The International Seabed Authority and Deep Seabed Disputes

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[Thanks to organizers and pleasantries]

It is a great pleasure to be here today to speak about the International Seabed Authority and Deep Seabed Disputes.

The International Seabed Authority is the institution established by Part XI of the UN Convention on the Law of the Sea to organize and control deep seabed mining in the seabed Area beyond national jurisdiction. In carrying out its functions, amongst other things, the Authority is empowered to award contracts to State and non-State entities allowing them to collect minerals from the deep seabed in exchange for the payment of royalties and other fees. The Authority is also required to supervise the implementation of those contracts and has wide-ranging powers of enforcement. The Authority, contractors and sponsoring States have differing degrees of liability and responsibility for wrongful acts, including potential damage to the marine environment.

The technology required for deep seabed mining is new, complex and in many respects untested. The risks of problems occurring are increased by the depths at which such activities are expected to occur, often exceeding 4,000 m water depth, as well as the distances from shore. The potential consequences of such problems, especially for the marine environment, are also difficult to quantify. It

is likely, therefore, that disputes may arise. While many disputes are likely to be simple, turning on points of contractual interpretation or regulatory compliance, there is a real risk of much more significant disputes which may be of high value and with potentially wide legal and practical significance.

To deal with these disputes, the Convention establishes the Seabed Disputes Chamber, a specialized Chamber of the International Tribunal for the Law of the Sea. Perhaps the most distinctive feature of the dispute settlement mechanisms established for the deep seabed is that, unlike the dispute settlement provisions contained in Part XV of the Convention, most of them are available to entities other than States Parties.[1]

In my presentation today, I am going to speak primarily about the contentious jurisdiction of the Seabed Disputes Chamber under Part XI of the Convention. In particular, I want to take a closer look at the provisions of Section 5 of Part XI of the Convention to identify the sort of disputes that may arise once deep seabed mining starts and that may be dealt with by the Seabed Disputes Chamber. I also want to take a few moments to look at potential disputes that do not seem to be covered by the provisions of Section 5 and consider how these may be resolved.

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[1] See Article 291, which limits access to the dispute settlement mechanisms under Part XV to States Parties except 'as specifically provided for in [the] Convention'. One of those exceptions is found in Article 285, which is intended to make the conciliation procedures available in Section 1 of Part XV available to non-State actors [although the first sentence of Article 285 as worded in the English, French and Spanish texts makes no sense unless the words 'this Part' are replaced by 'that Part'.]

I do not intend to say very much about the advisory jurisdiction of the Chamber during today's presentation, even though, as you know, it is only the advisory jurisdiction of the Chamber that has been invoked to date. Much has already been written on Case No. 17 on the responsibilities and obligations of sponsoring States, and I myself spoke about this in Hamburg earlier this year. I don't think I have much to add on this topic today, although one point I would make is that, in contrast to the contentious jurisdiction of the Chamber, the advisory jurisdiction can be invoked only by the Assembly and Council of the Authority. This does not mean that non-state entities have no role to play as they may participate in discussions in the Assembly or the Council leading to the request for an advisory opinion. They may also present written or oral submissions as illustrated by proceedings in Case No. 17.

On the other hand, some of you might be aware that the Authority has recently issued draft regulations for exploitation of marine mineral resources. These are out for public consultation until mid-November and they include several provisions that are relevant to the topic of dispute settlement. I will return to this at the end of the presentation.

Background

From the very beginning of discussions relating to exploitation of the resources of the deep seabed it was recognized that there might be a need for a specialized dispute settlement mechanism to deal with certain categories of disputes. For

example, a 1969 study by the Secretary-General of the United Nations to the Sea-Bed Committee[2] noted that disputes might arise in two broad categories; disputes between individual States and disputes in which a State wishes to challenge the exercise of its powers by an international body. Whilst it was felt that the first category could be dealt with under existing arrangements, it was considered necessary to establish a specialized review procedure to deal with contested decisions of the international body.

The precise nature of this specialized procedure, and the way in which it would interact with established procedures for the settlement of disputes between States, was the subject of much discussion during the enlarged Sea-Bed Committee between 1970 and 1973 and in the early sessions of UNCLOS III.

The Virginia Commentary[3] describes how discussions on dispute settlement took place in parallel in the Plenary and in the First and Second Committees between 1974 and 1977, before eventually converging in 1978 with the Group of Legal Experts, chaired by Professor Wünsche. I do not want to rehearse that background today, which is primarily of historic interest and is well covered in the Commentary. Although the initial idea was to establish a tribunal for the seabed as an organ of the Authority, in the end the decision was taken to create a single, unified International Tribunal for the Law of the Sea with a special dispute settlement mechanism to deal with disputes concerning seabed related activities. In this way, it was possible to avoid the consequence of creating two new

[2] U.N. Doc. A/AC.138/12 (1969), GAOR 24th Sess. Suppl. 22 (A/7622), 81-161.
[3] Vol. VI, p. 601-602.

tribunals, one dealing with general disputes concerning the Law of the Sea and the other dealing with disputes relating to the deep seabed.

The relevant provisions of Part XI of the Convention that set out the jurisdiction of the Seabed Disputes Chamber are relatively short. They give the Chamber extensive, in some respects exclusive, but not exhaustive, jurisdiction over a wide range of potential disputes arising from 'activities in the Area'. I should mention here that the phrase 'activities in the Area' is a term of art used extensively in Part XI to qualify and limit the jurisdiction of both the Authority and the Chamber to activities of exploration for and exploitation of deep seabed mineral resources. This is an important definition and one that I shall come back to in this presentation.

Scope of the Chamber's Jurisdiction

Article 187, read in conjunction with Article 188, suggests that for a variety of disputes, the Chamber's jurisdiction is absolute. These include in summary:

- Disputes between a State Party and the Authority concerning their respective 'acts or omissions' that are 'in violation of' Part XI, its relevant Annexes or the rules, regulations and procedures of the Authority;[4]

[4] Article187(b)(i)

- Disputes between a State Party and the Authority concerning 'acts' of the Authority that are 'alleged to be in excess of jurisdiction or a misuse of power';[5]
- Disputes between parties to a contract concerning 'acts or omissions' of a party 'relating to activities in the Area and directed to the other party or directly affecting its legitimate interests';[6]
- Disputes between the Authority and a prospective contractor concerning the refusal of a contract 'or a legal issue arising in the negotiation of the contract';[7] and
- Disputes between the Authority, a State Party, a state enterprise or a natural or juridical person sponsored by a State Party concerning liability of the Authority under Annex III, Article 22;[8]
- Other disputes for which the jurisdiction of the Chamber is specifically provided for in the Convention.[9]

Article 188 qualifies Article 187 by making clear that the jurisdiction of the Chamber under Article 187 is not compulsory in all cases. Certain disputes may at the option of a disputing party be referred not to the Chamber, but to other fora.

So, disputes between States Parties concerning the interpretation or application of Part XI under Article 187(a) may be referred at the request of any party to the

[5] Article 187(b)(ii).
[6] Article 187(c)(ii).
[7] Article 187(d).
[8] Article 187(e).
[9] Article 187(f).

dispute to an *ad hoc* chamber of the Seabed Disputes Chamber, or upon the request of all parties to the dispute to a special chamber of ITLOS.

Disputes between parties to a contract concerning 'the interpretation or application of a contract' under Article 187(c)(i)

> *'shall be submitted, at the request of any party to the dispute to binding commercial arbitration unless the parties otherwise agree'*

There is an important proviso here, in that a commercial arbitral tribunal shall have no jurisdiction to decide any question of interpretation of the Convention and when the dispute also involves a question of the interpretation of Part XI, with respect to activities in the Area, that question must be referred to the Chamber for a ruling. Where such a ruling is required, that shall be obtained first and the arbitral tribunal must render its award in conformity with the ruling of the Chamber.

Whilst these provisions may appear to be quite broad, there are some important limitations on the Chamber's jurisdiction in Article 189. This provides that the Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers and shall in no case substitute its discretion for that of the Authority. Furthermore, without prejudice to its advisory jurisdiction under Article 191, the Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with the Convention, nor declare invalid any such rules, regulations and procedures.

Potential disputes outside the jurisdiction of the Chamber

Quite a lot of disputes that could potentially arise from deep seabed activities will fall outside the jurisdiction of the Chamber. These may be considered in two categories.

The first category concerns those disputes which fall outside the jurisdiction of the Chamber based on the language of Article 187. These would include:

- Disputes that do not concern ‘activities in the Area’. I already mentioned that this is a term of art that is defined in Article 1(3) of the Convention, but I should also mention the clarification to this term given by the Chamber itself in Case No. 17, which seems to make it clear that activities such as processing of minerals on land as well as transportation of mineral ore across the high seas are not considered ‘activities in the Area’. The term also implies a spatial limitation, so a dispute that does not take place wholly within the Area or in respect of it, would potentially be excluded.
- Disputes concerning the Authority but arising under parts of the Convention other than Part XI. Such disputes may not be subject to the Chamber’s jurisdiction if they are not ‘in violation of’ Part XI or its Annexes.

  These might include, for example, disputes concerning interference with the rights of third parties under Part VII (High Seas), Part XII (Protection and Preservation of the Marine Environment) or Part XIII (Marine Scientific

Research). Depending on the facts, perhaps some such disputes could be characterized as an excess of jurisdiction or misuse of power and brought under Article 187(b)(ii).

- Disputes between parties to a contract concerning acts or omissions that are not 'directed to' the other party or do not 'directly affect' its legitimate interests, as required by Article 187(c)(ii).

The second category of excluded disputes is those where one or more of the parties is outside the Chamber's jurisdiction. Some of the more obvious claims might include:

- Disputes between a contractor and a neighbouring coastal State: these may involve disputes under Article 142 [Activities in the Area with respect to deposits in the Area which lie across limits of national jurisdiction] and potentially also acts or omissions of the contractor which have allegedly caused loss or damage in the maritime area of a neighbouring coastal State;
- Disputes between neighbouring contractors: for example, these might arise from a collision of contractor vessels or vessels or where one contractor encroaches on another contractor's contract area;
- Disputes with third parties, for example disputes between the Authority, the Enterprise or a contractor with a third-party user of the high seas such as a fisherman, a pipe-line layer, a cable-operator or a vessel conducting marine scientific research;

- Disputes involving a non-State Party, including disputes over whether a contract area overlaps with the continental shelf claimed by a non-State Party.

It is possible that some of these disputes might still find their way to ITLOS under the provisions of other provisions of the Convention or other multilateral agreements, but it is important to note that it is unlikely that ITLOS would have any jurisdiction in respect of the Authority. Nor would the Authority have any right to intervene in ITLOS proceedings because it is not a State Party.

It is equally possible that many of the disputes described above, particularly those which involve non-State actors, will not find their way to ITLOS at all, but would be dealt with in municipal courts, where the Authority would be immune from suit.

So, what are some of the conclusions and implications we can draw from this brief discussion.

First, I think it can be concluded that the jurisdiction of the Chamber is so specialized and so circumscribed by the wording of Articles 187 and 188 that the number of disputes that will reach the Chamber is likely to be rather small. On the other hand, any such disputes may well be very complex in nature whether from a legal, technical or scientific perspective. In particular, disputes may be procedurally complex to the extent that they involve multiple parties of differing

legal personalities, whether States Parties, international organizations such as the Authority, state enterprises, or private companies and individuals, or a combination of all of the above.

Second, the number of alternative scenarios for dispute settlement that are available in any given situation, could perhaps lead to the development of divergent jurisprudence, especially on matters relating to the interpretation of contracts, which are perhaps more likely than other disputes to go to commercial arbitration under the optional jurisdiction created by Article 188(2), particularly where they involve private sector entities. In such cases, there may also be issues as to which arbitration rules shall be applicable, although the Convention specifies UNCITRAL Rules by default, as well as questions as to whether arbitral awards will be made public. In contrast, ITLOS (and, by extension Seabed Disputes Chamber) proceedings shall be public, with decisions announced in open court. I should also mention that there is a whole other category of potential disputes – those relating to WTO matters – that are excluded from the jurisdiction of the Chamber by reason of the 1994 Implementation Agreement.[10]

Third, we might also conclude that in many of the cases where its jurisdiction is likely to be invoked, the Chamber could be seen as a sledgehammer to crack a walnut.

[10] 1994 Agreement, Section 6, para. 1(f).

It is more likely than not that most of the disputes that will arise in the Area will be of a technical or administrative nature. These might include, for example, appeals against the imposition of administrative sanctions for regulatory breaches, or requests for the review of decisions relating to operational matters.

In such cases, it may not be efficient to have such disputes determined by a predominantly legally-trained tribunal such as the Chamber. Perhaps such disputes could be referred to an appropriately qualified expert or expert panel, which is likely to be much faster and cheaper than formal proceedings before the Chamber. In this respect there are lessons to be learned from the practice of the offshore oil and gas arrangements concerning technical dispute resolutions.

This sort of procedure is in fact suggested in the draft exploitation regulations currently under consideration by the Authority.[11] Draft regulation 92 proposes a system of administrative review whereby a contractor may seek review of any decision made or action taken by or on behalf for the Authority against a contractor. The matter may be referred to a single expert, or to a panel of experts, who shall determine the issue in dispute in 'the most expeditious and cost-effective manner'. A separate provision, draft regulation 66, creates another type of administrative review mechanisms with respect to the audit of royalty assessments. Whilst the present drafting perhaps leaves a lot of questions unanswered, it will be interesting to see if this approach receives broad support. Your comments and suggestions will of course be very welcome.

11 ISBA/23/LTC/CRP.3, available at https://goo.gl/CqteSq

Fourth, more clarification of, and understanding of, the responsibilities of sponsoring States in relation to the activities of their sponsored contractors is required. Draft regulation 40, for example, requires that certain violations should be reported by the Secretary-General to the sponsoring State so that the sponsoring State could take action in municipal courts. Sponsoring States have the obligation under Article 153(4) to assist the Authority by taking all necessary measures to ensure compliance. Does this mean that municipal remedies should be exhausted prior to recourse to dispute settlement under the Convention?

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