

**CIL RESEARCH PROJECT ON THE
ROLE OF SPONSORING STATES IN DEEP SEABED MINING**

OVERVIEW

1. The International Seabed Authority (“ISA”) is in the process of developing Regulations on the Exploitation of mineral resources in the Area (“Exploitation Regulations”) which is the ultimate regulatory phase in developing the mineral resources of the Area.¹ One critical issue that needs to be addressed in the context of the Exploitation Regulations is the role of the sponsoring State including the division of responsibilities between the sponsoring State and the ISA.²
2. In this regard, the Centre for International Law (CIL) at the National University of Singapore (NUS) proposes to establish a working group (Working Group) to undertake research on the role of sponsoring States in deep seabed mining, with a particular emphasis on setting out a clear demarcation of responsibilities between the ISA and the sponsoring State, and how its role should be integrated in the future development of the Exploitation Regulations.
3. The key deliverables would be (1) a workshop to be convened on 12th and 13th April 2019; and (2) a Final Report to be issued in June 2019 based on the discussions in the Workshop, which would include a matrix of the division of responsibilities (in table form) between the ISA and the sponsoring State.

BACKGROUND

4. Under the 1982 UN Convention on the Law of the Sea (UNCLOS), sponsoring States play an instrumental role in deep seabed mining activities. As observed by the Seabed Disputes Chamber (SDC) in its 2011 Advisory Opinion on the *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, they contribute to “the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI.”³ Under Article 139 of UNCLOS, the sponsoring State has the responsibility to ensure that activities in the Area are carried out in conformity with Part XI,⁴ including the responsibility to ensure, within their legal systems, that a sponsored Contractor carries out activities in the Area in conformity with the terms of its contracts and its obligations under UNCLOS.⁵ In addition, sponsoring States must also assist the ISA by taking all measures necessary to ensure such compliance in accordance with Article 139.⁶
5. While the SDC Advisory Opinion clarified the obligations of the sponsoring State to a certain extent, and both the Exploration Regulations and Draft Exploitation Regulations

¹ See ISA Website available at <https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area>

² Apart from the ISA and sponsoring State, there may be other actors that have jurisdiction over activities in the Area, including the flag State. While the responsibilities of other actors will not be a major focus of the study, it may be necessary to highlight that these issues relating to the responsibilities of the actors warrant further study.

³ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011, 50 ILM 458, para. 76 (SDC Advisory Opinion).

⁴ Article 139 (1), UNCLOS.

⁵ Article 4 (4), Annex III, UNCLOS.

⁶ Article 153 (4), UNCLOS.

(July 2018) have some provisions on the rights and obligations of the sponsoring States,⁷ the lack of a clear division of responsibilities between the sponsoring State and the ISA, has come to the forefront in the course of developing the Draft Exploitation Regulations.⁸

6. Indeed, in 2015, the LTC addressed the matter as a ‘High Level Issue’ and observed “[i]t is not believed that the division of duties and responsibilities is clearly defined between a sponsoring State and the Authority. This relates to matters including enforcement and monitoring/inspection, offence and penalty systems, liability and responsibility of a contractor etc. From a contractor’s perspective, there is the potential for a duplicative regulatory and financial burden. This needs to be clarified and duties and responsibilities more clearly defined. Equally, this also points to effective co-operation between the Authority and a sponsoring State. Matrix setting out duties and responsibilities to be developed.”⁹
7. Some of the issues arising from the absence of a clear division of responsibilities between the ISA and the sponsoring State include the following:
 - Lack of clarity in the division of the **regulatory** obligations of the ISA and the sponsoring State, potentially leading to gaps, duplication or increased administrative costs and regulatory burden on the Contractor;¹⁰
 - Lack of clarity in the division of the **enforcement** obligations of the ISA, the sponsoring State as well as other actors such as the flag State, including obligations relating to enforcement and monitoring, inspection and offence and penalty systems, potentially leading to gaps, duplication and/or increased financial and regulatory burden on the Contractor;¹¹
 - Lack of clarity on **co-operation** between the ISA and the sponsoring State including co-ordination on information-sharing, monitoring, enforcement as well as public consultations;¹²
 - Lack of clarity on what obligations the ISA has towards the sponsoring States under the Draft Exploitation Regulations (for example, access to information, confidential or otherwise, joint consents etc);¹³
 - Lack of clarity on the **disclosure obligations** of the sponsoring State vis-à-vis the ISA, including (but not limited to) to its contractual arrangements with the

⁷ See Annex 1 for a brief summary of (1) the SDC Advisory Opinion on the obligations of sponsoring States; and (2) the obligations of sponsoring States in the Exploration Regulations and Draft Exploitation Regulations.

⁸ See in general, ISA, *Briefing Note to the Council on the Submissions to the Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/24/C/CRP.1, 21 February 2018, 9 [Briefing Note (2018)], 7 – 8.

⁹ See Draft framework, High level issues and Action plan, Version II, 15 July 2015. Also see Annex III of the Briefing Note, *id.*

¹⁰ The lack of a clear division of responsibilities between the sponsoring State and the ISA on various matters including enforcement and monitoring, inspection, offence and penalty systems was identified as a high-level issue in the 2015 Draft framework on the exploitation regulations: See Draft framework, High level issues and Action plan, Version II, 15 July 2015. Also see Annex III of the Briefing Note, *id.*

¹¹ See Briefing Note, Annex III, 18 – 19, *id.*

¹² See Briefing Note, Annex III, 18 – 19, *id.*

¹³ See Briefing Note, Annex III, 19, *id.*

sponsored Contractor as well disclosure of reasons for termination of sponsorship,¹⁴

- Lack of clarity on the implications for the responsibilities of sponsoring States when there are *multiple sponsoring States*;¹⁵
 - Whether any guidance should be provided by the ISA to sponsoring States on the assessment and evaluation of exploitation applications, ongoing monitoring and compliance and how to ensure that standards are consistently applied to ensure a level playing field;¹⁶ and
 - Uncertainty on whether and *how sponsoring State obligations should be integrated into the Exploitation Regulations*, with divergent views being expressed by stakeholders on whether such obligations should be set out in regulations which primarily regulate the relationship between the Contractor and the ISA. If not the Draft Exploitation Regulations, what is the most suitable mechanism to govern the relationship between the ISA and the sponsoring State?¹⁷
8. To address the issues described above, the Council has asked the Legal and Technical Commission (LTC) and the Secretariat to formulate a matrix of duties and responsibilities of the ISA and the sponsoring State.¹⁸

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9. To this end, CIL proposes to convene a working group of experts to examine selected issues relating to the role of sponsoring States in deep seabed mining to assist the LTC and ISA Secretariat in demarcating the responsibilities of the sponsoring State, the ISA and other actors such as the flag State and the coastal State.

Tentative List of Issues

10. Proper scoping of the Research Project will be done after consultations with the ISA Secretariat, but a tentative list of issues that may be examined is set out below:
- i) Identification of Responsibilities of Sponsoring States: This will explore the primary responsibilities of the sponsoring States based on UNCLOS, the 1994 Agreement, Annex III, the 2011 Advisory Opinion, the Exploration Regulations and the Draft Exploitation Regulations, and other principles of international law, where relevant.
 - ii) Division of Responsibilities between the ISA and the sponsoring State: After identifying the responsibilities of the sponsoring States, this part will identify potential gaps and overlaps between the legislative and enforcement

¹⁴ See Briefing Note, Annex III, 19, *id.*

¹⁵ Briefing Note, 19, *id.*

¹⁶ See Briefing Note, Annex III, 20, *id.*

¹⁷ See Briefing Note, Annex III, 18. While there had been concern that there was a lack of sufficient reference to the involvement of the sponsoring State in the exploitation regulations in prior stakeholder consultations, more recent stakeholder submissions reflected a divergence in views as to whether such obligations should be prescribed for in a set of regulations that regulates principally the relationship between a Contractor and the ISA. See Briefing Note, 18, *id.*

¹⁸ See Statement by the President of the Council on the work of the Council during the first part of the twenty-fourth session, ISBA/24/C/8, 13 March 2018, 8 -9; Statement by the President of the Council on the work of the Council during the second part of the twenty-fourth session, Annex I, 5, 15 July 2018, ISBA/24/C/8/Add.1,

responsibilities of the ISA and the sponsoring State. This will also be represented in a matrix of responsibilities in table form.

- iii) Mechanisms of Co-operation between the ISA and the Sponsoring State: This part will examine existing mechanisms of co-operation (access to information, exchange of information, public consultation, joint obligations of monitoring etc.) between the ISA and the sponsoring State.
- iv) Mechanisms to Ensure Compliance by Sponsoring States: This part will explore the range of measures, excluding dispute settlement mechanisms that can be taken by the ISA to ensure that the sponsoring States comply with its obligations under the Convention, using examples from other treaty regimes
- v) Arrangements Governing the Relationship between the ISA and the Sponsoring State: This part will examine whether there are gaps in the current draft of the Exploitation Regulations on the role of the sponsoring State including the extent to which the relationship between the ISA and sponsoring State could be reflected in the Exploitation Regulations, or whether there are other more suitable arrangements that should govern the relationship between the ISA and the sponsoring State.

Structure of Project

- 11. CIL will prepare a background paper and background materials in advance of the Workshop in April.
- 12. Individual members of the Working Group may be requested to comment upon specific issues during the Workshop followed by discussion.
- 13. The objective of the Workshop is to get feedback from the participants on the various issues and formulate a final report with the matrix of responsibilities based on the discussion at the Workshop.

Key Deliverables

- 14. The key deliverables will be (1) a 2-day Workshop held on 12th and 13th of April 2019; and (2) delivery of a Final Report with Matrix of Responsibilities at the beginning of June 2019.

Working Group Members

- 15. The Working Group will consist of no more than 15 members with relevant expertise in international law, law of the sea, environmental law and deep seabed mining, and may comprise academics, LTC members, as well as government representatives.

Funding

- 16. CIL will fund the Workshop (held in Singapore at the CIL Boardroom), and meals during the Workshop. The Workshop will be limited to members of the Working Group and invited participants. CIL will fund the travel and accommodation of 5 overseas Working Group Members (1 academic, 3 Government Members and 1 LTC member).
- 17. ISA will fund the participation of 2 representatives from the ISA Secretariat and 1 LTC Member.

Annex 1:

Summary of Sponsoring States' Obligations in the Advisory Opinion, the Exploration Regulations and the Draft Exploitation Regulations (July 2018)

2011 Seabed Disputes Chamber Advisory Opinion on Obligations of Sponsoring State

1. In order to fulfil its responsibility to ensure that activities in the Area are carried out in a manner consistent with UNCLOS, the SDC has held that the sponsoring State has a due diligence obligation to take necessary and appropriate measures within its legal system to ensure that the Contractor complies with its obligations.¹⁹ It is not an obligation to achieve, in each and every case, the result that the sponsored Contractor complies with its obligations but rather an obligation to “deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.”²⁰ These necessary and appropriate measures consist of “laws and regulations, and...administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.”²¹ These may also 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 ISA so as to avoid duplication of work.²² Further, sponsoring States have a continual duty to review measures so as to ensure that they meet current standards and that the Contractor “meets its obligations effectively without detriment to the common heritage of mankind.”²³ However, the exact scope and extent of the laws and regulations and administrative measures depend upon the legal system of the sponsoring State.²⁴
2. In addition to the due diligence obligations of sponsoring States to ensure that the Contractors comply with their obligations, sponsoring States have certain direct obligations which they must comply with independently of their obligation to ensure a certain behaviour by the sponsored Contractor.²⁵ These include: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the ISA for the protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.²⁶ The SDC observed that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule and that the implementation of these direct obligations will be a factor that will be taken into consideration when assessing whether the sponsoring State has fulfilled its due diligence obligations.²⁷

Exploration Regulations and Draft Exploitation Regulations

¹⁹ SDC Advisory Opinion, *supra* note 2, para. 117 – 120.

²⁰ SDC Advisory Opinion, *id.*, para. 110.

²¹ See Article 4 (4), Annex III, UNCLOS; SDC Advisory Opinion, *id.*, para. 216 – 217.

²² SDC Advisory Opinion, *id.*, para. 218.

²³ SDC Advisory Opinion, *id.*, para. 222.

²⁴ SDC Advisory Opinion, *id.*, para. 218.

²⁵ SDC Advisory Opinion, *id.*, para. 121.

²⁶ SDC Advisory Opinion, *id.*, para. 122.

²⁷ SDC Advisory Opinion, *id.*, para. 122.

3. Under the Exploration Regulations,²⁸ the sponsoring State has the following obligations:
 - Provide a statement that the applicant has the necessary financial resources to meet the estimated costs of the proposed plan of work for exploration;²⁹
 - Inform the ISA Secretary-General the reason for termination of sponsorship;³⁰
 - Apply the precautionary approach and best environmental practices;³¹
 - Co-operate with Contractors, other interested States or entities and the ISA in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment;³² and
 - In the event the Contractor does not provide the Council with a guarantee of its financial and technical capability to comply promptly with emergency orders, sponsoring States, on the request of the ISA Secretary-General, shall take necessary measures to ensure that the Contractor provides such a guarantee or take measures that assist the ISA in minimizing damage to the marine environment.³³
4. Under the latest version of the draft Exploitation Regulations issued in July 2018,³⁴ the sponsoring State has the following obligations:
 - a) Sponsoring States shall take all necessary and appropriate measures to secure effective compliance by Contractors whom they have sponsored with UNCLOS, the 1994 Implementation Agreement and the terms and conditions of the exploitation contract;³⁵

²⁸ The Exploration Regulations of the ISA currently consist of the regulations for exploration of polymetallic nodules, polymetallic sulphides and cobalt-rich crusts: International Seabed Authority, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (13 July 2000), Doc. No. ISBA/6/A/18 (13 July 2000) (**Nodules Regulations**) (in 2013, the Regulations for Polymetallic Nodules were amended to be consistent with the regulations adopted in 2010 and 2012 for the other resources); International Seabed Authority, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, Doc No. ISBA/16/A/12/Rev.1 (7 May 2010) (**Sulphides Regulations**); International Seabed Authority, Regulations on Prospecting for Cobalt-rich Ferromanganese Crusts in the Area, Doc No. ISBA/19/C/17 (22 July 2013) (**Cobalt Crust Regulations**).

²⁹ See, for example, Regulation 13 (3), Sulphides Regulations.

³⁰ See, for example, Regulation 31 (1), Sulphides Regulations.

³¹ See, for example, Regulation 33 (2), Sulphides Regulations.

³² See, for example, Regulation 33 (6), Sulphides Regulations, Regulation 34 (1), Sulphides Regulations.

³³ See, for example, Regulation 35 (8), Sulphides Regulations,

³⁴ Legal and Technical Commission, *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/24/LTC/WP.1/Rev.1, 9 July 2018 (Draft Exploitation Regulations, [July 2018]).

³⁵ Draft Regulation (DR) 103, Draft Exploitation Regulations, July 2018, *id.* The August 2017 version of the Draft Exploitation Regulations set out specific obligations of the sponsoring State in more detail in Draft Regulation 91 (See *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/23/LTC/CRP.3, 8 August 2017). Stakeholder submissions suggested that while the list of obligations identified in Draft Regulation 91 could be used as illustrative, the list is not exhaustive, whilst other stakeholders considered it unnecessary to prescribe Sponsoring State obligations: See ISA, *Briefing Note to the Council on the Submissions to the Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/24/C/CRP.1, 21 February 2018, 9 [Briefing Note (2018)], 7 – 8. The revised Draft Exploitation Regulations issued in July 2018 contains a considerably pared down provision on sponsoring States: See DR 103, Draft Exploitation Regulations (July 2018).

- b) Sponsoring States must provide a Certificate of Sponsorship, including a statement that the Contractor has the necessary financial resources to meet the estimated costs of the proposed Plan of Work;³⁶
- c) Sponsoring States' obligations of co-operation:
 - An obligation to co-operate with the ISA to avoid unnecessary duplication of administrative procedures and compliance requirements;³⁷
 - An obligation to co-operate with the ISA, flag States, competent international organizations and other relevant to develop measures to promote the health and safety of life at sea, protection of the marine environment, and to exchange information and data to facilitate compliance with and enforcement of applicable international rules and standards;³⁸ and
 - An obligation to co-operate with Contractors, members of the ISA and the ISA in the establishment and implementation of programmes to observe, measure, evaluate and analyse the impacts of exploitation on the marine environment and further development of best environmental practices in connection with activities in the Area.³⁹
- d) Obligations in relation to the Marine Environment:⁴⁰
 - Apply the precautionary approach to the assessment and management of risk of harm to the marine environment from exploitation in the Area;
 - Ensure the application of best available techniques and best environmental practices;
 - Integrate best available scientific evidence in environmental decision-making;
 - Promote accountability and transparency in the assessment, evaluation and management of environmental effects from exploitation in the Area; and
 - Develop incentive structures, including market-based instruments that support and enhance the environmental performance of Contractors.
- e) Obligations in relation to inspections aboard vessels and installations, offshore or onshore:
 - Sponsoring states shall assist the Council, the Secretary-General and Inspectors in their inspection of vessels and installations used by the Contractor to carry out exploitation activities.⁴¹

5. Implicit Obligations to Adopt Certain Laws and Regulations (obligations not expressly mentioned but which the regulations assume the sponsoring State will have):

³⁶ Section I and IV, Annex I, Draft Exploitation Regulations (July 2018), *id.*

³⁷ DR 3 (b), Draft Exploitation Regulations (July 2018), *id.*

³⁸ DR 3 (d), Draft Exploitation Regulations (July 2018), *id.*

³⁹ DR 3 (e), Draft Exploitation Regulations (July 2018), *id.*

⁴⁰ DR 46, Draft Exploitation Regulations (July 2018), *id.*

⁴¹ DR 94 (1), Draft Exploitation Regulations (July 2018), *id.*

- National laws, regulations and administrative measures made pursuant to article 139 and 153 (4) of UNCLOS, and Article 4 (4) of Annex III.⁴²
- National laws relating to crew safety in relation to installations;⁴³
- National laws in relation to any matters that fall outside the jurisdiction of the flag State, such as worker rights for non-crew members and human health and safety that pertains to the mining process rather than to ship operation;⁴⁴ and
- National laws on the designation of information as confidential.⁴⁵

6. Other aspects of the role of the sponsoring State:

- The sponsoring State has the right to examine evidence of allegations made by a coastal State of serious harm or a threat of serious harm to its environment and respond;⁴⁶
- The sponsoring State has the right to consent to the Contractor taking out a mortgage, pledge, lien, charge or otherwise encumber all or parts of its interests under an exploitation contract;⁴⁷
- The sponsoring State has the right to be notified in the event of an incident, as defined in the Draft Exploitation Regulations;⁴⁸
- The sponsoring State has the right to institute legal proceedings against a Contractor for not complying with the regulations relating to incidents⁴⁹ or regulations relating to inspection of vessels and installations;⁵⁰
- The sponsoring State has the right to be notified of any notifiable events;⁵¹
- The sponsoring State has the right to be notified if the Contractor finds any human remains of an archaeological or historical nature, or any object or site of a similar nature, and its location, including the preservation and protection measures taken;⁵²
- The sponsoring State can participate in a review of activities under a plan of work, and has the right to receive reports of reviews of plans of work by the ISA Secretary-General;⁵³
- The sponsoring State has the right to receive from the Contractor a statement from an auditor that royalty calculation for that year is based on proper accounts and complies with the regulations;⁵⁴
- The sponsoring State may request a review of the Regulations;⁵⁵

⁴² DR 7 (d), Draft Exploitation Regulations (July 2018), *id.*

⁴³ DR 32 (1) (a), Draft Exploitation Regulations (July 2018), *id.*

⁴⁴ DR 32 (1) (b), Draft Exploitation Regulations (July 2018), *id.*

⁴⁵ DR 87 (2) (e), Draft Exploitation Regulations (July 2018), *id.*

⁴⁶ DR 4 (1), Draft Exploitation Regulations (July 2018), *id.*

⁴⁷ DR 23, Draft Exploitation Regulations (July 2018), *id.*

⁴⁸ DR 35 (2), Draft Exploitation Regulations (July 2018), *id.*

⁴⁹ DR 35 (3), Draft Exploitation Regulations (July 2018), *id.*

⁵⁰ DR 35 (6), Draft Exploitation Regulations (July 2018), *id.*

⁵¹ DR 36 Draft Exploitation Regulations (July 2018), *id.*

⁵² DR 37, Draft Exploitation Regulations (July 2018), *id.*

⁵³ DR 56 (1) & (3), Draft Exploitation Regulations (July 2018), *id.*

⁵⁴ DR 69 (3), Draft Exploitation Regulations (July 2018), *id.*

⁵⁵ DR 105, Draft Exploitation Regulations (July 2018), *id.*

- The sponsoring State has the right to receive all data collected under the electronic monitoring system that Contractors have put in place;⁵⁶
- The sponsoring State also has a role in developing an emergency response and contingency plan along with other international organizations, flag States, coastal States and other entities which may have jurisdictional competence.⁵⁷

⁵⁶ DR 100, Draft Exploitation Regulations (July 2018), *id.*

⁵⁷ Annex IV, Draft Exploitation Regulations (July 2018), *id.*