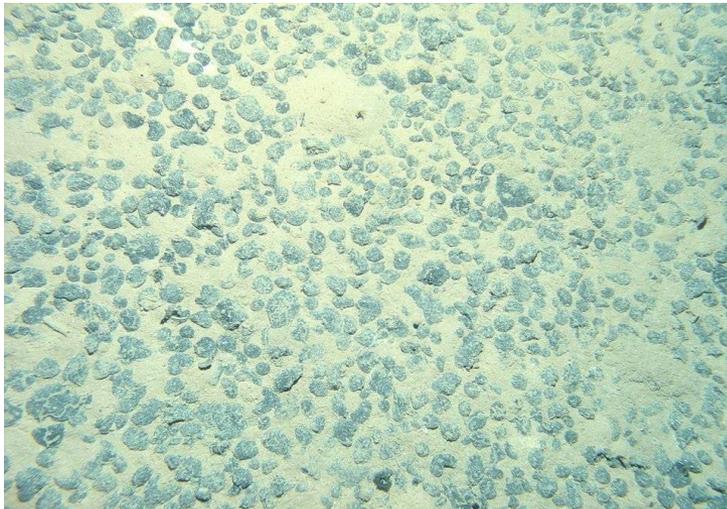


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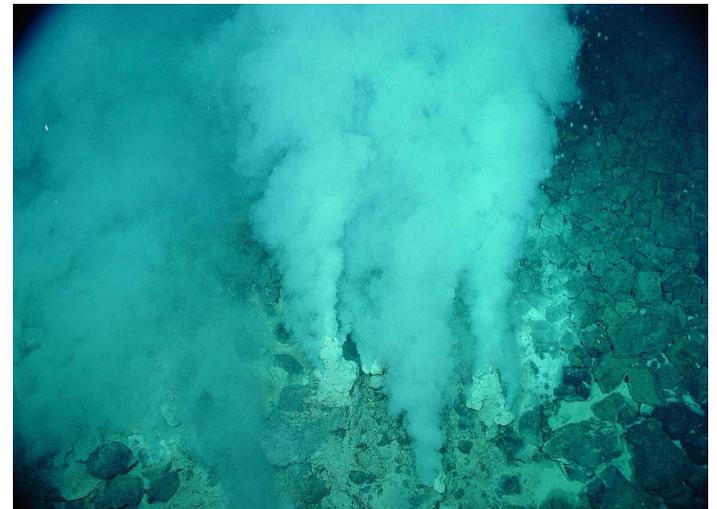


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Types of Part XI disputes

- Disputes between States Parties
- Disputes between a State Party (including a sponsoring State) and the Authority
- Disputes between a contractor (including a State, a state enterprise, the Enterprise, and a natural/juridical person) and the Authority (with the sponsoring State able to participate in proceedings where relevant)
- Disputes between a prospective contractor which has fulfilled the conditions in Articles 4(6) and 13(2) of Annex III and the Authority concerning the refusal of a contract or a legal issue arising in the negotiation of a contract
- Not all possible disputes are included, e.g. disputes between contractor and sponsoring state; disputes between (coastal or flag) states and a contractor; disputes between different contractors





What forum will decide Part XI disputes?

The Seabed Disputes Chamber (SDC) is the default forum for most Part XI disputes. The SDC is composed of 11 members selected every three years by a majority of the elected members of ITLOS from among them, provided that it assures a representation of the principal legal systems of the world and equitable geographical representation. A quorum of 7 judges is needed to constitute the Chamber. Ad hoc judges may be appointed but in place of other Members of ITLOS [ITLOS Statute, Article 17(4)].

Alternative Forums for Dispute Settlement under Part XI

- Disputes between States Parties may be submitted to a Special Chamber of ITLOS or an ad hoc Chamber of the SDC.
- Disputes concerning contracts **shall** be submitted to binding (UNCITRAL) commercial arbitration, unless the parties agree otherwise, although an arbitral tribunal must refer any question of interpretation of the Convention to the SDC and it must “proceed to render its award in conformity with the ruling of the [SDC]” [UNCLOS, Article 188(2)(b)].
- The rationale for this exclusive jurisdiction is the maintenance of the integrity and coherence of the Part XI regime, so can it be assumed by analogy that the same requirement applies to rules, regulations and procedures adopted by the Authority in accordance with the Convention?





Alternative Forums for Dispute Settlement under Part XI

- Section 1 of Part XV allows states to substitute their preferred means of dispute settlement for those contained in Section 2 of Part XV.
- UNCLOS, Article 285: “This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with the procedures provided for in this Part. If an entity other than a State Party is a party to such a dispute, this section applies mutatis mutandis.”
- There is some ambiguity as to the extent to which applicants must comply with the requirements in Part XV, Section 1 before submitting a claim to the procedures in Part XI, Section 5.



The Application of Section 1 of Part XV to Part XI Disputes

- Article 283: “When a dispute arises between States Parties **concerning the interpretation or application of this Convention [including Part XI]**, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.” See also Article 284.
- Article 280: “**nothing in this Part [i.e. Part XV]** impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation and application of this Convention by any peaceful means of their own choice.” See also Articles 281 and 282.



Limits on challenges to the exercise of legislative competence

- Article 189: “In exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures.”
- Presumably such a limit extends to any other body which may be charged with settling a Part XI dispute, e.g. a special chamber of ITLOS.





Limits on challenges to the exercise of administrative/enforcement competence

- Article 189: “The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority...”
- The reference to “the exercise ... of ... discretionary powers in accordance with this Part” cannot be understood as a complete prohibition on the challenge of any decisions which are based upon a discretionary power, but rather it provides protection for those decisions which are made within the confines of the discretion that has been granted. Indeed, the latter half of Article 189 expressly provides that the SDC may hear “claims concerning excess of jurisdiction or misuse of power...”



Mis-use of power: specific standards

- Limits on the discretion of the Authority when approving contracts [UNCLOS, Annex III, Article 6(3), 10], extending contracts [Part XI Agreement, Section 1, para. 9] and suspending or terminating contracts [UNCLOS, Annex III, Article 18(1)]
- Non-discrimination [UNCLOS, Article 152]
- Uniform application of rules, regulations and procedure [UNCLOS, Annex III, Article 17(1)]
- Good faith [Standard contract clauses, section 13.4]
- Proportionality of monetary penalties [UNCLOS, Annex III, Article 18(2)]
- Some of these standards not only raise questions of **interpretation**, but also questions about the appropriate **standard of review**