Deep Seabed Mining Liability: Potential Legal Pathways

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This briefing paper summarises the work of the Legal Working Group (LWG) on Liability for Environmental Harm from Activities in the Area. The author acknowledges the contribution of the LWG members, particularly those members who prepared papers for the project (referenced in this Paper). This work is based on the Synthesis Report of the LWG and is reproduced with the permission of the Centre for International Governance Innovation (CIGI), Waterloo, Ontario, Canada.

Introduction

A critical component of the international regime governing the exploitation of deep seabed minerals is the development of appropriate rules and procedures for the payment of "adequate and prompt" compensation in the event of harm to the environment, persons or property arising from mining activities in the Area. Unique features of the deep seabed mining regime, including the mix of State and Non-State entities involved in mining activities, and the status of the Area as the common heritage of mankind, raise new and complicated legal issues. Recognizing the potential challenges posed by the development of liability rules, the Legal and Technical Commission (LTC) of the ISA identified "Responsibility and Liability" as a key deliverable in the development of the rules governing the exploitation stage of deep seabed mining, and specifically identified the establishment of a Legal Working Group to support and inform the development of liability rules by the ISA.

In response to this demand, the Centre for International Governance Innovation, in partnership with the ISA Secretariat and the Commonwealth Secretariat, formed a Legal Working Group in 2017, (*see LWG membership, Page 7*), and held meetings in London on September 2017 and February 2018 to consider key legal issues relating to liability for environmental harm from activities in the Area.

The principal output of the LWG is a series of research papers addressing:

- attribution of liability,
- scope of compensable damages ,
- who may have standing to pursue legal claims,
- potential dispute settlement fora in which those claims may be brought,
- standard of liability to be applied,

- potential use of existing insurance and compensation fund models,
- current liability rules and practices contained in sponsoring state legislation, and
- the definition of "effective control" in the Convention on the Law of Sea (LOSC).

The LWG has also produced a synthesis and overview document summarizing the individual papers and identifying key policy options that will have to be addressed in considering the formulation of liability rules.[1]

Purpose of Liability Rules

Liability for activities in the Area is addressed in Part XI of the LOSC under article 139 and articles 4 and 22 of Annex III, which provide that the states sponsoring contractors shall be liable for failures of due diligence, and that contractors and the ISA shall be liable for wrongful acts that result in losses. The extent of sponsoring state liability is addressed extensively in the Seabed Dispute Chamber's advisory opinion.[2] The provision of the LOSC do not elaborate on the content of liability rules, but do establish that the goal of liability provisions is to ensure prompt and adequate compensation, as well as to contribute to the prevention and remediation of environmental harm.[3] Article 304 of the LOSC anticipates the further development of liability rules either generally in international law or more specifically in relation to deep seabed mining activities. The legal authority of the ISA, through Council and the Assembly, to develop new liability rules falls within those bodies' broad plenary powers to develop rules, regulations and procedures for deep seabed mining.[4]

Approaches to the Form of Liability Scheme

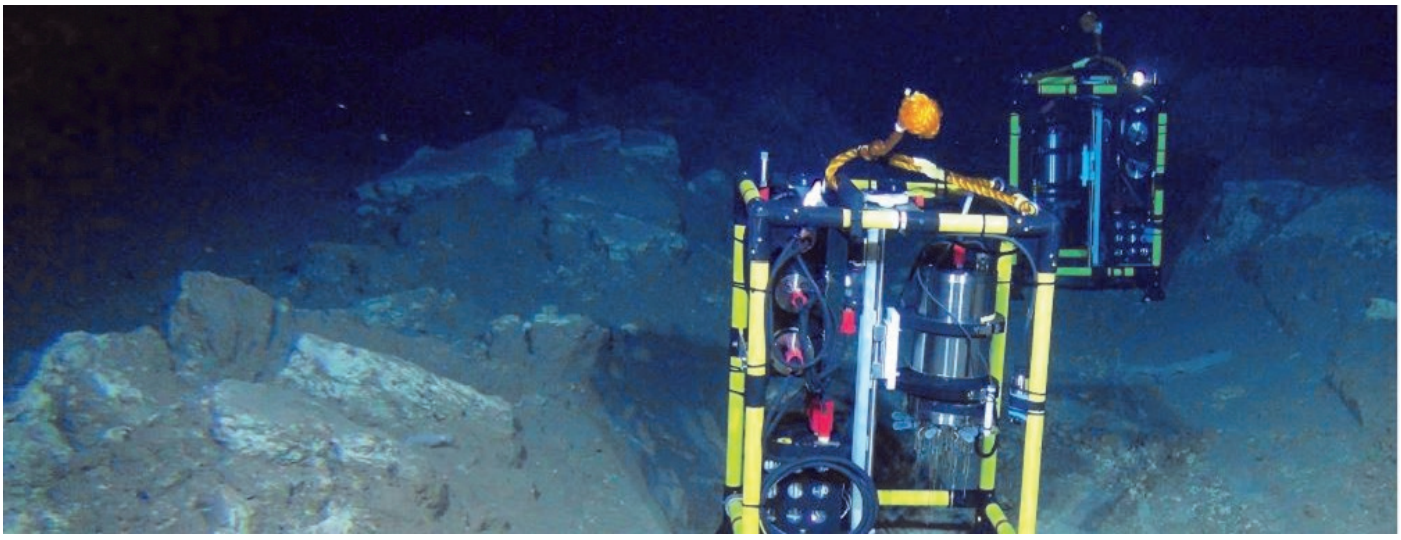
One issue identified by the LWG is that the liability rules can take different forms depending on the level of governance used to implement the scheme. The regime in the Area encompasses both state responsibility and that of international organizations, such as the ISA, as developed in international law, whether under the LOSC or rules of general application. Contractors are also recognized under existing LOSC rules as being legally responsible for their wrongful acts. Direct claims by individuals could proceed under domestic law, which is anticipated under article 235 of the LOSC, but in the absence of further international cooperation there would be a patchwork of rules and procedures at the domestic level. One of the papers prepared by the LWG, which looked at current domestic practices of sponsoring states, found existing practices to be divergent, with little attention currently being paid to the development of specialized liability rules.[5] Another paper highlighted issues that may arise in identifying which State is the State with "effective control" of a contractor, and thus exposed to liability as its sponsor.[6]

Harmonizing domestic state practices is one possible approach to generate greater consistency and ensure the availability of adequate compensation. However, the dominant approach in other areas involving hazardous activities is the development of sector specific civil liability rules in international law, such as those seen in relation to oil pollution from tankers and nuclear accidents. Civil liability schemes typically channel liability to operators and provide mandatory compensation mechanisms, such as insurance and the use of compensation funds.[7]

It should be recognized that there may be alternative measures that do not rely on liability rules *per se*, but respond to environment harm through other regulatory tools, such as emergency or administrative orders (to remediate harm).

Attribution of Liability [8]

The issue of attribution of liability is a question of who, among the parties involved, should be held ultimately liable for damage arising from a particular



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activity. Clear attribution rules are important to limit the possibility of liability gaps arising where an actor that has caused damage can avoid paying compensation, either because it is not legally responsible or, even if responsible, has insufficient funds and is not required to be properly insured or guaranteed.

A key consideration here is whether liability ought to be channelled to particular actors, such as contractors, which may simplify procedures and facilitate compensation mechanisms, such as insurance.

Standards of Liability [9]

A threshold question for designing liability rules in any legal system is the degree of fault required to impose liability. Does liability only flow where the responsible party fails to meet some defined standard of care, such as due diligence? Or can strict (no-fault) liability be imposed? While the current rules under LOSC, as implemented in the exploration regulations, impose a fault-based due diligence standard, it remains open for the ISA or sponsoring States to revisit this standard in relation to the development of new rules. Other civil liability regimes in international law have favoured no-fault approaches to liability (usually coupled with channelled liability and mandatory insurance).

Defining Compensable Damages[10]

While the liability framework under the LOSC identifies that liability for wrongful acts resulting in damages shall be for the actual amount of damage, the LOSC does not define which types of damages are compensable and how that damage is to be quantified. Damages to persons and property present less of an issue, and are well understood in both international and domestic legal settings. Environmental harm may present particular challenges, such as whether there ought to be limits on damages awarded for remediation, and whether "pure" environmental losses are compensable. There is a further question as to whether compensation ought to be restricted to instances of "serious harm" only, effectively requiring that the harm exceeds some legal threshold before compensation rights are triggered.

Standing to Bring Claims and Dispute Settlement Fora[11]

The rules of standing identify who has a sufficient legal interest in order to bring a legal claim for damages. The common heritage status of the Area confers a collective interest, giving rise to questions regarding the ability of the ISA and individual states to bring claims based on harm caused to collective interests. Other affected elements of the marine environment, such as marine living resources and water column, fall outside the category of common heritage resources, but nonetheless implicate collective interests.

A distinct but related issue is identifying the appropriate forum to bring claims. The Seabed Disputes Chamber and other tribunals recognized under article 187 of the LOSC could potentially be used for some claims, but these have limited jurisdiction and only the ISA, states parties and contractors could be parties to disputes.

National courts provide alternative venues for claims, but may not have appropriate procedures or competence, or may limit access to certain litigants. One concern is that without further clarification, the system of dispute settlement over liability claims becomes fragmented and with uneven access to justice, undermining the essential compensation goals of a liability scheme.

Compensation Funds and Insurance[12]

Other "hazardous" international sectors have developed their own comprehensive civil liability schemes. Among the common elements are:

- the use of channelling liability to operators;

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- employing a strict (no-fault) approach to the standard of liability;
- liability caps (limitations on recoverable amounts);
- explicitly defining damages, including damages for environmental reinstatement;
- imposing insurance requirements; and
- the use of compensation funds, where insurance may be insufficient.

There are a number of further considerations that are likely to arise in relation to the use of insurance and compensation funds, including whether insurance would be commercially available for deep seabed mining, and the mechanisms for determining contributions to, and administering, compensation funds.

Summary of Key Issues for Policy Makers

To assist in focusing the discussions on liability, the LWG has identified key issues and policy options that will need to be addressed in considering the formulation of liability rules. The overarching consideration in determining the contours of a liability scheme should be the ability of the rules to secure the objectives of ensuring prompt and adequate compensation and to protect and remediate the marine environment. This will, in the view of the LWG, require the development of further rules and procedures on liability.

- In relation to the overall approach taken, it will be necessary to consider whether the principal rules respecting liability will be formulated within domestic legal systems, with the possibility of international minimum standards/ requirements, or whether the approach will be more centrally driven by the ISA, adopting common rules and mechanisms for compensation.
- Consideration should be given to the suitability of alternative approaches to addressing environmental damage that rely on administrative mechanisms, such as emergency orders or other remediation orders, and the use of trust funds.
- Liability rules will address harm from "activities in the Area," but legal certainty will require careful delineation of the boundaries of any liability scheme.
- Given the complex constellation of actors involved in deep seabed mining, liability rules

will need to establish rules on attribution, including consideration of:

- whether channelling of liability should be adopted and, if so, whether liability would be channelled exclusively to contractors;
- whether channelling would provide for a full exclusion from liability from some or all other actors, or would recourse by the contractors against other responsible parties be permitted;
- whether channelling would need to be accompanied by other features, such as strict liability and mandatory insurance; and
- treatment of subcontractors and other potentially responsible actors, including how allocation of liability may be privately arranged between those parties.

- Specific attention will need to be paid to the role of parent companies and states that directly, or through their nationals, have effective control over contractors. This will require a clarification of the meaning of the concept of "effective control" as it appears in *the LOSC*.
- Whether the standard of liability should require fault, recognizing that different approaches to liability may be imposed on sponsoring states, the ISA and contractors, respectively, and may be accompanied by other rules and procedures, such as exceptions to liability, liability caps and the use of insurance and compensation schemes.
- The scope of compensable damages should be clearly identified and should reflect the particular features of the marine environment of the Area, and the status of the Area and its resources as the common heritage of humankind. Key issues in determining the scope of compensable damages include:
  - whether, in order to require compensation, damages must exceed a threshold, such as "serious" or "significant" harm; and
  - whether pure environmental losses will be recoverable, and if this is desirable, whether there are adequate tools for quantifying this form of damages.
- Clarity on which parties have standing to claim for damages to the marine environment, including damages to the Area and its resources, is needed.
- Assessment of the adequacy of existing dispute settlement mechanisms and the potential for a multiplicity of proceedings or lack of an available forum for claims.
- Investigation of mechanisms to ensure that funds are available to provide adequate compensation, including the

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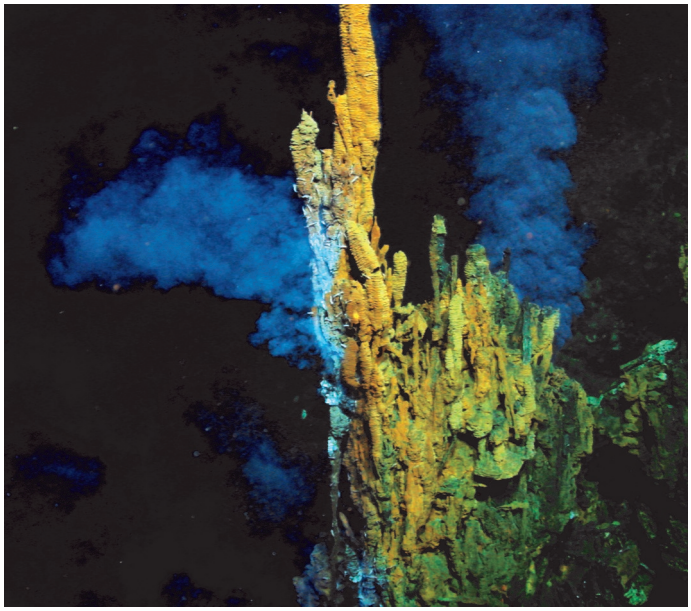

commercial availability and scope of insurance, and how any compensation funds may be funded and administered.

Endnotes

1. LWG, "Legal Liability for Environmental Harm: Synthesis and Overview", CIGI Liability Issues for Deep Seabed Mining Series, Paper No. 1, June 2018 .
2. SDC of the ITLOS, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (2011), Advisory Opinion, No 17 [SDC Advisory Opinion 2011], online: <www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>.
3. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994), art. 235 .
4. LOSC, *ibid*, arts 162(2)(o)(ii), 160(2)(f)(ii).
5. Hannah Lily, "Sponsoring State Liability Practices", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
6. Andres Rojas, "Effective Control", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
7. Julia Xue, "Civil Liability Regimes and Compensation Funds", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
8. Tara Davenport, "Attribution of Liability", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
9. Neil Craik, "Standards of Liability", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
10. Ruth MacKenzie, "Defining Compensable Damages", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
11. Tara Davenport, "Standing and Dispute Settlement Issues", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.
12. Julia Xue, "Civil Liability Regimes and Compensation Funds", CIGI, Liability Issues for Deep Seabed Mining Series, forthcoming 2018.

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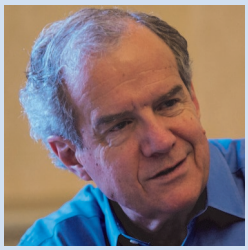

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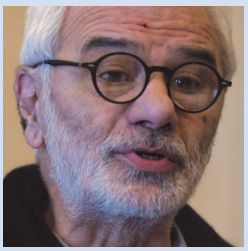

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The International Seabed Authority is an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. The Authority is the organization through which States Parties to the Convention shall, in accordance with the regime for the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (the Area) established in Part XI and the Agreement, organize and control activities in the Area, particularly with a view to administering the resources of the Area.

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