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Possible Forums for Liability Claims Arising from Deep
Seabed Mining:
Problems & Prospects

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Overview

- I. EXISTING FRAMEWORK ON LIABILITY – A BRIEF OVERVIEW
- II. POSSIBLE CLAIMANTS & RESPONDENTS
- III. EXISTING FORUMS FOR DETERMINATION OF LIABILITY CLAIMS
- IV. PROBLEMS & PROSPECTS

PART I:

EXISTING FRAMEWORK ON LIABILITY – A BRIEF OVERVIEW

Objectives of Liability and Compensation Regimes

Need to compensate innocent parties that have suffered damage



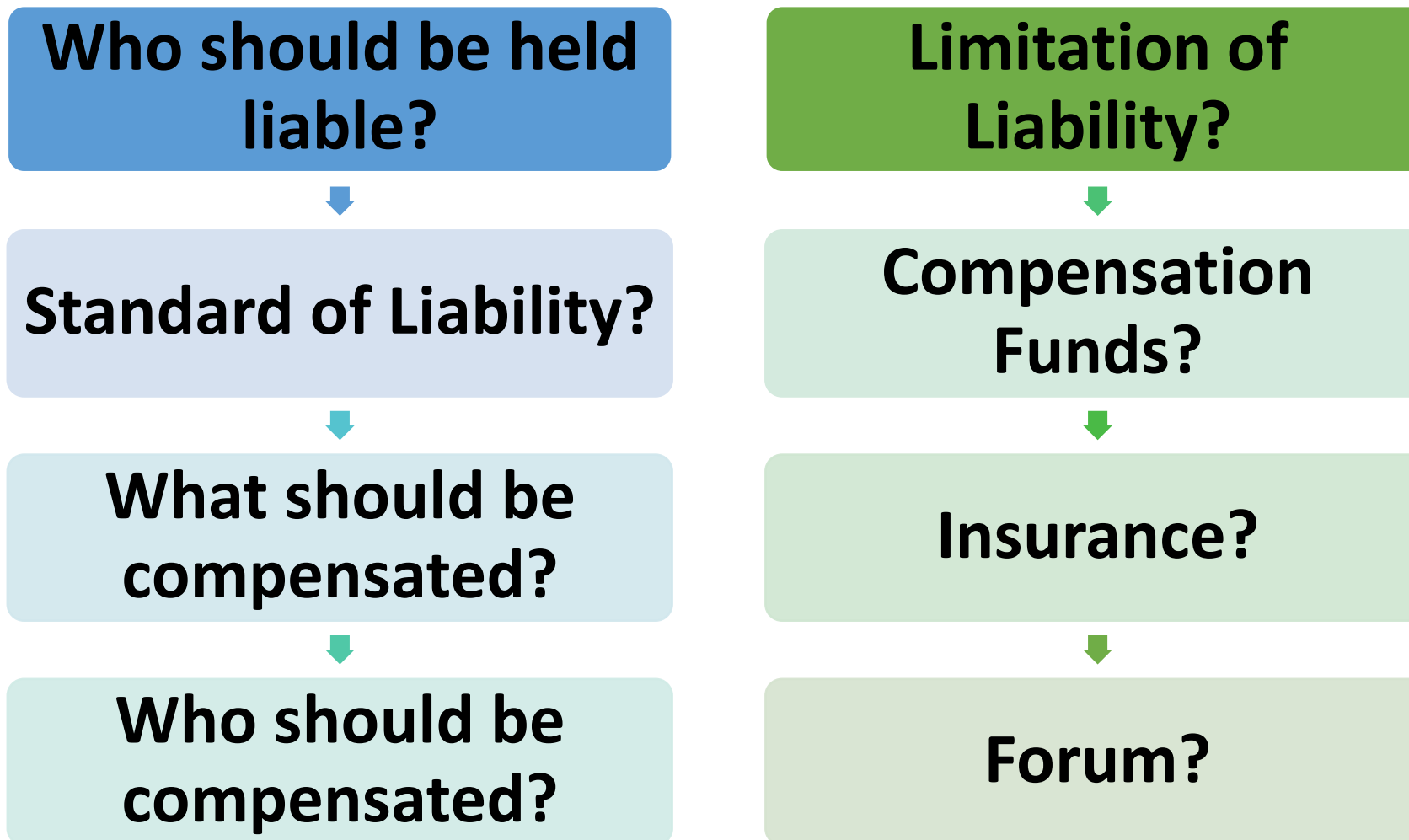
Provide effective deterrence for the avoidance of damage



Provide incentives to both wrongdoers and potential victims to mitigate damage

Minimize the total sum of accident costs

Elements of a Liability & Compensation Regime



Existing Framework on Liability for Damage arising from Deep Seabed Mining

Liability of the ISA & Contractor

Article 22, Annex III, UNCLOS

- The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority
- Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor
- Liability in every case shall be for the actual amount of damage

Existing Framework on Liability for Damage arising from Deep Seabed Mining

Liability of the Contractor

(S 16, Annex IV, Exploration Regulations)

- Contractor is liable for the actual amount of any damage including damage to the marine environment arising out of its wrongful acts or omissions
- Contractor is liable for the actual amount of any damage including damage to the marine environment arising out of the wrongful acts or omissions of its employees, subcontractors, agents and all persons working or acting for them
- Damage includes the costs of reasonable measures to prevent or limit damage to the marine environment
- Liability of Contractor must take into account any contributory acts or omissions of the ISA
- Contractor shall indemnify the ISA against all claims and liabilities of any third party arising out of any wrongful acts or omissions of the Contractor
- Must maintain appropriate insurance policies

Liability of the ISA

(S 16, Annex IV, Exploration Regulations)

- ISA is liable for the actual amount of any damage including damage to the marine environment arising out of its wrongful acts or omissions
- ISA's liability must take into account contributory acts or omissions by the Contractor, its employees, agents and subcontractors and all persons working or acting for them
- ISA shall indemnify the Contractor, its employees, subcontractors, agents and all persons working or acting for them against all claims and liabilities of any third party arising out of any wrongful acts or omissions of the ISA

Existing Framework on Liability for Damage arising from Deep Seabed Mining

Sponsoring State Liability

- **Article 139, UNCLOS**
 - Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party to carry out its responsibilities under this Part shall entail liability
 - A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.
- **Seabed Disputes Chamber Advisory Opinion 2011**
 - Sponsoring States have a due diligence obligation to take necessary and appropriate measures within its legal system to ensure that the Contractor complies with its obligations under UNCLOS; the ISA rules, regulations and procedures of the ISA; plans of work; and terms of contract with the ISA
 - Sponsoring States have certain direct obligations under UNCLOS independent of their obligations to ensure compliance by the Contractors
 - Not strictly liable
 - Sponsoring State liability exists in parallel to Contractor's liability i.e. no residual liability

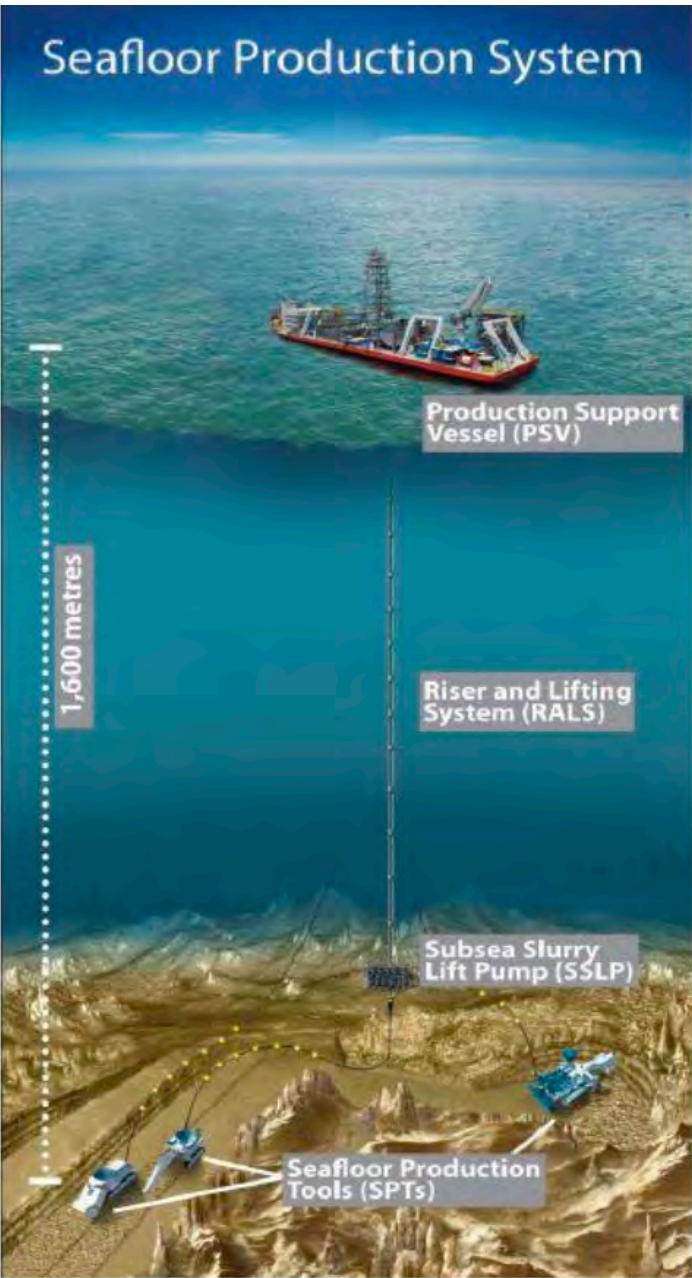
Existing Framework on Liability for Damage arising from Deep Seabed Mining

Article 235 Responsibility and Liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

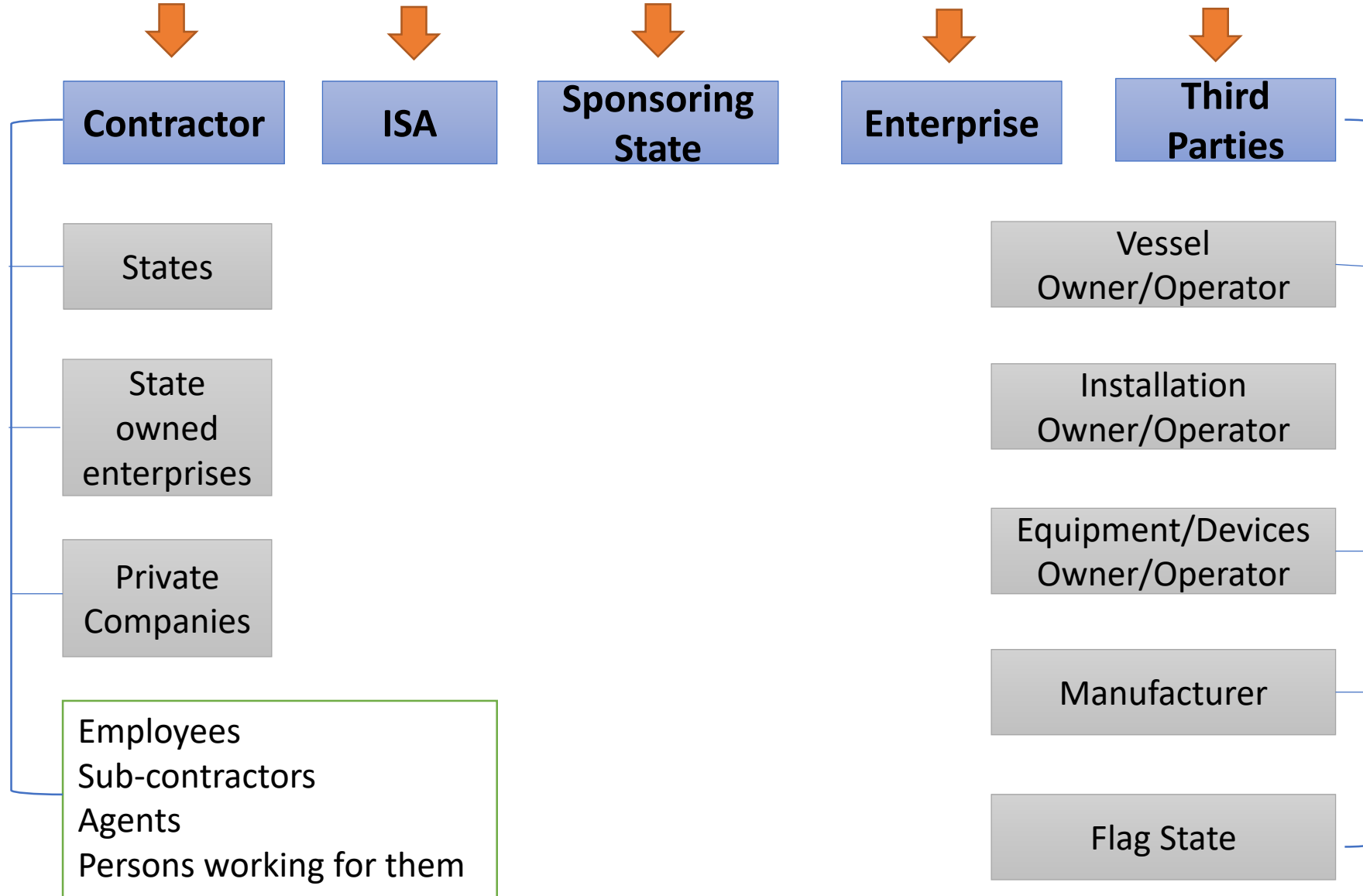
**PART II:
POSSIBLE CLAIMANTS AND RESPONDENTS**

Seafloor Production System



An example of a commercial seabed mining system.
© Nautilus Minerals

Possible Actors that Could Cause Damage



Possible Heads of Claim for Damage

Damage arising out of seabed mining can impact both **INDIVIDUAL INTERESTS & COLLECTIVE INTERESTS**

Damage to Common
Heritage of
Humankind
Resources

Damage to Marine
Environment &
Biodiversity in Areas
Beyond National
Jurisdiction

Damage to Living
Resources in Areas
Beyond National
Jurisdiction

Damage to Persons
& Property in Areas
Beyond National
Jurisdiction

Damage to
Coastal State
Interests

Erga Omnes Obligation?
SDC Advisory Opinion

(a) Which actor has sufficient legal interest to bring a claim and (b) which forum does it have access to?

Possible Claimants that May Be Entitled to Compensation for Damage

Possible Heads of Claim	Possible Claimants					
	ISA	Contractor	Sponsoring States	States Parties	Non-State Parties	Non-State Actors
Damage to Common Heritage of Humankind Resources	✓	✓	✓	✓	?	?
Damage to Marine Environment & Biodiversity in Areas Beyond National Jurisdiction	✓	✓	✓	✓	?	?
Damage to Living Resources in Areas Beyond National Jurisdiction	X	X	X	✓	✓	✓
Damage to Persons and Property in Areas Beyond National Jurisdiction	✓	✓	✓	✓	✓	✓
Damage to Coastal State Interests	X	X	X	✓	✓	✓

**PART III:
EXISTING FORUMS FOR DETERMINATION
OF LIABILITY CLAIMS**

Existing Forums for Determination of Liability Claims

UNCLOS Forums [Section 5, Part XI]

Seabed Disputes Chamber

Commercial Arbitration

National Courts

Courts of Sponsoring States

Courts of States Parties?

Existing Forums for Determination of Liability Claims

Seabed Disputes Chamber

Does the Seabed Disputes Chamber have PERSONAL JURISDICTION?

Does the Seabed Disputes Chamber have SUBJECT-MATTER JURISDICTION?

Possible Heads of Claim

Damage to Common Heritage of Humankind Resources

Damage to Marine Environment & Biodiversity in Areas Beyond National Jurisdiction

Damage to Living Resources in Areas Beyond National Jurisdiction

Damage to Persons and Property in Areas Beyond National Jurisdiction

Damage to Coastal State Interests

ARTICLE 187: JURISDICTION OF SEABED DISPUTES CHAMBER

Article 187 (a): Disputes between States Parties concerning the interpretation or application of this Part and the Annexes thereto

Article 187 (b): Disputes between a State Party and the ISA on:

- Acts or omissions of the ISA or a State Party alleged to be in violation of this Part or the Annexes relating thereto or or rules, regulations and procedures of the ISA
- Acts of the ISA alleged to be in excess of jurisdiction or a misuse of power

Article 187 (c): Disputes between Parties to a Contract, being States Parties, the ISA, or the Enterprise, state enterprises and natural or juridical persons concerning:

- the interpretation or application of a relevant contract or a plan of work; or
- Acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests

Article 187 (e): Disputes between the ISA and a State Party, a state enterprise or natural or juridical person sponsored by a State Party where it is alleged that the ISA has incurred liability as provided in Annex III, Article 22

Article 187 (f): any other disputes for which the jurisdiction of the chamber is specifically provided in this Convention

Existing Forums for Determination of Liability Claims

Does commercial arbitral tribunal have
SUBJECT-MATTER JURISDICTION?

Commercial Arbitration

Does commercial arbitral tribunal have
PERSONAL JURISDICTION?

Possible Heads of Claim

Damage to Common Heritage of Humankind Resources

Damage to Marine Environment & Biodiversity in Areas Beyond National Jurisdiction

Damage to Living Resources in Areas Beyond National Jurisdiction

Damage to Persons and Property in Areas Beyond National Jurisdiction

Damage to Coastal State Interests

ARTICLE 188 (2)

Disputes between **parties to a contract, States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons concerning the interpretation or application of a relevant contract or plan of work referred to Article 187 (c) (i)** shall be submitted at the request of any party to binding commercial arbitration unless the other parties agree

Commercial arbitral tribunal shall have no jurisdiction to decide any question of interpretation of UNCLOS, Part XI and the Annexes, which shall be referred to the Seabed Disputes Chamber

The arbitral tribunal shall issue its award in conformity with the ruling of the Seabed Disputes Chamber

In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree

ACCESS TO SEABED DISPUTES CHAMBER & COMMERCIAL ARBITRATION UNDER UNCLOS

	<u>RESPONDENTS</u>				
<u>CLAIMANTS</u>	State Contractor	Non-State Contractor	ISA	Sponsoring State	Third Parties
State Contractor	SDC (Art. 187a)	X	SDC Art 187e	SDC Art 187a	X
Non-State Contractor	X	X	SDC Art 187e	SDC Art 187 c (i) [??] Arbitral Tribunal	X
ISA	SDC Art 187a/c Arbitral Tribunal	SDC Art 187c Arbitral Tribunal	NA	SDC Art 187b	X
Sponsoring State	SDC (Art 187a)	SDC Art 187 c (i) [??] Arbitral Tribunal	SDC Art 187b/e	SDC Art 187a	X
States Parties	SDC (Art 187a)	X	SDC Art 187b/e	SDC Art 187a	X
Non-States Parties	X	X	X	X	X
Non-State Actors	X	X	X	X	X

National Courts

- **Article 235 (2), UNCLOS:**
 - States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction
- **Seabed Disputes Chamber, Advisory Opinion, paras. 139 - 140:**
 - Article 235 (2) places a direct obligation on sponsoring States to ensure recourse is available within their legal systems
 - This provision applies to the sponsoring State as the state with jurisdiction over the persons that caused the damage. By requiring the **sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts**, this provision serves the purpose of ensuring that the sponsored contractor meets its obligations under Annex III, article 22, of the Convention to **provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area**
- **Seabed Disputes Chamber, Advisory Opinion, para. 235:**
 - Sponsoring State also has an obligation to ensure that any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the ISA and the Contractor shall be enforceable in the territory of each State Party

**PART IV:
PROBLEMS AND PROSPECTS**

Advantages

- Arguably reflects Intention of Drafters
- Easiest Option i.e. maintains status quo

Disadvantages

- Lack of Uniformity in Sponsoring State Legislation
- Possible Immunity of ISA, State Contractors and State enterprises before national courts
- Inconsistency and fragmentation of interpretation of UNCLOS
- Multiple proceedings arising out of the same event – double exposure for Contractor, inefficient use of resources

CHANNEL ALL CLAIMS TO THE SEABED DISPUTES CHAMBER?

Article 21 & 40, ITLOS Statute

Jurisdiction of ITLOS “comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*”

- Problematic?
 - Expansion of subject-matter and personal jurisdiction of SDC may not be agreed upon?
 - Time and resources?

CHANNEL ALL CLAIMS TO NATIONAL COURTS?

Similar to Civil Liability Regimes for Marine Pollution

Harmonization

- provide a common minimum standard for all legal systems
- mitigate conflicts of laws problems
- create certainty and predictability in the adjudication of claims for damage

Many other issues to be resolved:

- Strict Liability?
- Compensation Funds?

THE END

Questions?

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