INTERNATIONAL WORKSHOP ON ENVIRONMENTAL MANAGEMENT NEEDS FOR EXPLORATION AND EXPLOITATION OF DEEP SEABED MINERALS
FIJI ISLANDS
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LEGAL WORKING GROUP REPORT

Working Group Participants

- Robert Makgill (Working Group Chair)
- Robin Warner (Working Group Rapporteur)
- Michael Lodge
- Gene Bau
- Kiji Vukikomoala
- Trevor Durbin
- Akanisi Navalarua
- Malakai Finai
- Kazuhiro Kitazawa
- Kate McPherson
- Paul Lynch
- Steve Raaymakers
- Hannah Lily

Introduction

The purpose of the Legal Working Group was to identify legislative and regulatory provisions that should form the basis of environmental management of deep seabed mining activities, both within and beyond international jurisdiction.

Accordingly, the Working Group's discussions did not consider wider legislative and regulatory issues such the payment of royalties or tax. Although important, such issues fell outside the scope of the International Seabed Authority and SPC-SOPAC Fiji Workshop (29 November to 2 December 2011), which was convened to discuss environmental management needs for deep seabed mining.

Furthermore, the Working Group decided not to draft a detailed legislative model for regulation of deep seabed mining because the first step in drafting legislative instructions is to identify key policies that need to be reflected in the legislation. These decisions should not be pre-empted by draftsmen.

In light of time constraints (1 day), the Working Group decided that the parts of a national legislative template that it would be useful to address are:

- International obligations
- Administering authority – powers, duties, functions
- Permitting/licensing requirements and environmental impact assessment ("EIA")

Preliminary Issues

National deep seabed minerals legislation ("the Act") could either supplement existing environmental legislation or could be stand-alone legislation. The principle of integrated

management suggests that fewer legislative instruments facilitate efficient and timely decision making.

The Act should contain high-level statements on EIA obligations and other international law obligations. The Working Group considered that the best approach would be for such provisions to form a preliminary 'purpose and principles' part of the Act, against which decision-making under the Act would be considered. This is consistent with a purpose-based approach to legislative drafting.

The Working Group acknowledged that international environmental law obligations are the same within and beyond national jurisdiction, and should be reflected as such in national level legislation that addresses activities in either, or both of these jurisdiction zones. However, differences in relation to the administration of deep sea bed mining in the International Seabed Area (i.e. beyond national jurisdiction) arise due to the additional role of the International Seabed Authority, and the geographical remoteness of the activities from areas within national control. This should be reflected in the legislation e.g. there may be differences arising in relation to sponsorship requirements, timing of EIA, and components of EIA. The International Seabed Authority's Mining Code will be a useful drafting tool for such legislation.

Provision for consideration of transboundary impacts should be included in the legislation, for example a requirement to provide timely information to another State who may be affected, and an opportunity for that State to participate in the environmental decision-making procedures.

To enable administration and to provide regulatory certainty for investment, countries should prioritise making their maritime claims under the United Nations Convention on the Law of the Sea Convention 1982 ("LOSC"). Where there is dispute over maritime boundaries, joint development zones for offshore mining are a potential approach.

International obligations

The Working Group identified the following obligations under international law as overarching principles that should be incorporated as a purpose and principles part of any statutory framework for offshore mining:

- Duty to protect and preserve marine environment (Article 192 LOSC)
- Precautionary approach (Rio Declaration Principle 15, Advisory Opinion of 1 February 2011, case 17, Seabed Disputes Chamber, International Law of the Sea ("ITLOS AO"), International Seabed Authority Mining Code)
- Duty to prevent, reduce and control pollution from seabed activities (Article 208 LOSC)
- Best environmental practice (International Seabed Authority Mining Code , ITLOS AO)
- Duty to prevent transboundary harm (LOSC Part XII, ITLOS AO, Rio Declaration)
- Duty to conserve biodiversity (Article 3 Convention on Biodiversity)
- Prior EIA of activities likely to cause significant harm (Article 206 LOSC)
- Ongoing monitoring of environmental impacts (Article 204 LOSC)
- Sustainable development and integrated management (widely implemented in existing domestic legislation of countries within the region e.g. Fiji, Cook Islands, New Zealand and Australia)

The following principles might also be included:

- 'Polluter pays' principle (Rio Declaration)
- Regional cooperation/integration in monitoring, processing and capacity building (Articles 276 - 277 UNCLOS)
- Identifying mechanisms of capacity building (Part XI LOSC)
- Accountability and transparency (Aarhus Convention)

The Working Group agreed that powers, duties and functions under the Act should be consistent with LOSC. An example of wholesale incorporation into domestic legislation was noted in New Zealand's EEZ and Continental Shelf (Environmental Effects) Bill, clause 11:

"This Act must be interpreted, and all persons performing functions and duties or exercising powers under it must act, consistently with New Zealand's international obligations under the LOSC."

Administering Authority – Powers Duties and Functions

Regulating Body

The Working Group identified the need for a specialised body to regulate, on behalf of a State, operators performing deep seabed mining activities within that State's control or jurisdiction. The functions and powers of the regulating body would include:

- conducting due diligence (gathering and evaluating information about the financial and technical capabilities of mining proponents);
- requiring and assessing EIAs;
- permitting/licensing; and
- monitoring, compliance and enforcement.

The regulating body should also have the power to contract independent peer review of permitting/licensing applications and associated EIA. Funding of processing permit/license applications and peer review should be borne by industry in accordance with 'user pays' principles.

The Working Group recognised that the creation and operation of such a regulating body would require significant resources and also technical expertise. This expertise may not be currently found in smaller or developing states. Concerns were also expressed about multiple legislative instruments and institutions and lack of integration amongst them.

It was agreed by the Working Group that there is precedent, and clear benefit, for some administering functions of that regulator to be delegated to a regional body, or other third party. Any delegation would be exercised subject to the retention by the State of sovereign decision-making power. Regional cooperation/integration LOSC for this type of activity is endorsed in Articles 276 and 277.

The Working Group considered that delegating the function to a regional body or other third party, would not only plug national capacity gaps, provide specialist expertise not found in-country, and

avoid proliferation of national institutions, but would also avoid the perception of bias and provides checks and balances against undue influence and conflicts of interest.

Due Diligence Requirements

Due diligence has different legal meanings.

Firstly, in the context of meeting international obligations to protect the marine environment there are due diligence requirements that States must satisfy in order to avoid liability for environmental damage. Incorporating the regulatory provisions detailed in this paper into national legislation would be one step towards meeting such due diligence requirements; effectively implementing the legislation would be another.

Secondly, in the context of deep seabed mining activities, due diligence requires an applicant for a licence to satisfy the decision-maker that it is a viable and responsible operator likely to comply with the State's regulatory requirements. For instance, before submitting an application for a deep sea mining permit/licence within national jurisdiction, an applicant will need to provide information on its financial and technical capabilities, relevant policies and procedures, and its plan of work. The State may also investigate the applicant's track record.

Allocation of Mining Sites

There are a number of methods of allocating sites for mining exploration e.g. first come first served, or by auction/bidding process. The mechanism of allocation needs to be provided for in the Act. Allocation systems should enable investment by mining companies and facilitate competition. For example, they should provide for certainty of process, and prevent consideration of extraneous matters such as trade competition effects.

Permitting/licensing requirements and EIA

It was recognised that most deep seabed mineral projects would be activities likely to have a significant impact on the environment. The permitting/licensing part of the Act should therefore incorporate provision for EIA - or should refer to existing national legislation that contains EIA requirements and processes. The existing legislation may also require amendment, to ensure that deep seabed mineral activities are appropriately covered by the existing EIA regime. Furthermore, it was discussed that an effects-based or impact-specific approach (rather than activity-specific approach) may be taken. This takes account of the possibility that some deep seabed scientific research and/or exploration activity may not have significant environmental impact, and that the ability to mitigate adverse effects/impacts of certain activities will improve over time.

The permitting licensing process includes a recognised sequence of stages. These include:

- Application for permit/license, with supporting EIA
- Public notification of application
- Written submission on notified application
- Public hearing of notified application
- Decision
- Appeal Process

Industry representatives raised concerns about protecting the confidentiality of commercial information. The Working Group identified that there is a competing public policy issue of transparency and accountability. Balancing these two interests is important, and may be dealt with in the Act, if it is not adequately covered elsewhere in a State's law. The ISA Model for dealing with this is to issue a general public notification that an application has been made without disclosing the exact coordinates of the prospecting/exploration area.

Applying Principles in Decision Making

The Working Group discussed some high level principles and how they could be reflected in the Act, and incorporated into administrative decision-making. The Group chose to discuss the precautionary approach and best environmental practice.

Precautionary Approach

The Working Group referred to Principle 15 of the Rio Declaration as a common starting point for defining the precautionary approach. Principle 15 provides:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

Precaution may be defined as caution in advance, caution practised in the context of uncertainty, or informed prudence. The precautionary principle does not prevent activities with unknown effects/impacts from proceeding, but rather requires that they only proceed with appropriate checks and risk-minimising controls in place.

While the Rio Declaration precautionary principle uses the term "serious or irreversible damage", LOSC and the International Seabed Authority's Mining Code employ the term "serious harm to the marine environment." Serious or irreversible damage, or serious harm to the marine environment, are thresholds that will be informed by scientific evidence. Nevertheless, the Working Group agreed it would be advantageous for the Act to provide a definition of these terms.

The qualifying words "according to their capabilities" used in the precautionary approach definition should not be used to justify a lower standard of due diligence. In the deep seabed mining context, the burden of the precautionary approach falls on the entity making the application and undertaking the EIA. The State and its decision-making authority bear the responsibility of verification. This is normally achieved through peer review of EIA and monitoring of information supplied by the permit holder/licensee during the currency of the mining activity.

The Working Group identified a need for more guidance on how to operationalise the precautionary approach in the deep seabed mining context. The following examples of how the precautionary approach might be incorporated into decision-making were provided:

- Regular reporting of data on environmental impacts, pre-emptive action to avert serious harm to the marine environment

- Ensuring the conservation of biodiversity through creation of marine protected areas in proximity to the mining footprint, corridors outside the mining areas and environmental compensation (i.e. protecting biodiversity of equal or greater value in a different location altogether).
- Where there is imperfect information on an issue, such as the effects/impacts of removal of manganese nodules on regeneration of biota, there should be a corresponding requirement to introduce something into the management system which encourages regeneration of biota. A potential response might be changing the mining footprint to encourage regeneration.
- Adopt an incremental test bed approach to a mining activity where impacts are uncertain e.g. authorise test mining rather than immediately authorising commercial scale activity

The Working Group recommended that the International Seabed Authority, or other competent authority, undertake a technical consultation to operationalise the precautionary approach - similar to the Food and Agriculture Organization (FAO) technical consultation for operationalising the precautionary approach in deep sea fishing.

Best Environmental Practices

Best environmental practices - an international law requirement of deep seabed mineral activities - generally refer to widely-accepted norms or customs of environmental and risk management. Where there is incomplete information and no established best practices, best environmental practice requires that the precautionary approach be applied.

Adaptive management is one example of the precautionary approach, and should form part of the Act. Adaptive management allows the proponent of a mining activity to fill the vacuum (where there is not an established practice) with a novel methodology. Adaptive management can be implemented by the mining operator through monitoring and assessing the operator's activities, and by amending or improving the plan of work (including methods of mitigation) in cases where new information requires changes in approach.

Similarly, it is the mining operator's obligation to satisfy best environmental practices and to provide the regulating authority with reporting/monitoring information confirming that best practices are being satisfied. The regulating authority is obliged to verify (either in-house or through independent peer review) that the information supplied by the mining operator confirms that it is adhering to best environmental practices. The Act should impose reporting requirements on the operator that will provide adequate information to the regulating authority to be able to meet this obligation. The terms of the Act should enable the regulating authority to retain sufficient control and flexibility within the permit/licensing model, to require amendments to the operator's conduct of activities.

Stages at which best environmental decision-making becomes relevant include, inter alia, the permitting/licensing phase, review of reporting/monitoring information, and in the case of any litigation.

One example of best environmental practices in the context of deep seabed mining would be to adopt a series of control strategies to protect the marine environment.

The Working Group observed that best environmental practices will invariably be determined by the specific seabed mining activities involved and will be proportionate to their risk and scale.

Regional projects such as SPC-SOPAC's may assist States by identifying existing and proposing new guidelines so that a consistent approach is taken to decision-making. Examples of relevant guidelines include:

- International Seabed Authority's Legal and Technical Committee's Guidelines in the Area.
- International Marine Minerals Society Code of Conduct
- InterRidge Codes of Conduct
- Madang Guidelines

The Act does not have to reflect the specifics of best environmental practice as long as the principle of best environmental practices is reflected as a statutory requirement. This enables best environmental practices to evolve over time and to adapt to evidentially specific scenarios.