

DISPUTE SETTLEMENT RELATING TO DEEP SEABED MINING: A PARTICIPANT'S PERSPECTIVE

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This paper addresses the question of what mechanisms are available for settlement of disputes relating to deep seabed mining in different scenarios. The question is dealt with from a participant's perspective. Upon examination, it is found that although the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has been established to have compulsory jurisdiction over disputes arising out of deep seabed mining activities, gaps are identified in the current legal framework. Consequently, it is suggested that an administrative review mechanism and a complaint mechanism could be established within the International Seabed Authority ('ISA') to fill in these gaps. Lastly, policy advice is given to the three kinds of participants in the deep seabed mining regime: the contractor, the ISA and the sponsoring state.

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I INTRODUCTION: THE DEVELOPMENT OF DEEP SEABED MINING

It was in 1873, during the *HMS Challenger* Expedition (1873–76), that polymetallic nodules were first discovered on the seafloor.¹ Yet, it was not until the 1960s that the economic value of those nodules became an issue of international interest.² Soon, exploration for and exploitation of the mineral resources on the seabed — ie deep seabed mining (‘DSM’) — appeared as a topic on the agenda of the United Nations General Assembly. From 1967, under the auspices of the UN, negotiations began for a DSM legal regime. The final outcome of the long-lasting negotiations was pt XI of the 1982 *United Nations Convention on the Law of the Sea* (‘*Convention*’).³ However, owing to divergent attitudes towards the content of pt XI of the *Convention*, the *Convention* did not enter into force until pt XI was amended by the 1994 *Implementation Agreement*.⁴

The International Seabed Authority (‘ISA’) was established upon pt XI’s entry into force in 1994, and came into operation in 1996. The ISA is empowered under the *Convention* to ‘organize and control activities in the Area, particularly with a view to administering the resources of the Area’.⁵ It controls activities in the Area by granting permits in the form of contracts.⁶ To date, the

¹ International Seabed Authority (‘ISA’), *Deep Seabed Mineral Resources* (2017) <<https://www.isa.org.jm/mineral-resources/55>> archived at <<https://perma.cc/WR8Y-DQV4>>.

² In 1962, John L Mero said that ‘the nodules are indicated to be forming at an annual rate of 6×10^6 metric tons in [the Pacific] ocean’. The same estimation was repeated in his influential book *The Mineral Resources of the Sea*. According to this estimation, the potential economic value of manganese nodules would be huge. Although it turned out to be far too exaggerated, this estimation stimulated great international interest in deep seabed mining. John L Mero, ‘Ocean Floor Manganese Nodules’ (1962) 57 *Economic Geology* 747, 756–8; John L Mero, *The Mineral Resources of the Sea* (Elsevier, 1965) 235.

³ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) pt XI (‘*Convention*’).

⁴ The *Convention* entered into force on 16 November 1994 with the adoption of the *Implementation Agreement: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 3 (entered into force 28 July 1996) art 1 (‘*Implementation Agreement*’). States’ divergent attitudes were exemplified in the unilateral national legislation of a group of industrialised countries, and in the mini-treaty arrangement between these states in the 1980s: Yuwen Li, *Transfer of Technology for Deep Sea-Bed Mining: The 1982 Law of the Sea Convention and Beyond* (Martinus Nijhoff, 1994) 87–90. The unilateralism movement created a crisis in the international DSM legal regime. As a response, the then Secretary-General of the UN initiated formal consultations (1990–94) which resulted in the amendment of the *Convention*: ISA, *Secretary-General’s Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents* (Collected Documents, ISA, 2002) 1.

⁵ *Convention* art 157(1).

⁶ *Ibid* art 153(3).

ISA has signed 26 contracts for exploration in the Area.⁷ Behind these 26 contracts, there are 16 contractors who fall within three categories: states, publicly funded companies or institutions and private companies.⁸ Private companies were not involved in exploration in the Area until 2011. The first private company to sign a contract with the ISA was Nauru Ocean Resources Inc (sponsored by Nauru).⁹ Thereafter, four more private companies became involved.¹⁰ All five of these private companies are currently conducting exploration for polymetallic nodules in the Area.

The involvement of private companies made for more diverse contractors. Additionally, private investment served as a strong impetus to bring DSM into the exploitation stage. Unlike states or publicly funded companies or institutions who might have strategic goals and long-term plans for DSM, private companies are normally commerce-oriented. For them, the viability of making profits in a relatively short term is of significant importance. Along with private companies, there were also calls from some developing countries for progress to the exploitation stage.¹¹ The likely incentive underlying their suggestions was the potential benefits they might share in accordance with the principle of common heritage of mankind. Additionally, the ISA itself was of the opinion that ‘commercialization of marine minerals in the [Area] ... [was] well within reach and could be attained in the foreseeable future’.¹² Thus, it seems that, in spite of

⁷ ‘As at 31 May 2016, 24 contracts for exploration had entered into force (15 for polymetallic nodules, 5 for polymetallic sulphides and 4 for cobalt rich ferromanganese crusts)’. As at 31 May 2017, the number of contracts has increased to 27 (17 for polymetallic nodules, 6 for polymetallic sulphides and 4 for cobalt rich ferromanganese crusts). Assembly, *Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea*, 22nd sess, ISBA/22A/2 (11–22 July 2016) [46]; Council, *Status of Contracts for Exploration and Related Matters: Report of the Secretary-General*, 23rd sess, Provisional Agenda Item 7, ISBA/23/C/7 (5 June 2017) [2].

⁸ There are three contractors in the first category: the governments of India, South Korea and Russia. Eight contractors belong to the second category. Four are from Asia and the Pacific: China Ocean Mineral Resources Research and Development Association, Japan Oil, Gas and Metals National Corporation (sponsored by Japan), Marawa Research and Exploration Ltd, Cook Islands Investment Corporation. Three are from Europe: Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany, Institut Français de Recherche pour l’Exploitation de la Mer, and Interoceanmetal Joint Organization. One is from Latin America: Companhia De Pesquisa de Recursos Minerais. ISA, *Deep Seabed Minerals Contractors* <<https://www.isa.org.jm/deep-seabed-minerals-contractors>> archived at <<https://perma.cc/S263-WBGS>>.

⁹ Ibid.

¹⁰ These private companies are Tonga Offshore Mining Limited (2012, sponsored by Tonga), G TEC Sea Mineral Resources NV (2013, sponsored by Belgium), UK Seabed Resources Ltd (2013, sponsored by United Kingdom), Ocean Mineral Singapore Pte Ltd (2015, sponsored by Singapore): Ibid.

¹¹ This position was vividly exhibited at the 22nd annual session of the ISA during discussion of the Legal and Technical Commission’s report on ‘applications for extension of contracts for exploration of polymetallic nodules’. Brazil maintained that it was necessary that the draft decision pertaining to extensions be reworded to ensure that contractors are able to proceed to the exploitation stage at the end of the five-year exploration stage. Cameroon, Chile, Kenya and South Africa support the position of Brazil: ISA, ‘Seabed Council Approves Plan of Work for Crusts Exploration by the Republic of Korea; Delays Approval of Five-Year Extension of Six Exploration Contracts’ (Press Release, SB/22/8, 18 July 2016).

¹² ISA, ‘Commercialization of Marine Minerals in Deep Seabed Well within Reach, International Seabed Authority Secretary-General States as He Introduces Annual Report’ (Press Release, SB/22/11, 19 July 2016) 1.

the existence of obstacles such as the gap of marine scientific knowledge,¹³ the technology,¹⁴ the fluctuation of the metal market,¹⁵ and the development of exploitation regulations,¹⁶ DSM is now in a crucial transitional period towards the exploitation stage.

Against this background, this paper addresses an important issue facing all participants in DSM once commercial mining activities in the Area commence, namely, the mechanisms for settlement of disputes relating to DSM. It focuses only on contentious cases, while questions of request for and giving of advisory opinions are excluded. Part II lays out the legal framework for settlement of disputes relating to DSM. Then, Part III examines the specific dispute settlement mechanism for each kind of dispute under different situations from a participant's perspective. The paper concludes with comments and policy advice to the three categories of participant in DSM: the contractor, the sponsoring state and the ISA.

¹³ See, eg, Kathryn J Mengerink et al, 'A Call for Deep-Ocean Stewardship' (2014) 344 *Science* 696, 698; R E Boschen et al, 'Mining of Deep-Sea Seafloor Massive Sulfides: A Review of the Deposits, their Benthic Communities, Impacts from Mining, Regulatory Frameworks and Management Strategies' (2013) 84 *Ocean & Coastal Management* 54, 55; Van Dover C L et al, 'Environmental Management of Deep-Sea Chemosynthetic Ecosystems: Justification of and Considerations for a Spatially-Based Approach' (Technical Study No 9, ISA, 2011) 52; Census of Marine Life, 'First Census of Marine Life 2010: Highlights of a Decade of Discovery' (Report, Census of Marine Life, 2010) 1–3 <<http://www.coml.org/highlights-2010>>; Kristina M Gjerde et al, 'Report on the Implications of MIDAS Results for Policy Makers with Recommendations for the Future Regulations to be Adopted by the EU and the ISA' (Report, Managing Impacts of Deep Sea Resource Exploration ('MIDAS'), 16 December 2016) ss 2, 3.4.10, 3.6.9, 3.8.3.4 <https://www.eu-midas.net/sites/default/files/deliverables/D9.6_FINAL_lowres.pdf> archived at <<https://perma.cc/5M8X-MGNS>>.

¹⁴ See, eg, Ecorys, 'Study to Investigate the State of Knowledge of Deep-Sea Mining' (Final Report, 28 August 2014) 55–71; Elaine Baker and Yannick Beaudoin (eds), 'Sea-floor Massive Sulphides — A Physical, Biological, Environmental, and Technical Review' (Review, Secretariat of the Pacific Community, 2013) 43–8 <http://dsm.gsd.spc.int/public/files/meetings/TrainingWorkshop4/UNEP_vollA.pdf> archived at <<https://perma.cc/M6PU-Z6HK>>; Elaine Baker and Yannick Beaudoin (eds), 'Manganese Nodules: A Physical, Biological, Environmental, and Technical Review' (Review, Secretariat of the Pacific Community, 2013) 43–8 <http://dsm.gsd.spc.int/public/files/meetings/TrainingWorkshop4/UNEP_vollB.pdf> archived at <<https://perma.cc/Y87W-J864>>; Elaine Baker and Yannick Beaudoin (eds), 'Cobalt-rich Ferromanganese Crusts: A Physical, Biological, Environmental, and Technical Review' (Review, Secretariat of the Pacific Community, 2013) 41–5 <http://dsm.gsd.spc.int/public/files/meetings/TrainingWorkshop4/UNEP_vollC.pdf> archived at <<https://perma.cc/MX75-6EJE>>.

¹⁵ Ecorys, 'Study to Investigate the State of Knowledge of Deep-Sea Mining', above n 14, 112–36.

¹⁶ In 2011, Fiji made a request for the formulation of the exploitation regulations: Council, *Statement to the Council by the Delegation of Fiji*, 17th sess, ISBA/17/C/22 (22 July 2011). As a response, the ISA started the drafting process in 2012: Council, *Workplan for the Formulation of Regulations for the Exploitation of Polymetallic Nodules in the Area*, 18th sess, ISBA/18/C/4 (25 April 2012). As of the 22nd session in 2016, the LTC has produced a first working draft of exploitation regulations. However, they have stated that 'the draft should be considered a work in progress': Council, *Report of the Chair of the Legal and Technical Commission on the Work of the Commission at its Session in 2016*, 22nd sess, ISBA/22/C/17 (13 July 2016) [39]. There is no timetable for the completion of the work, the ISA has only requested that the Commission 'continue its work on exploitation regulations as a matter of priority': Council, *Decision of the Council of the International Seabed Authority Relating to the Summary Report of the Chair of the Legal and Technical Commission*, 22nd sess, ISBA/22/C/28 (19 July 2016) [3].

II LEGAL FRAMEWORK FOR SETTLEMENT OF DISPUTES

Owing mainly to its mixed participants, the DSM legal framework is *sui generis*. It embodies not only the traditional form of public international law — the *Convention* — but also rules, regulations and procedures made by the ISA, contracts signed between the ISA and the contractor, and related national legislation. Legal bases for settlement of disputes relating to DSM are identified as follows. First, s 5, pt XI of the *Convention* prescribes a specialised judicial system for settlement of disputes relating to DSM. It establishes the Seabed Dispute Chamber (‘SDC’).¹⁷ It also recognises the *locus standi* of non-state actors — the (prospective) contractor and the ISA — before the SDC and any other dispute settlement bodies. Secondly, in accordance with arts 186 and 285 of the *Convention*, s 1, pt XV of the *Convention* is also applicable to any dispute arising out of DSM activities. Thirdly, s 1 of annex V to the *Convention* is applicable since it describes a conciliation procedure pursuant to s 1, pt XV. Fourthly, the *Statute of the International Tribunal for the Law of the Sea* (‘ITLOS Statute’) contained in the *Convention* annex VI, particularly s 4, constitutes an important legal basis since it prescribes the composition and competence of the SDC of the International Tribunal for the Law of the Sea (‘ITLOS’), as well as the procedural requirements for the proceedings.¹⁸ Fifthly, the *Rules of the Tribunal*, in particular s F of pt III, provide detailed rules on proceedings in contentious cases before the SDC; they thus also constitute a legal basis for dispute settlement.¹⁹ Sixthly, the *UNCITRAL Arbitration Rules*,²⁰ as default procedural rules for the settlement of a commercial dispute between parties to a contract, are applicable if parties to a contract did not agree on the procedural rules for a commercial tribunal.²¹ Seventhly, the regulations, rules and procedures adopted by the ISA are legally binding upon all participants in

¹⁷ The initial discussion over DSM dispute settlement was conducted within the permanent Sea-bed Committee (1967–73): Myron H Nordquist, Shabtai Rosenne and Louis B Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1989) vol 5, 5. However, the third Law of the Sea Conference, convened in 1972, expanded mandates from establishing a DSM legal regime to a comprehensive Law of the Sea legal framework, and such a legal framework was meant to embody a general dispute settlement mechanism. There, the question of how to reconcile the special DSM dispute settlement mechanism with the general dispute settlement mechanism arose. During the 1974 Caracas session, the informal working group on the settlement of disputes was established to deal with the dispute settlement issue, including the issue of reconciliation between the general system and the special system. It identified 11 issues in need of attention. The sixth issue was phrased as follows: ‘the possibility of special procedures in such functional fields as fishing, seabed, marine pollution, or scientific research, and their relationship to general procedures’: at 7. During the Informal Plenary at the sixth session of the third Law of the Sea Conference (1977), agreement was reached on the integration of the seabed dispute settlement system into the general system by creation of a Seabed Disputes Chamber within the Law of the Sea Tribunal. This structural arrangement was eventually adopted in the *Convention*: at 11–12.

¹⁸ *Convention* annex VI.

¹⁹ International Tribunal for the Law of the Sea, *Rules of the Tribunal*, Doc No ITLOS/8 (adopted 28 October 1997) pt III, s F.

²⁰ However, since the entry into force of the *Convention* in 1994, the 1976 *UNCITRAL Arbitration Rules* have been revised twice (in 2010 and 2013). This raises the question: which version of the *Rules* should be applied? United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2017) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.

²¹ *Convention* art 188(2)(c).

the DSM regime, therefore the provisions relevant to dispute settlement can also be legal bases.²² Yet, compared with the *Convention* which is relatively fixed, the content of regulations, rules and procedures is in a state of flux. This is because the ISA can introduce, amend or repeal regulations, rules and procedures by exercising its legislative powers. Lastly, the contract signed between a contractor and the ISA is binding upon the parties to the contract. If a contract provides for a dispute settlement mechanism, such provisions can serve as a legal basis for settlement of disputes relating to the contract.²³

Which legal basis will apply in specific cases depends primarily on the nature of the dispute at issue.²⁴ A detailed analysis of different dispute scenarios is set out in Part III of this paper. Considering the central role of the judicial system relating to DSM established under the *Convention*, the remainder of this Part is directed towards bringing out the three salient features of that judicial system.

The *Convention* establishes ‘a two tier system of judicial settlement’.²⁵ With respect to the general judicial system established under pt XV, the first tier is established under s 1, while the second tier is established under ss 2–3. In so far as the special judicial system relating to DSM is concerned, the first tier is established under pt XV s 1, while the second tier is established under pt XI s 5. Pursuant to art 286, a prerequisite for resorting to the second tier established under ss 2–3 of pt XV is that ‘no settlement has been reached by recourse to section 1’. For instance, ITLOS has heard several cases concerning non-compliance with art 283 (obligation to exchange views), including *MOX Plant, Land Reclamation in and around the Straits of Johor, M/V ‘Louisa’*, and *Southern Bluefin Tuna*.²⁶ Following this line of thought, a respondent could challenge the jurisdiction of the SDC if it claims that the applicant failed to fulfil its obligations under s 1 of pt XV. It seems that pt XV s 1 sets a jurisdictional barrier to the SDC. The reason for doing so, as revealed in art 280, is that the freedom a state has to choose the means for peaceful settlement of disputes shall

²² See, eg, Council, *Decision of the Council of the International Seabed Authority relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related Matters*, 19th sess, ISBA/19/C/17 (22 July 2013) annex (‘*Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*’) reg 40; Assembly, *Decision of the International Seabed Authority regarding the Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, 19th sess, 142nd mtg, ISBA/19/A/9 (25 July 2013).

²³ See, eg, Council, *Decision of the Council relating to Exploration Regulations*, ISBA/19/C/17, annex IV (‘*Standard Clauses for Exploration Contract*’). However, it should be noted that the sponsoring agreement between a contractor and its sponsoring state cannot serve as a legal basis for settlement of disputes at the international level.

²⁴ To determine the nature of the dispute it is necessary to establish the nature of the legal relationship between the relevant parties as well as their relevant rights and obligations.

²⁵ Thomas A Mensah, ‘The Dispute Settlement Regime of the 1982 *United Nations Convention on the Law of the Sea*’ (1998) 2 *Max Planck Yearbook of United Nations Law* 307, 309.

²⁶ Philippe Gautier, ‘The Settlement of Disputes’ in David Joseph Attard, Malgosia Fitzmaurice and Norman Gutiérrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea* (Oxford University Press, 2014) vol 1, 533, 541; *The Mox Plant Case (Ireland v United Kingdom) (Orders)* (2001) (ITLOS, Case No 10, 3 December 2001); *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Orders)* (ITLOS, Case No 12, 8 October 2003); *The M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Spain) (Provisional Measures, Orders)* (ITLOS, Case No 18, 23 December 2010); *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Orders)* (ITLOS, Case Nos 3 and 4, 27 August 1999).

be respected.²⁷ In this sense, the *Convention* accepts the central notion of traditional public international law procedures — state consent.

Nevertheless, the *Convention* accepts the notion of state consent only to a limited extent because it establishes a compulsory judicial system in the second tier.²⁸ This is the second salient feature of the judicial system under the *Convention*. Considering that ‘a distinct feature — and weakness — of public international law, in comparison with municipal law, is the lack of a compulsory judicial system’,²⁹ the establishment of a compulsory judicial system under the *Convention* constitutes a significant development.³⁰ However, there are limitations to the compulsory judicial system under the *Convention*. With respect to the general judicial system, the compulsory jurisdiction of a court or tribunal under art 287 is subject to the limitations under art 297 and exceptions under art 298. Similarly, with respect to the special judicial system, the compulsory jurisdiction of the SDC under art 187 is subject to the limitation under art 189.

Taken together, a compulsory judicial system is established under the *Convention*; yet, such a compulsory judicial system is subject to some limitations and exceptions and it must also accommodate to some extent the notion of state consent. In so far as DSM is concerned, to establish its jurisdiction, the SDC needs to determine first whether an applicant has fulfilled its obligations under s 1 of pt XV and whether the subject matter of the dispute falls within the scope of art 189.

The two features indicated above are shared by both the special judicial system under s 5, pt XI and the general judicial system under pt XV. The third salient feature, however, is only attached to the former. This third feature is that the special judicial system under s 5, pt XI is of a hybrid nature, namely, it covers not only disputes between states, but also disputes between states and non-state actors, and between non-state actors. Moreover, it is a specialised system for a specific functional area — DSM. Owing to this feature — the mixed participants in a specific functional area — the dispute settlement mechanisms relating to DSM have multiple purposes.³¹

²⁷ Article 280 of the *Convention* is in line with the *Charter of the United Nations* art 33, as well as the *Manila Declaration on the Peaceful Settlement of International Disputes*, where the free choice of means by a state is referred to three separate times: *Manila Declaration on the Peaceful Settlement of International Disputes*, UN GAOR, 68th plen mtg, UN Doc A/Res/37/10 (15 November 1982) annex I [3], [5], [10].

²⁸ *Convention* arts 187, 287.

²⁹ Gautier, above n 26, 533.

³⁰ Just as the World Trade Organization’s compulsory dispute settlement mechanism is a robust mechanism which contributes to the maintenance of international trade order, the compulsory judicial system under the *Convention* can be considered a robust mechanism for securing a unifying interpretation and application of the *Convention*, the supervision of compliance, the rational use of marine resources and the maintenance of international maritime order.

³¹ When dealing with disputes between states, the ultimate purpose is to secure international peace and security: *Convention* art 279. When dealing with disputes between states and non-state actors, or between non-state actors, the special judicial system aims at a fair and efficient remedy or supervision system. This point is attested to by the international dispute settlement mechanisms in the fields of international investment and trade relations. For instance, the *UNCITRAL Arbitration Rules* state that ‘the arbitral tribunal ... shall conduct the proceedings so as to ... provide a fair and efficient process for resolving the parties’ dispute’: *UNCITRAL Arbitration Rules (As Revised in 2010)*, GA Res 65/22, UN GAOR, 6th Comm, 65th sess, Agenda Item 77, UN Doc A/RES/65/22 (10 January 2011) art 17.

Undoubtedly, the compulsory judicial system as prescribed under art 187 of the *Convention* is the most important mechanism for settlement of disputes relating to DSM. However, the next section demonstrates that such a judicial system is not as comprehensive and robust as it seems; there are gaps that need to be filled in.

III EXAMINATION OF THE DISPUTE SETTLEMENT MECHANISMS FROM A PARTICIPANT'S PERSPECTIVE

A *From the Perspective of the Contractor*

The disputes concerning DSM activities that a contractor might face include the following six scenarios: (1) disputes between an applicant (who is a prospective contractor) with the ISA over the approval of a plan of work in the form of a contract; (2) disputes between a contractor and the ISA over the implementation of a contract; (3) disputes between a contractor and its sponsoring state(s) over the implementation of a sponsoring agreement or the revocation of a sponsorship certificate; (4) disputes between contractors over interference with each other's DSM activities; (5) disputes between a contractor and other users of resources or space in the Area or high seas over interference with one another's activities; and (6) disputes between a contractor and a coastal state over the violation of the rights or interests of the coastal state. Mechanisms for the settlement of disputes in these six scenarios will be examined in turn.

1 *Mechanisms for Settlement of Disputes over the Approval of Plans of Work in the Form of Contracts*

The *Convention* contains a licensing system to control access to DSM activities in the Area. The ISA is empowered to give permits to applicants through the approval of plans of work in the form of contracts. The ISA processes an exploration/exploitation application in two steps. First, an application is considered by the Legal and Technical Commission ('LTC'). Then, based upon the recommendations of the LTC, the Council of the International Seabed Authority ('Council') makes a decision on whether to approve the plan of work in the form of a contract.³² If the Council decides to disapprove a plan of work and hence refuses a contract, in accordance with art 187(d) of the *Convention*, the applicant, as a prospective contractor, can challenge such a decision before the SDC. Pursuant to the same provision, the

³² ISA, 'Developing a Regulatory Framework for Mineral Exploitation in the Area' (Report, ISA, July 2016) pt III <https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf> archived at <<https://perma.cc/E9DK-QN7L>>; Council, *International Seabed Authority, Decision of the Council of the International Seabed Authority relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters*, 19th sess, 190th mtg, ISBA/19/C/17 (22 July 2013) pt III; Assembly, *Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, 18th sess, 138th mtg, ISBA/18/A/11 (27 July 2012) pt III. It is expected that the procedure for the processing of exploitation applications will be similar: ISA, 'Developing a Regulatory Framework for Mineral Exploitation in the Area' (Report, ISA, July 2016) pt II <https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf> archived at <<https://perma.cc/3V3R-RCHA>> ('*Draft Exploitation Regulations*').

applicant may also institute proceedings before the SDC concerning a dispute over a legal issue arising in the negotiation of the contract. Thus, there is a judicial mechanism for the settlement of disputes with regard to the negotiation and conclusion of contracts.

However, there is a significant limitation on this judicial review mechanism. The first sentence of art 189 states: ‘The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part’.³³ The second sentence of art 189 continues:

Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this *Convention*, nor declare invalid any such rules, regulations and procedures.³⁴

Article 189 thus heavily qualifies the jurisdiction of the SDC under art 187(d).³⁵ The implication of this qualification can be demonstrated by looking at some hypothetical cases. Suppose that the ISA disapproves a plan of work for the reason that, in the ISA’s opinion:

- 1 The applicant is inadequate in financial or technical capacity;
- 2 The applicant fails to provide a certificate of sponsorship;
- 3 The applicant fails to submit application fees;
- 4 The applicant fails to provide a written undertaking with respect to compliance with its obligations;
- 5 The applicant fails to provide adequate data and information about mineral resources and the environment of the covered area of the application;
- 6 The applicant’s description of the plan for marine environment studies, monitoring, protection or emergency response and contingency is not properly completed;
- 7 Substantial evidence indicates that exploitation in the covered area would have the risk of serious harm to the marine environment;
- 8 The plan of work for exploitation is not consistent with the production policy of the Authority; or

³³ *Convention* art 189.

³⁴ *Ibid.*

³⁵ It is noted that the third sentence of art 189 of the *Convention* specifies three kinds of claims which fall under the compulsory jurisdiction of the SDC, in particular, that the SDC has jurisdiction over claims concerning excess of jurisdiction or misuse of power by the ISA. To some extent, the third sentence of art 189 can be seen as limiting the restrictions outlined in the first and second sentences of art 189. This delicate internal structure of art 189 renders the discretionary room for the SDC to decide on the issue of whether a certain dispute falls into the compulsory jurisdiction of the SDC even larger: *Convention* art 189. Furthermore, art 58 of the *Rules of the Tribunal* states that ‘in the event of a dispute as to whether the Tribunal has jurisdiction, the matter shall be decided by the Tribunal’: ITLOS, *Rules of the Tribunal*, Doc No ITLOS/8 (adopted 28 October 1997) art 58.

- 9 The applicant fails to fulfil any other conditions or criteria required by the *Convention*, regulations or decision of the ISA, or guidance recommended by the LTC.

Decisions on the grounds of 1, 5, 6, 7 and 8 cannot be challenged before the SDC because they involve the exercise of the discretionary power of the ISA. Decisions taken on the grounds of 2, 3 and 4 can be challenged before the SDC because they are made on the basis of clear-cut conditions or criteria, meaning that the room for exercise of the discretionary powers of the ISA is excluded. With regard to ground 9, the answer depends on whether the ISA exercises discretionary power during the course of their decision making. If they do, then the answer is negative, and vice versa.

Again, supposing that an applicant wants to challenge a decision of the ISA to refuse to grant a contract, for the reason that, when reviewing an application, the LTC does not:

- 1 Examine applications in the order in which they are received;
- 2 Consider applications expeditiously;
- 3 Apply the rules of the ISA in a uniform and non-discriminatory manner; or
- 4 Comply with the procedural rules of the ISA.

The question arises as to whether the applicant can settle these cases before the SDC. The answer is yes, because normally the application of procedural rules does not involve the exercise of the ISA's discretionary powers.

From the above, it can be seen that the jurisdiction of the SDC with respect to disputes arising during the negotiation and conclusion of contracts is generally confined to disputes over the application of the procedural rules of the ISA; the crucial majority of the potential disputes over the application of substantive rules of the ISA is excluded. This means that there is a great gap in the dispute settlement mechanism. From an institutional perspective, one can see that this gap was deliberately left.³⁶ However, from an applicant's perspective, this gap results in an ineffective remedial mechanism. Considering that acquiring a contract is necessary for anyone wishing to get involved in DSM activities, it is desirable to have a more effective mechanism for the settlement of disputes over the approval of plans of work in the form of contracts. The ways to achieve this goal include either removing the limitation upon the jurisdiction of SDC under art 189 or creating new mechanisms. The former will not be discussed in this paper because it requires the revision of the *Convention*. The possibility of the establishment of an administrative review mechanism within the ISA will be discussed in Part III(B)(1).

2 *Mechanisms for Settlement of Disputes over the Implementation of Contracts*

Concerning disputes arising in the course of the implementation of a contract, the *Convention* prescribes two different dispute settlement mechanisms. One is

³⁶ It was based upon the consideration that ITLOS should not interfere with the operation of the ISA: Myron H Nordquist, Shabtai Rosenne and Louis B Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1989) vol 6, 631.

commercial arbitration for ‘disputes concerning the interpretation or application of a contract’;³⁷ the other is judicial settlement by the SDC for disputes concerning ‘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’.³⁸

The reason why the *Convention* introduces a commercial arbitration mechanism to settle disputes concerning the interpretation or application of a contract is because the DSM contract is considered a commercial contract. This can be inferred from art 188(2)(c) of the *Convention* where the *UNCITRAL Arbitration Rules* are prescribed as the default arbitration procedure. Considering that *UNCITRAL Arbitration Rules* are ‘a set of comprehensive procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of commercial relationship’,³⁹ the ISA and a contractor can be considered to have a commercial relationship under a contract. In this context, the legal relationship between the ISA and a contractor is on an equal footing, just as parties to a contract in the field of international trade law. This is one aspect of the nature of the DSM contract.

However, there is another aspect of the nature of the DSM contract. Namely, a DSM contract also establishes an administrative relationship between the ISA as a regulator and the contractor. This relationship is on an unequal footing because it involves the exercise of administrative powers by the ISA. The administrative powers of the ISA are granted by the *Convention*,⁴⁰ and these authorisation provisions are also incorporated in the contracts. For instance, the ISA can conduct environmental monitoring,⁴¹ issue an environmental emergency order⁴² and inspect the operation of the contractor.⁴³ It can also unilaterally suspend and terminate the contract and impose penalties on a contractor.⁴⁴ Hence, the ISA can act as a legal regulator even when they are in a legal relationship under the contract. Pursuant to art 187(c)(ii) of the *Convention*, disputes related to the exercise of administrative powers of the ISA in the course of the implementation of a contract shall be subject to the exclusive jurisdiction of the SDC. However, as is the situation with respect to the approval of contracts for plans of work, the jurisdiction of the SDC with respect to the acts or omissions of the ISA in the course of the implementation of a contract is also heavily qualified by art 189. For the same reason, namely to achieve a more efficient remedial mechanism for the contractor, the possibility of the establishment of an administrative review mechanism within the ISA will be discussed in Part III(B).

It is thus evident that the DSM contract is of a mixed nature: it is treated as a commercial contract but at the same time involves the exercise of administrative powers by one of the parties. The key is the ISA, who plays two different roles in

³⁷ *Convention* art 188(2).

³⁸ *Ibid* art 187(c)(ii).

³⁹ United Nations Commission on International Trade Law, above n 20.

⁴⁰ *Convention* art 162(2)(w) and (z).

⁴¹ *Standard Clauses for Exploration Contract*, ISBA Doc ISBA/19/C/17, annex IV, s 5.

⁴² *Ibid* s 6.

⁴³ *Ibid* s 14.

⁴⁴ *Ibid* s 21.

the contract.⁴⁵ Depending on what role the ISA plays in a specific legal relationship, disputes are subject to different settlement mechanisms. The essential criterion is whether a dispute involves the exercise of administrative powers on the part of the ISA or not. Additionally, for the sake of unifying the interpretation and application of the *Convention*, there is a limitation on the jurisdiction of the commercial arbitral tribunal. Namely, '[a] commercial arbitral tribunal ... shall have no jurisdiction to decide any question of interpretation of the *Convention*'.⁴⁶ When the question of the interpretation of the *Convention* is involved, the commercial arbitral tribunal shall suspend proceedings, refer the question to the SDC, and then continue the arbitral proceedings in conformity with the decision of the SDC.⁴⁷

3 *Mechanisms for Settlement of Disputes concerning the Implementation of a Sponsoring Agreement or the Revocation of a Certificate of Sponsorship*

A sponsoring agreement is valid only between a contractor and its sponsoring state.⁴⁸ The sponsoring agreement does not fall within the scope of the international DSM legal framework.⁴⁹ Correspondingly, no mechanism for settlement of disputes arising out of the implementation of a sponsoring agreement is described in the international DSM legal framework.

In contrast, a certificate of sponsorship is a document provided by a sponsoring state to the ISA for the purpose of ascertaining the legal connection between the sponsoring state and its sponsored contractor.⁵⁰ Under the international DSM legal framework, the certificate of sponsorship is a necessary condition for the acquisition and maintenance of a contract between a contractor and the ISA.⁵¹ When a sponsoring state terminates its certificate of sponsorship, it shall notify the ISA in writing and state the reasons for the termination.⁵² In that case, the sponsored contractor has to submit a new certificate of

⁴⁵ To some extent, the DSM contract is exemplary of the 'administrative contract' as adopted in the administrative law systems of some countries.

⁴⁶ *Convention* art 188(2)(a).

⁴⁷ *Ibid* art 188(2)(b).

⁴⁸ *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) [224].

⁴⁹ A sponsoring agreement is concluded under the domestic law of the sponsoring state and it is not required to be submitted to the ISA: *Ibid* [225]–[226].

⁵⁰ Common reg 11 of the three sets of regulations: Assembly, *Decision of the International Seabed Authority regarding the Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, 19th sess, 142nd mtg, ISBA/19/A/9 (25 July 2013) reg 11; Assembly, *Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, 16th sess, 130th mtg, ISBA/16/A/12/Rev.1 (7 May 2010) reg 11; Assembly, *Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, 18th sess, 138th mtg, ISBA/18/A/11 (27 July 2012) reg 11.

⁵¹ *Convention* annex III, art 4; Council, *Decision of the Council of the International Seabed Authority relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related Matters*, 19th sess, ISBA/19/C/17 (22 July 2013) reg 11.

⁵² Council, *Decision of the Council of the International Seabed Authority relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters*, 19th sess, 190th mtg, ISBA/19/C/17 (22 July 2013) reg 29.

sponsorship; failure to do so will result in the invalidity of the contract.⁵³ However, the international DSM legal framework does not describe mechanisms for settlement of disputes arising out of the termination of a certificate of sponsorship.

Taken as a whole, the international DSM legal framework does not contain any mechanisms for settlement of disputes arising out of either a sponsoring agreement or the termination of a certificate of sponsorship. However, this does not mean that no such mechanism exists at the national level.

4 *Mechanisms for Settlement of Disputes between Contractors*

Disputes between contractors over interference with each other's activities concern the conflicting rights and obligations of contractors under different contracts. This kind of dispute is not covered by art 187, hence the SDC has no jurisdiction. No other mechanisms can be found in the existing legal framework either.

5 *Mechanisms for Settlement of Disputes Regarding Interference between a Contractor and Other Users of the Area or the High Seas*

In the latest *Draft Exploitation Regulations* under development by the ISA, it is expressly stated that the exploitation regulations will address the issue of development of 'the resources of the Area with reasonable regard to the rights and legitimate interests of other users of the marine environment'.⁵⁴ Indeed, there are multi-sectoral uses of the resources or spaces in the high seas and the Area, such as laying and operation of submarine cables or pipelines, marine scientific research, fisheries, navigation, deep seabed mining as well as bioprospecting.⁵⁵ It is anticipated that when DSM proceeds into the exploitation phase, the probability of disputes arising out of these multi-sectoral uses will increase. In particular, a contractor might face disputes with other users regarding interference with each other's activities.

Part XI of the *Convention* does not contain mechanisms for settlement of disputes of this kind. Instead, a solution has to be sought in a broader context — the *Convention* as a whole. Because pt XV of the *Convention* establishes a compulsory dispute mechanism which covers 'any dispute concerning the interpretation or application of the *Convention*' between states party,⁵⁶ pt XV of the *Convention* could provide ways to resolve disputes arising out of multi-sectoral uses in the high seas and the Area.

⁵³ Ibid annex IV, s 20.2.

⁵⁴ ISA, *Draft Exploitation Regulations*, above n 32, reg 7(k).

⁵⁵ 'Bioprospecting can be defined as the systematic search for and development of new sources of chemical compounds, genes, microorganisms, macro organisms, and other valuable products from nature': Karin Timmermans, 'Report of an ASEAN Workshop on the *TRIPS Agreement* and Traditional Medicine' (Report, World Health Organisation, 13–15 February 2001) ch 2.3 <<http://apps.who.int/medicinedocs/en/d/Jh2996e/6.3.html>> archived at <<https://perma.cc/9TLY-6MR6>>.

⁵⁶ This compulsory dispute settlement mechanism can only be resorted to if the means chosen by parties to a dispute through mutual agreement have been exhausted and no settlement has been reached: *Convention* art 286. It is also subject to certain limitations and exceptions: *Convention* arts 297–8.

By way of illustration, some hypothetical cases are set out here. For instance, a flag state may institute a case against a sponsoring state in the following situations: where there is conflict between a party conducting DSM and a party asserting that its right of navigation under arts 87 and 90 has been interfered with, or that their safety of navigation has been threatened; where there is conflict between DSM and marine scientific research, resulting in a request for settlement of a dispute over the interpretation of arts 87(2), 143, 147, 238, 239, 256 and 257;⁵⁷ where the owner of a fishery asserts that their right of fishery under arts 87 and 116 has been interfered with; and in cases concerning the laying and operation of submarine cables or pipelines, where the right under art 112 has been interfered with or the sponsoring state has failed to fulfil its obligations under arts 113 and 114. The situation with respect to interference between DSM and bioprospecting activities is more complicated because the topic of marine biological diversity beyond areas of national jurisdiction is not covered by the *Convention*.⁵⁸ It is unknown whether there will be mechanisms for settlement of disputes of this kind in the final instrument regarding biological diversity beyond areas of national jurisdiction.

There is however a point in controversy with respect to the hypothetical cases above. Namely, is the sponsoring state the suitable respondent?⁵⁹ If the answer is negative, then the mechanisms prescribed in pt XV of the *Convention* are not applicable.

6 *Mechanisms for Settlement of Disputes over the Violation of Rights or Interests of a Coastal State*

Article 142 of the *Convention* recognises the rights and legitimate interests of coastal states with respect to DSM. It is stated that when a contractor conducts activities concerning ‘resource deposits in the Area which lie across limits of national jurisdiction’, he is required to consult with the concerned coastal state. Specifically, the consultation shall include a system of prior notification. In cases where ‘activities in the Area may result in the exploitation of resources lying within national jurisdiction’, the prior consent of the concerned coastal state is required.

It is noted that the requirements under art 142 of the *Convention* are very similar to those under the *Draft Articles on Prevention of Transboundary Harm*

⁵⁷ Article 87(2) requires states to exercise their freedoms of the high seas with due regard to those of other states. Article 147 requires activities within the Area to be exercised with ‘reasonable regard for other activities in the marine environment’: the *Convention*, art 147. Arts 143, 238, 239, 256, 257 provide rights to, and conditions associated with, marine scientific research.

⁵⁸ This topic has been studied by an ad hoc open-ended informal working group under the auspices of the UN. The negotiations are still under progress, but they are aiming for the development of a legally binding instrument under the *Convention: Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, GA Res 69/292, UN GAOR, 69th sess, Agenda Item 74(a), UN Doc A/RES/69/292 (6 July 2015).

⁵⁹ The answer to this question is uncertain for the following two reasons. First, the *Convention* does not oblige the sponsoring state to appear before an international arbitral or judicial body on behalf of its sponsored contractor: *Convention* annex III, art 4(4). Second, when the sponsoring state is not the same as the flag state of the operational ship of the contractor, it is not clear which state should become the respondent.

from *Hazardous Activities* ('2001 Prevention Draft Articles') adopted by the International Law Commission ('ILC') in 2001.⁶⁰ In effect, in spite of the different geographic scope,⁶¹ the focal points of art 142 of the *Convention* and the *2001 Prevention Draft Articles* are essentially the same. They both deal with the issue of trans-boundary effects of industrial activities. Requirements such as prior notification and exchange of information are important procedural arrangements for balancing conflicting interests of parties in the utilisation of resources and the protection of the environment, thereby mitigating the negative effects of industrial activities.

Therefore, one important category of disputes arising out of industrial activities taking place in boundary areas would be disputes over whether a party has fulfilled the procedural requirements as depicted in the *2001 Prevention Draft Articles*. DSM activities concerning 'resource deposits in the Area which lie across limits of national jurisdiction' could be such a relevant case. The parties might also have a dispute over substantive matters. However, in so far as DSM is concerned, disputes between a contractor and a coastal state over the interpretation and application of art 142 fall outside the jurisdiction of the SDC under art 187.

In the absence of SDC jurisdiction, a few possible dispute settlement mechanisms can be explored. First, could a coastal state institute a case against the sponsoring state? Secondly, could a coastal state institute a case against the ISA? Thirdly, could the contractor or the coastal state solve their disputes through the national judicial systems of the coastal state or the sponsoring state?

For the first two options, disputes between the coastal state and the contractor would have to be transformed into disputes between the coastal state and the sponsoring state or the ISA, who are regulators of the contractor at national and international levels, respectively. Here a question of whether such a transformation is plausible arises. The *Convention* does not touch upon this point. However, considering that neither the ISA nor the sponsoring state assume liability in the substitution of the contractor, a negative answer should be given, unless the coastal state disputes the liability of the sponsoring state or the ISA as regulators. The plausibility of the third option depends on whether there exists relevant national legislation in the coastal state or the sponsoring state. Moreover, such national legislation would have to cover issues such as the competent court, the applicable law and the recognition and enforcement of a final judgment. An additional question is whether such a judgment would have any legal effect vis-à-vis the ISA.

A fourth option is the innovative mechanism developed by the ISA, through which a coastal state could claim against a contractor and its sponsoring state before the ISA if the coastal state deems that activities of the contractor cause serious harm, or the threat of serious harm, to the marine environment under the

⁶⁰ *Report of the International Law Commission*, UN GAOR, 53rd sess, Supp No 10, UN DOC A/56/10 (10 August 2001) pt 2, ch 5 ('2001 Prevention Draft Articles'). Articles 8, 11–13 of the *2001 Prevention Draft Articles* detail the requirements related to notification and information, while arts 9–10 elaborate on the requirement for consultations.

⁶¹ The *2001 Prevention Draft Articles* cover transboundary areas, that is, areas 'under the jurisdiction or control of a State other than the State of origin', while art 142 of the *Convention* covers areas under the jurisdiction of coastal states: *Ibid* ch 5, art 2(c); *Convention* art 142.

jurisdiction of the coastal state.⁶² Under this mechanism, the ISA functions in a similar way to a dispute settlement body.

To sum up, five preliminary conclusions can be drawn from the analysis above. First, disputes between a contractor and the ISA over the conclusion and implementation of a contract fall within the jurisdiction of the SDC. However, the practical role of such a judicial mechanism is likely to be very limited because the SDC shall have no jurisdiction with respect to the exercise of the discretionary powers of the ISA. To fill in the gap, an administrative review mechanism is explored in the next section. Secondly, disputes between DSM contractors and disputes between contractors and other users of resources and space in the Area and the high seas fall outside of the jurisdiction of the SDC. To fill in this gap, the establishment of a complaint mechanism within the ISA is examined in the next section. Thirdly, disputes between a contractor and its sponsoring state are resolved at the national level. Fourthly, disputes between a contractor and a coastal state fall outside the jurisdiction of the SDC. However, the ISA has developed an innovative mechanism for settlement of these kinds of disputes for the purpose of the protection of the marine environment. Fifthly, disputes arising out of the commercial relationship between a contractor and the ISA should be referred to a commercial arbitral tribunal.

B *From the Perspective of the ISA*

Under the international legal regime for DSM, the ISA mainly establishes legal relations with the contractor. Hence, the analysis of dispute settlement mechanisms from the ISA's perspective overlaps with that from the contractor's perspective set out above. To avoid repetition, only two special issues that are not touched on above will be discussed below. The first is the possible establishment of an administrative review mechanism and a complaint mechanism within the ISA. The second is those situations involving the invocation of the liability of the ISA.

1 *Establishment of an Administrative Review Mechanism and a Complaint Mechanism*

In Part III(A)(1)–(2) of this article, an administrative review mechanism is suggested to fill in the gaps left by the *Convention* concerning the disputes between a contractor and the ISA over the conclusion and implementation of a contract; while in Part III(A)(4)–(5), a complaint mechanism is suggested to cover disputes between contractors and disputes between a contractor and other users of the Area and the high seas.

An administrative review mechanism is common in the administrative law systems of many countries.⁶³ Under such a mechanism, an appellate

⁶² Council, *Decision of the Council of the International Seabed Authority relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters*, 19th sess, 190th mtg, ISBA/19/C/17 (22 July 2013) reg 34(2).

administrative body is appointed to examine the decisions of a lower administrative agency of the government. The examination covers not only the legality but also the legitimacy of the decisions. The administrative review mechanism is established within the administrative system, as opposed to the judicial review mechanism. At the heart of judicial review is the idea that ‘the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch’.⁶⁴ Under a judicial review mechanism, a court examines only the legality of the decision of an administrative agency of the government. The administrative review mechanism and the judicial review mechanism are different ways to achieve a common goal — supervising the exercise of public authorities, thereby providing remedy to private persons.

The concept of an administrative review mechanism at national level described above could be applied, by analogy, to the international administration of the ISA with respect to DSM activities.⁶⁵ As a response to the absence of the judicial review mechanism under the *Convention*, it is expected that the ISA will introduce an administrative review mechanism within the ISA in the *Draft Exploitation Regulations*, when finalised. Pursuant to reg 57 of the *Draft*

⁶³ See, eg, the Law on Administrative Review in China: 中华人民共和国行政复议法 [Law of the People’s Republic of China on Administrative Reconsideration] (People’s Republic of China) National People’s Congress, 29 April 1999, art 1. In Australia, the Administrative Appeals Tribunal provides a one-stop shop for the independent review of a wide range of decisions made by the Australian Government: Administrative Appeals Tribunal, *Welcome to the AAT* <<http://www.aat.gov.au>> archived at <<https://perma.cc/7XM2-SYN9>>; in the UK, administrative review is available for eligible decisions under the immigration rules: Home Office, *Immigration Rules Appendix AR: Administrative Review* GOV.UK <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-ar-administrative-review>> archived at <<https://perma.cc/RA7P-ZB28>>. In the United States, an Administrative Review Board is established within the Department of Labor: United States Department of Labor, *Administrative Review Board* <<https://www.dol.gov/arb/welcome.html>>.

⁶⁴ In the United States, judicial review was established in the classic case of *Marbury v Madison*. Judicial review is a fundamental concept in the US system of government. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803); Legal Information Institute of Cornell University, *Judicial Review* Cornell University Law School <https://www.law.cornell.edu/wex/judicial_review> archived at <<https://perma.cc/8VA8-24WK>>.

⁶⁵ Rudiger Wolfrum considers that the ISA is a key example of ‘international administration’: Rudiger Wolfrum, ‘Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations’ in Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010) 917, 934. Bogdandy et al state that ‘there is a part of public international law that should be better understood as “international public law”, because it enables and disciplines the exercise of international public authority, i.e. the pursuit of public interests by international institutions’: Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, ‘From Public International to International Public Law: Translating World Opinion into International Public Authority’ (Research Paper No 2016-02, Max Planck Institute for Comparative Public Law and International Law, 25 February 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770639> archived at <<https://perma.cc/JA4P-TJ5A>>. The ISA is exercising an ‘authority’ because it can unilaterally affect the freedom of the contractors; moreover, the exercise of such ‘authority’ is of a ‘public’ nature because it is in and for the common interest of mankind; lastly, the exercise of such ‘public authority’ is of an ‘international’ nature because the legal basis is international law. Thus, the ISA exercises international public authority with respect to DSM activities.

Exploitation Regulations,⁶⁶ there should be ‘an administrative review of any decision made or action taken on behalf of the Authority against a Contractor’.⁶⁷ Under this draft regulation, administrative appeal is made to the Secretary-General of the ISA; in turn, the Secretary-General of the ISA is empowered to initiate investigation. During the procedure, a qualified expert or panel of experts could be called upon to deal with matters of a technical nature. However, reg 57 fails to spell out the legal effect of the decision of the Secretary-General.

Unlike the administrative review mechanism where the subject matter is the exercise of administrative power of the ISA, the complaint mechanism provides a platform for settlement of disputes over the conflicting rights of different users in the Area and the high seas. As indicated above, the ISA has already established an innovative mechanism of this kind to deal with the conflict of rights and interests between the contractor and a coastal state, in particular for the purpose of the protection of the marine environment. A similar mechanism could also be established to cover disputes between contractors and between different users of the Area and the high seas over conflicting rights.

To summarise, the establishment of an administrative review mechanism and a complaint mechanism could help to fill in the gaps left by the current DSM legal framework. However, the implementation of these ideas requires some conditions. First of all, these ideas have to be materialised through the legislation of the ISA which requires the political willingness of the states party to the *Convention*. Secondly, in both mechanisms, the ISA would serve as a dispute settlement body, assuming new quasi-judicial functions. This would necessitate restructuring and the creation of new staff posts at the ISA.

2 *Invocation of the Liability of the ISA*

Article 187(e) of the *Convention* expressly states that the SDC has jurisdiction over disputes concerning the liability of the ISA. Moreover, contractors and any states party to the *Convention* are entitled to invoke the liability of the ISA before the SDC. Yet, claims by states party and contractors have different legal bases. For the contractor, the legal basis is the contract; while for states party, it is the *Convention*, the 1994 *Implementation Agreement* or the regulations issued by the ISA. Moreover, owing to the different legal relationships between the parties to a dispute, the contents of the claims by a contractor or a state party could also be different. A contractor is likely to invoke the liability of the ISA for the reason that the ISA infringes its contractual rights under the contract. A state party, on the other hand, might invoke the liability of the ISA because it believes the ISA has failed to fulfil its regulatory obligations.

⁶⁶ This provision is related to a suggestion in the ISA discussion prepared by Herbert Smith Freehills: Herbert Smith Freehills, ‘Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations’ (Discussion Paper No 1, ISA, 12 February 2016) 9 <<https://www.isa.org.jm/files/documents/EN/Pubs/DPs/DP1.pdf>> archived at <<https://perma.cc/7MVQ-Q9NG>>.

⁶⁷ The administrative review mechanism in this provision explicitly covers decision or action by ‘duly authorized representative(s) of the Authority’. However, it is not clear whether it also covers decisions by the organs of the ISA, such as the Council. ISA, ‘Developing a Regulatory Framework for Mineral Exploitation in the Area’ (Report, ISA, July 2016) reg 57 <https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf> archived at <<https://perma.cc/GB93-WU86>>.

However, since the SDC must refrain from reviewing the legislative acts⁶⁸ and the exercise of the discretionary powers of the ISA, the judicial mechanism as depicted in art 187 of the *Convention* is of limited practical value. Alternatively, states party might also invoke the liability of the ISA through its internal procedures. They might, for example, question the ISA during the annual sessions of the Assembly or Council of the ISA. This is a political way of settling disputes.

C *From the Perspective of the Sponsoring State*

Like the ISA, the sponsoring state mainly establishes legal relations with the contractor. Yet, such legal relations are built on the basis of national law. At the international level, a sponsoring state may become involved in disputes between its sponsored contractor and other actors. Also, it may itself be the subject of legal proceedings for its own state liability. Accordingly, two issues under discussion in this section are: (1) the sponsoring state as a third party in existing proceedings; and (2) the invocation of the liability of the sponsoring state.

1 *The Sponsoring State as a Third Party to Existing Proceedings*

According to art 190 of the *Convention*, a sponsoring state has the right to appear or participate in existing proceedings where its sponsored contractor participates as a party. However, art 190 fails to explain the legal status of the sponsoring state in the proceedings. It is reasonable to infer that the sponsoring state could participate as an observer who does not have any legal rights or obligations in the proceedings. Moreover, a sponsoring state could participate as an intervening third party. Yet, to do so, it must meet substantive as well as procedural requirements. Under art 31(1) of the *ITLOS Statute*:

Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene.⁶⁹

Legal consequences flow from the legal status of an intervening third party. Article 31(3) of the *ITLOS Statute* states that:

If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party so far as it relates to matters in respect of which that State Party intervened.⁷⁰

Although not acknowledged expressly, it might also be argued that the sponsoring state could participate as *amicus curiae* because of its special connection with the contractor and its participation being beneficial to the court or tribunal. In this way, it could provide its perspective or expertise to the court or the tribunal via written submissions, but the decision of the court or tribunal

⁶⁸ *Convention* art 189.

⁶⁹ *Ibid* annex VI, art 31(1).

⁷⁰ *Ibid* art 31(3).

would not be binding upon it.⁷¹ Lastly, in some situations, the sponsoring state might participate for the purpose of representing its sponsored contractor at the international level.⁷²

2 Invocation of the Liability of the Sponsoring State

The core question in this subsection is that of *locus standi*, namely, who is entitled to invoke the liability of the sponsoring state. This question constitutes a procedural barrier which needs to be overcome before a case can go into the merits phase, if invocation of liability is made before a judicial body. In the absence of an answer in the *Convention*, it is suggested that states party to the *Convention* and the ISA have standing, with the ISA being the better choice.

(a) States Party to the Convention as the Candidates

Following the approach adopted by the ILC's *2001 Articles on State Responsibility* ('*2001 ASR*'), the liability of the sponsoring state could be invoked by an injured state⁷³ or a state other than an injured state.⁷⁴ The application of art 42 of the *2001 ASR* in the context of DSM is relatively easy: any state whose rights and legitimate interests are specifically affected by the internationally wrongful acts of the sponsoring state is certainly entitled to invoke the liability of the sponsoring state. Since the Area and its resources are declared as common heritage of mankind,⁷⁵ and states are considered as having common interests in the use of resources in the Area and the protection of the marine environment, a non-injured state could also invoke the liability of the

⁷¹ 'Amicus participation is ordinarily justified on the basis that this friend of the court is in a position to provide the court or tribunal its special perspective or expertise in relation to the dispute' and it ordinarily takes the form of written submissions. Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation' (2011) 29 *Berkeley Journal of International Law* 200, 207.

⁷² See, eg, the situations discussed in Part III(A)(5) of this article.

⁷³ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, 56th sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) annex, art 42 ('*Responsibility of States for Internationally Wrongful Acts*').

⁷⁴ The terms 'state responsibility' and 'state liability' have differences between their substantive aspects. To understand these differences, a comparative analysis of the ILC's work on the topics of 'Responsibility of States for Internationally Wrongful Acts' ('state responsibility') and 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law' ('international liability') is necessary. Particularly, a retrospect of the historical development of international liability shows that initially the ILC's work on international liability focused on state liability *sine delicto*. It was not until the 10th report in 1994 that Special Rapporteur Julio Barboza changed the direction of the inquiry from state liability *sine delicto* governed by primary rules to state liability *ex delicto* governed by secondary rules. This shift resulted in state liability falling within the scope of state responsibility: Julio Barboza, *Tenth Report on International Liability for Injurious Consequences of arising out of Acts not Prohibited by International Law*, UN GAOR, 46th sess, UN Doc A/CN.4/459 (4 April 1994) [5]. In spite of the unification of the two terms, state liability kept its salient characteristics. The focal point of state liability is on the element of 'damage', in contrast with that of state responsibility which is on the element of 'wrongful act'. This is the main difference between the two terms. Note, however, that the differences between the terms are confined to the conditions for the establishment of state responsibility or state liability; they do not have impact on the question of how to implement state responsibility or state liability. Being both within the scope of secondary rules, the two terms are unified with respect to their procedural aspects. Since this article focuses only on procedural aspects, the two terms are used interchangeably.

⁷⁵ *Convention* art 136.

sponsoring state via the application of art 48 of the *2001 ASR*. Article 48(1) of the *2001 ASR* states:

Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.⁷⁶

Thus, under this article, a state party to a treaty can invoke liability of another state party for protecting the common interest under the treaty and, any states (including non-states party) can invoke liability of a state party if it is for the protection of the common interest of the international community as a whole. Both means of invocation are possible in the context of the DSM regime.

However, invocation by a state party to the *Convention* is more practical because the dispute settlement mechanism under the *Convention* is available for states party only. Article 187(a) of the *Convention* prescribes that the SDC has jurisdiction over ‘disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto’. Moreover, art 188(1) states that:

Disputes between States Parties referred to in Article 187, subparagraph (a), may be submitted:

- (a) at the request of the parties to the dispute, to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17; or
- (b) at the request of any party to the dispute, to an ad hoc chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, article 36.⁷⁷

Invocation by a non-state party will encounter a practical problem, namely, that they lack a compulsory judicial mechanism. The International Court of Justice could have jurisdiction under art 36(2) of the *Statute of the International Court of Justice*. However, such a mechanism is still preconditioned on the consent of the states. Therefore, it is suggested that states party be the candidates.

Despite the availability of judicial dispute settlement mechanisms, there are problems with the invocation of the liability of the sponsoring state by states party. Following art 48(a) of the *2001 ASR*, each individual state party is entitled to invoke the liability of the sponsoring state. This might have the following potential problems. The first potential problem is concurrent invocation. Since each state is entitled to invoke liability, theoretically, there might be a situation

⁷⁶ *Responsibility of States for Internationally Wrongful Acts* annex, art 48(1).

⁷⁷ *Convention* art 188(1).

where more than one state invokes the liability of the sponsoring state simultaneously. The coordination or synthesis of these claims may become a problem. The *Convention* has a solution for this problem. Article 32 of the *ITLOS Statute* prescribes the right to intervene in cases of interpretation or application as follows:

1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith.
[...]
3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.⁷⁸

Through the procedural mechanism of intervention, the problem of concurrent invocation is solved. Secondly, however, some might worry that, although concurrent invocation is not a problem, the recognition of the entitlement of each individual state to invoke liability of the sponsoring state might open the floodgates of international litigation against the sponsoring state, thereby significantly increasing the legal risk of sponsoring DSM activities. Thirdly, to the contrary, others might argue that empowerment of everybody is tantamount to empowerment of nobody because of the classic free rider problem. To illustrate, a key example can be found in the area of international human rights protection. Although established as an enforcement mechanism in almost all human rights treaties, the interstate complaint mechanisms are rarely used in reality. One might argue that what makes states reluctant to accuse other states of breaching their human right obligations will also make states reluctant to invoke the liability of the sponsoring state for breaching its international obligations in the DSM context. Lastly, one may also contend that invocation of liability of the sponsoring state by a state party carries the risk of being politicised. For instance, a non-sponsoring state party might use the entitlement to invoke liability of the sponsoring state as a weapon to check the right of the latter for the sake of its own economic interests rather than the common interests of the mankind.

Although only hypothetical, the potential problems outlined above cannot be ruled out. It thus seems that the invocation of liability by states party is far from ideal. Accordingly, the ISA's role as a guardian of common heritage of mankind will be examined next.

(b) *International Seabed Authority as the Candidate*

The ISA is entitled to invoke the liability of the sponsoring state. There are two channels through which it can do so. On the one hand, the ISA can invoke liability of the sponsoring state through the political channel. Article 162(2)(a) of the *Convention* states that the Council is empowered to 'supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance'.

⁷⁸ *ITLOS Statute* art 32(1) and (3).

On the other hand, the ISA can invoke the liability of the sponsoring state through the judicial channel. The *Convention* art 162(2)(u) states that the Council shall ‘institute proceedings on behalf of the Authority before the SDC in cases of non compliance’. Moreover, a judicial dispute settlement mechanism is available. Pursuant to art 187(b)(i) of the *Convention*, the SDC has jurisdiction over:

[D]isputes between a State Party and the Authority concerning acts or omissions of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith.⁷⁹

It is therefore undoubtable that, under the DSM legal regime, the ISA is entitled to invoke the liability of the sponsoring state either through the political or judicial channel — there is a judicial dispute settlement mechanism available.

In comparison to invocation of liability by states party to the *Convention*, the advantages of the invocation by the ISA are obvious. Namely, all of the potential problems analysed above concerning invocation by individual states can be avoided. First, there will be no concurrent invocations. Secondly, the invocation cannot be omitted or deliberately avoided, that is, the ISA has to invoke the liability of the sponsoring state when non-compliance occurs, otherwise the liability of the ISA itself would arise. Thirdly, the invocation of liability would be less likely to be used as a weapon against the sponsoring states to further the economic interests of non-sponsoring states, since the decision is made by the ISA as an organisation.

However, there is one drawback with respect to the invocation of liability by the ISA. This drawback is related to the composition and decision-making procedure of the Council. According to s 3 of the annex to the 1994 *Implementation Agreement*, decisions of the Council are normally made on the consent of its members. Considering that most sponsoring states are members of the Council, this means that if the Council intends to invoke the liability of a sponsoring state as a member of the Council, the Council must gain the consent of the sponsoring state itself. This procedural arrangement paralyses the functioning of the Council. The problem could be solved by amending or interpreting the decision-making procedure, for instance, by requiring the state whose liability is at issue not to participate in the decision-making procedure. Upon comparison, it seems that the advantages of the invocation by the ISA prevail.

IV CONCLUSION AND POLICY ADVICE

The analysis in Part III shows that the special judicial system centred on the SDC, established under s 5, pt XI of the *Convention*, is not as comprehensive and robust as it seems. There are gaps in the current legal framework which need to be filled; and it is inefficient with respect to the remedial mechanism for the contractor. The means by which to fill these gaps and improve the efficiency of

⁷⁹ *Convention* art 187(b)(i).

the remedial mechanism for the contractor include: (1) the establishment of an administrative mechanism to check the exercise of administrative powers of the ISA; and (2) the establishment of a complaint mechanism to settle disputes between different users of the Area and the high seas. Both means require the ISA to assume a new function similar to that of a dispute settlement body.

These suggestions are of significance to both the contractor and the ISA. Considering that the contractor and the ISA, as parties to a DSM contract, are equipped with unbalanced political powers, a more efficient remedial mechanism is an important tool for the contractor to gain balance in its legal relationship with the ISA. For this reason, policy advice for the contractor, including the prospecting contractor, is that it should attempt to have input on the establishment of an effective remedial mechanism in the *Draft Exploitation Regulations* (when finalised) by becoming actively involved in the legislative process. The policy advice for the ISA is to devise a mechanism that could provide efficient remedial outcomes and convenience to the contractor. This could increase the confidence of the contractor in the international administration of the Area by the ISA. After all, the participation of the contractor is the keystone of the whole DSM legal regime — without it, the very reason for the existence of the ISA would disappear.

The role of the sponsoring state in the dispute settlement mechanism relating to DSM is less significant than that of the contractor or the ISA. However, it is noted that the chance of the sponsoring state being involved in international legal proceedings is higher than it looks. As is shown in Part III(A)(3), a sponsoring state might become involved as a third party in existing proceedings where its sponsored contractor participates as a party. Its liability might also be invoked either by states party to the *Convention* or by the ISA. Thus, the sponsoring state should be aware of the legal risk associated with its role and prepare itself for avoiding or dealing with such risk. The policy advice for the sponsoring state is that it should conduct studies, preferably together with its sponsored contractor, on the ways in which to participate in existing proceedings and the different implications and legal effects.