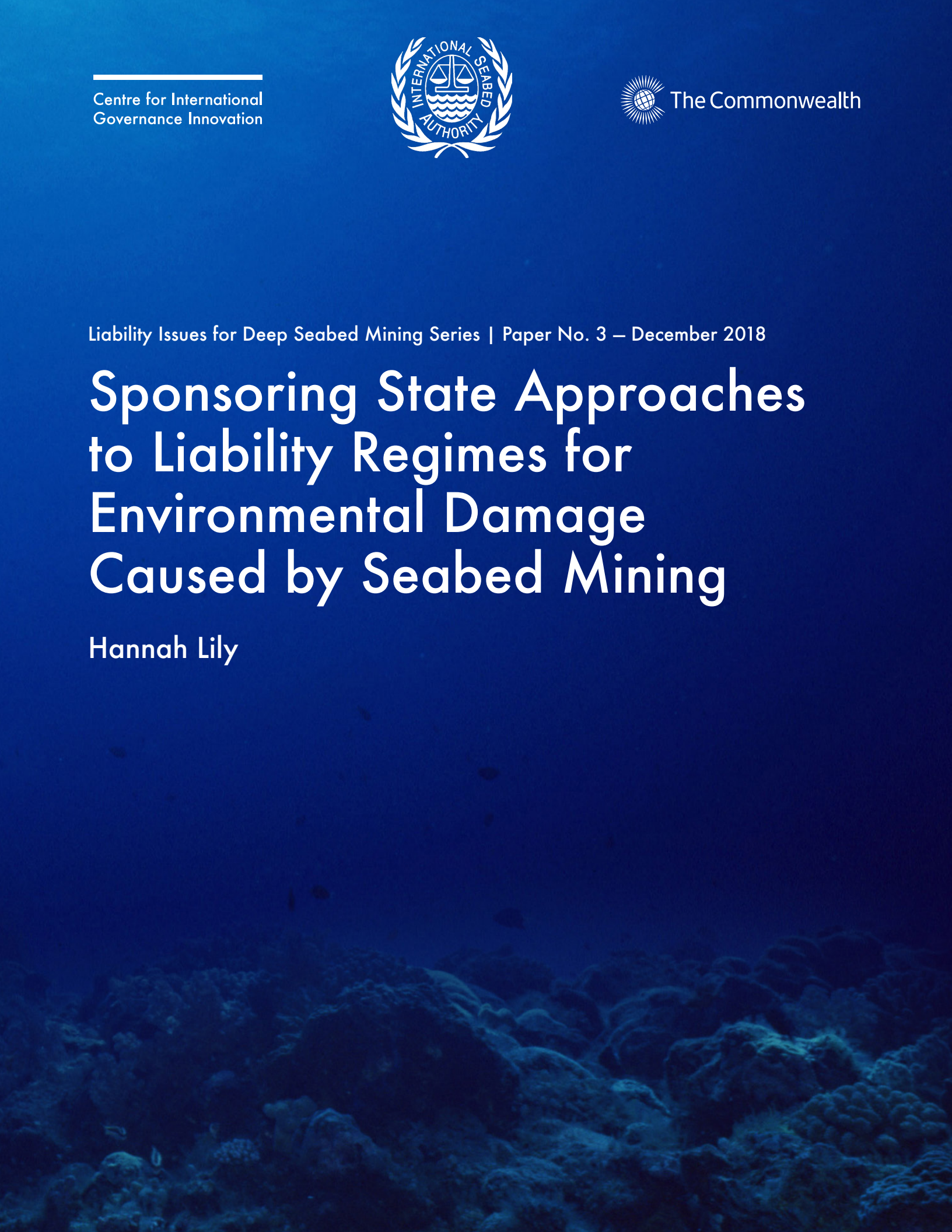
Centre for International Governance Innovation

The Commonwealth

Liability Issues for Deep Seabed Mining Series | Paper No. 3 — December 2018

Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining

Hannah Lily



Centre for International Governance Innovation

The Commonwealth

Liability Issues for Deep Seabed Mining Series | Paper No. 3 — December 2018

Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining

Hannah Lily

CIGI Masthead

Printed in Canada on paper containing 100% post-consumer fibre and certified by the Forest Stewardship Council® and the Sustainable Forestry Initiative.

Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

Table of Contents

About the Project

The Liability Issues for Deep Seabed Mining project was developed by the Centre for International Governance Innovation (CIGI), the Commonwealth Secretariat and the Secretariat of the International Seabed Authority (ISA) to assist in clarifying legal issues of responsibility and liability underpinning the development of exploitation regulations for the deep seabed. CIGI, in collaboration with the ISA Secretariat and the Commonwealth Secretariat, in 2017, invited leading legal experts to form the Legal Working Group on Liability for Environmental Harm from Activities in the Area (LWG) to discuss liability related to environmental damage, with the goal of providing the Legal and Technical Commission, as well as members of the ISA with an in-depth examination of potential legal issues and avenues.

Papers in the series cover the following topics: the current legal architecture for liability/responsibility under the United Nations Convention on the Law of the Sea; the scope of activities covered under a liability regime; the responsible parties; the potential claimants; the range of recoverable damages; and the appropriateness of using insurance and compensation funds to ensure adequate resources for compensation. CIGI Senior Fellow Neil Craik coordinated the development of the paper series.

About the LWG

The LWG was co-convened by CIGI, the Commonwealth Secretariat and the Secretariat of the ISA, under the joint direction of Neil Craik (CIGI), Hannah Lily (Commonwealth Secretariat) and Alfonso Ascencio-Herrera (ISA Secretariat). Other members of the LWG were invited based on their expertise in areas related to international law of state responsibility and liability, international environmental law and law of the sea. While working under the auspices of the ISA, the LWG is an independent group of legal experts.

The members of the LWG are:

- Alfonso Ascencio-Herrera, Deputy Secretary-General, ISA
- Christopher Brown, Legal Officer, ISA
- Eden Charles, Independent Consultant on International Law, and Former Deputy Permanent Representative of Trinidad and Tobago to the United Nations*
- Neil Craik, Senior Fellow, CIGI, and Professor of Law, University of Waterloo*
- Tara Davenport, Research Fellow, Centre for International Law, National University of Singapore*
- Elie Jarmache, Special Adviser on the Law of the Sea, Member, Legal and Technical Commission, ISA
- Hannah Lily, Legal Adviser, Commonwealth Secretariat*
- Ruth Mackenzie, Reader in International Law, University of Westminster*
- Stephen E. Roady, Professor of the Practice of Law, Duke University School of Law
- Andres Rojas, Diplomat, Ministry of Foreign Affairs and Worship, Argentina*
- Dire Tladi, Professor, University of Pretoria, and Member, International Law Commission
- Guifang (Julia) Xue, Professor, KoGuan Law School, Shanghai Jiao Tong University*

*Contributing authors to the paper series.

About the Author

Hannah Lily is a UK-qualified solicitor and legal expert on regulatory law, with specialization in seabed mining. As legal adviser (oceans and natural resources) at the Commonwealth Secretariat in London, Hannah advises a number of Commonwealth governments on the development of their national seabed mineral laws and their engagement with the International Seabed Authority. Hannah was previously legal adviser to the Secretariat of the Pacific Community-European Union Pacific Islands Deep Sea Minerals Project based in Fiji, and has assisted in drafting a number of regional instruments and national seabed mining laws across the Pacific Islands region, including legislation currently in force in the Cook Islands, Fiji, Kiribati, Nauru, Tonga and Tuvalu.

Acronyms and Abbreviations

IOM	Interoceanmetal Joint Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LOSC	United Nations Convention on the Law of the Sea
LWG	Legal Working Group on Liability for Environmental Harm from Activities in the Area
SDC	Seabed Dispute Chamber
SPC-EU	Secretariat of the Pacific Community-European Union

Executive Summary

This paper examines how legal liability for damage arising from seabed mining is currently handled in the national laws of countries who sponsor seabed mineral activities in international waters. The paper explores how sponsoring state laws form a crucial part of the international legal liability regime for seabed mining and highlights some apparent gaps in the current statutory framework.

Introduction

Sponsoring State Liability

This paper considers a particular aspect of the legal regime for regulating mining activities in the seabed area beyond national jurisdiction ("the Area"). The United Nations Convention on the Law of the Sea 1982 (LOSC) created a regime whereby interested parties are able to apply to the intergovernmental body for a contract to explore or exploit minerals in the Area, provided they are sponsored by a state party. The LOSC also provides that "damage caused by the failure of a State Party to carry out its responsibilities under this Part shall entail liability."[1] Those "responsibilities" of a sponsoring state include taking all necessary measures within its domestic legal system to ensure that the contractor's activities in the Area are carried out in conformity with Part XI of the LOSC and the terms of its contract.[2]

Scope of this Paper

This paper will examine, as of October 2018, to what extent sponsoring states have done the following:

- enacted legislation aimed at ensuring contractor compliance with the LOSC and the rules of the International Seabed Authority (ISA); and
- included mechanisms in their domestic sponsorship legislation to meet the LOSC article 235 obligation for recourse for "prompt and adequate compensation."[3]

Sponsoring State Obligations

In addition to the specific responsibility to implement laws and related measures designed to ensure contractor compliance with the LOSC and ISA rules, sponsoring states have other direct responsibilities that arise from the LOSC or from ISA regulations. These include assisting the ISA, applying a precautionary approach, employing best environmental practices and requiring environmental impact assessments to be conducted.[4]

In order for a state to be found liable under Part XI, it must first be the sponsor of a contractor whose actions result in damage. The contractor must have contravened its obligations under its contract and failed to pay the actual amount of the damage.[5] Furthermore, the sponsoring state must have failed to carry out its responsibilities under the LOSC, and the failure to carry out these responsibilities must be causally linked to the damage caused by the sponsored contractor.[6]

1 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 art 139(2) (entered into force 16 November 1992) [LOSC].

2 *Ibid*, arts 139, 153, Annex III, art 4(4).

3 This paper does not enquire into other general domestic civil law rules and procedures within sponsoring states and the extent to which these might be accessible to third-party claimants for damage arising out of sponsored activities in the Area. The paper also does not consider, in any detail, non-liability aspects of sponsoring state legislation (for example, different ways in which the "responsibility to ensure" is operationalized by national regulators), noting that such a study appears to be in progress by the ISA Secretariat, upon the council's request. See "Summary of the Twenty-third Annual Session of the International Seabed Authority" (2017) 25:151 Earth Negotiations Bulletin [ISA Summary], online: <www.isa.org.jm/sites/default/files/files/documents/enb25151e.pdf>.

4 Seabed Dispute Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011), Advisory Opinion No 17 [SDC Advisory Opinion 2011] at para 122ff; see also Deep Sea Conservation Coalition, *Summary of Some Liability Issues: A Briefing to the International Seabed Authority for the 23rd Session*, online: <www.savethehighseas.org/wp-content/uploads/2017/08/liability-briefing-DSCC.pdf>.

5 SDC Advisory Opinion 2011, *supra* note 4 at para 202.

6 *Ibid* at paras 181–82.

Effect on State Liability of Discharge of Sponsoring State Responsibility

The LOSC indicates that there are "due diligence" measures that a sponsoring state can take to discharge its "responsibility to ensure" and to exempt the state from the attached liability.[7] These include the adoption of laws and regulations and the implementation of administrative measures reasonably appropriate within the context of its domestic legal system to secure compliance by persons under its jurisdiction (such as sponsored contractors).[8]

There has been limited public discussion to date as to what "administrative measures" other than the adoption of laws and regulations might be required. The SDC Advisory Opinion 2011 suggested that administrative measures "may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor. They may also provide for the co-ordination between the various activities of the sponsoring State and those of the Authority with a view to eliminating avoidable duplication of work."[9] It certainly seems likely that such measures might reasonably include institutional capabilities such as an identified regulatory body, with monitoring and enforcement functions and access to appropriate personnel, equipment and other technical capacity to implement them.

In any event, where such measures are satisfactorily taken, a sponsoring state will bear no liability, even if unlawful damage is, in fact, caused by its sponsored contractor.[10] Thus "the sponsoring State's obligation 'to ensure' is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result [...] an obligation 'of conduct' and not 'of result' [...] an obligation of 'due diligence.'"[11]

It seems logical to assume that sponsoring states would want to absolve themselves of liability that may arise from contractor action. See, for example, the Republic of Nauru's comments in instigating the SDC Advisory Opinion 2011: "Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States)."[12]

It is clear that a requisite step toward achieving this protection from liability is for a sponsoring state to put in place necessary measures, including legislation, to ensure contractor compliance with Part XI of the LOSC, the ISA contract and the ISA rules; and that this obligation applies equally to developed and developing states.[13]

Sponsoring States' Role in Upholding Contractor Liability

Sponsoring states are likely to play a key role in enabling a claimant to seek redress from damage caused by their sponsored contractors. One can presume that the sponsoring state — the contractor's country of nationality and/

7 *LOSC*, *supra* note 1, art 139(2); SDC Advisory Opinion 2011, *supra* note 4 at paras 117-20.

8 *LOSC*, *supra* note 1, Annex III, art 4(4).

9 Article 153(4) of the LOSC also elaborates that a sponsoring state's necessary measures should operate *to assist the ISA* in exercising such control over activities in the Area as is necessary for the purpose of securing the contractor's compliance with the relevant provisions of Part XI and the rules, regulations and procedures of the ISA, and approved plans of work. The division of the regulatory responsibilities between sponsoring states and the ISA has yet to be delineated in any ISA rules, regulations or procedure documents; SDC Advisory Opinion 2011, *supra* note 4 at para 218.

10 *LOSC*, *supra* note 1, art 139(2), Annex III, art 4(3); SDC Advisory Opinion 2011, *supra* note 4.

11 SDC Advisory Opinion 2011, *supra* note 4 at para 110.

12 ISA, *Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability*, 16th Sess, UN Doc ISBA/16/C/6 (2010) at para 1.

13 SDC Advisory Opinion 2011, *supra* note 4 at paras 158, 219.

or "effective control" as per LOSC article 153(2)(b) — would be the appropriate jurisdiction in which to lodge a claim for harmful effects from a contractor's activities in the Area.

States are specifically required by LOSC article 235 to "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."[14] Article 235 provides "compulsory insurance or compensation funds" as examples of mechanisms that may assist in meeting this obligation.

Sponsoring State Liability Issues in the Emerging ISA Regime

The ISA's Exploitation Regulations are currently under development. Once finalized, these regulations will be binding on all sponsoring states. The text of these regulations, and the existing Exploration Regulations, bear examining for any additional insight into sponsoring state liability issues.

The Exploration Regulations (ISBA/16/A/12/Rev.1, ISBA/18/A/11 and ISBA/19/C/17)[15] and the latest iteration of the draft Exploitation Regulations shared with stakeholders in August 2017 (ISBA/23/LTC/CRP3/Rev)[16] reveal close adherence to the wording of the liability provisions of the LOSC relating to both the contractor and the ISA, respectively. However, while sponsoring states' headline responsibilities are listed in draft Exploitation Regulation 91, no specific direction is given as to how sponsoring states should address liability issues.[17]

Summary of Sponsoring States and Legislation Status

Table 1 sets out a list of sponsoring states, their contracts and whether a national law addressing sponsorship has been enacted.

Sponsoring States: Overview

As of October 2018, the ISA's 29 exploration contracts comprise between them 20 different ISA contractors (including seven contractors who hold more than one contract each).

These are sponsored by 20 different sponsoring states, including one contract sponsored by a consortium of six states and nine sponsoring states who hold more than one sponsorship:

- Russia and China have each sponsored four contracts;
- Korea has sponsored two contracts and one pending contract;
- Japan, France, India, Germany and the United Kingdom have each sponsored two contracts;
- Poland has sponsored one contract as part of the Interoceanmetal Joint Organization (IOM) consortium and one other pending contract;
- Belgium, Tonga, Nauru, Singapore, Kiribati, the Cook Islands and Brazil have each sponsored one contract; and
- Bulgaria, Czech Republic, Cuba, Slovakia and Poland are each co-sponsors of the consortium contract.

14 *LOSC*, *supra* note 1, art 235.

15 ISA, *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, UN Doc ISBA/16/A/12/Rev.1 (2010) [ISA, Polymetallic Sulphides]; ISA, *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, UN Doc ISBA/18/A/11 (2012) [ISA, Cobalt]; ISA, *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, UN Doc ISBA/19/C/17 (2013) [ISA, Polymetallic Nodules].

16 ISA, *Draft Regulations on Exploitation of Mineral Resources in the Area*, UN Doc ISBA/23/LTC/CRP.3* (2017) [ISA, Mineral Resources].

17 An inference can be drawn from draft Exploitation Regulation 40(3) that a sponsoring state's regime must allow for domestic legal action against a contractor for failure to limit adverse impacts upon the occurrence of an "incident" (causing harm to the marine environment or other sea users). This specifically relates to state – presumably enforcement – action, rather than to a third-party tortious claim.

Table 1: ISA Sponsoring States

State	Contractor	Location	Resource	Start Date	Sponsorship Law Enacted?
Poland	IOM	CCZ	Nodules	2001	No
	Government	Mid-Atlantic	SMS	Pending	
Russia	IOM	CCZ	Nodules	2001	No
	JSCY	CCZ	Nodules	2001	
	Government	Mid-Atlantic	SMS	2012	
	Government	NW Pacific	Crusts	2015	
Bulgaria	IOM	CCZ	Nodules	2001	No
Cuba	IOM	CCZ	Nodules	2001	No
Czech Republic	IOM	CCZ	Nodules	2001	Yes
Slovakia	IOM	CCZ	Nodules	2001	No
Korea	Government	CCZ	Nodules	2001	No
	Government	Central Indian	SMS	2014	
	Government	NW Pacific	Crusts	Pending	
China	COMRA	CCZ	Nodules	2001	Yes
	COMRA	SW Indian	SMS	2011	
	COMRA	NW Pacific	Crusts	2014	
	Minmetals	CCZ	Nodules	2017	
Japan	DORD	CCZ	Nodules	2001	Yes
	JOGMEC	NW Pacific	Crusts	2014	
France	Ifremer	CCZ	Nodules	2001	Yes
	Ifremer	Mid-Atlantic	SMS	2014	
India	Government	Central Indian	Nodules	2002	No
	Government	Central Indian	SMS	2016	
Germany	BGR	CCZ	Nodules	2006	Yes
	BGR	Indian	SMS	2015	
Nauru	NORI	CCZ	Nodules	2011	Yes
Tonga	TOML	CCZ	Nodules	2012	Yes
Belgium	GSR	CCZ	Nodules	2013	Yes
United Kingdom	UKSRL	CCZ	Nodules	2013	Yes
	UKSRL	CCZ	Nodules	2016	
Kiribati	Marawa	CCZ	Nodules	2015	Yes
Singapore	OMS	CCZ	Nodules	2015	Yes
Brazil	CPRM	S Atlantic	Crusts	2015	Pending
Cook Islands	CIIC	CCZ	Nodules	2016	Pending

Sources: See ISA, "Deep Seabed Minerals Contractors", online: <www.isa.org.jm/deep-seabed-minerals-contractors>; ISA, "National Legislation Database", online: <www.isa.org.jm/national-legislation-database>. *Abbreviations:* BGR — Bundesanstalt für Geowissenschaften und Rohstoff; CCZ — Clarion-Clipperton Zone; CIIC — Cook Islands Investment Corporation; COMRA — China Ocean Mineral Resources Research and Development Association; CPRM — Companhia De Pesquisa de Recursos Minerais; DORD — Deep Ocean Resources Development Company Ltd.; GSR — Global Sea Mineral Resources NV; Ifremer — Institut Français de Recherche pour l'Exploitation de la Mer; JOGMEC — Japan Oil, Gas and Metals National Corporation; JSCY — JSC Yuzhmorgeologiya; Marawa — Marawa Research and Exploration Ltd.; NORI — Nauru Ocean Resources Inc.; OMS — Ocean Mineral Singapore Pte. Ltd.; SMS — Seafloor Massive Sulphides; TOML — Tonga Offshore Mining Ltd.; UKSRL — United Kingdom Seabed Resources Ltd.

Sponsoring State Legislation: Overview

Of the current 20 sponsoring states, 10 had targeted sponsorship laws in force as of October 2018, and one other (France) addresses sponsorship issues within a broader piece of national legislation.[18] Two of the nine countries without sponsorship laws in place (Brazil and the Cook Islands) have indicated that such legislation is under development.[19]

However, this leaves 13 ISA exploration contracts sponsored by states with no relevant law in place and thus states who are potentially[20] not meeting their due diligence responsibilities as a sponsoring state under the LOSC and, therefore, exposed to any damages arising from contractor (or state) acts. The absence of any implementing legislation also raises the issue of the oversight obligations of the ISA in relation to appropriate regulatory conditions. There are also non-sponsoring states with relevant laws in place, for example, Fiji, Tuvalu and New Zealand.

Liability Aspects of Existing Sponsoring State Legislation

The author has reviewed the 11 laws enacted by countries who are currently active ISA sponsoring states and examined these specifically for their treatment of liability.

"Responsibility to Ensure" Incorporated into National Laws

Examination of the 11 sponsorship laws gives rise to the following general observations:

- The primary purpose of each of these 11 laws is to meet the sponsoring state's LOSC "responsibility to ensure" by putting in place domestic regulation of contractor activities.

Most of the laws expressly state this purpose. For example:

- Kiribati's law states that "[t]he objects of this Act are: [...] to provide that Seabed Mineral Activities under Kiribati's sponsorship in the Area must be carried out in accordance with best international practice, and in a manner that is consistent with internationally accepted rules, standards, principles and practices, including Kiribati's responsibilities under the UN Convention on the Law of the Sea" (section 5 of Kiribati's Seabed Minerals Act 2017).

- Singapore's law states that "[t]he purposes of this Act are to regulate the exploration for and exploitation of resources in the Area by persons sponsored by Singapore under [the LOSC]" (section 3 of Singapore's Deep Seabed Mining Act 2015).

- Germany's law states that "[t]he purpose of this Act is to ensure compliance with the obligations of the Federal Republic of Germany deriving from [the LOSC] [...and] to regulate supervision of prospecting and activities in the Area" (section 1 of Germany's Seabed Mining Act 1995).

Accordingly, each of the 11 sponsorship laws studied contains an express statutory requirement for sponsored contractors to comply with Part XI of the LOSC and/or the relevant contractual and regulatory rules of the ISA.

- Different countries have taken different approaches to the level of detail contained in their law. For example, France's law covers sponsorship issues very briefly, in a single six-paragraph section within a broader maritime zone law, whereas Nauru has a dedicated law comprising 56 sections over 30 pages.

- Different countries have taken different approaches to the level of regulatory proactivity they anticipate undertaking as a sponsoring

18 This paper did not include in its scope the Russian Federation's Decree of the President of November 22, 1994 No. 2099 "About activities of the Russian physical and legal entities for exploration and development of mineral resources of the seabed outside the continental shelf", presented to the ISA Secretariat by way of a May 2018 note verbale. See note verbale from Embassy of the Russian Federation to the ISA Secretariat (28 May 2018), online: <www.isa.org.jm/files/documents/EN/NatLeg/Russia/rus.pdf>.

19 Permanent Mission of Brazil, *Note Verbale from the Permanent Mission of Brazil to the International Seabed Authority*, No 05/17 (11 August 2017), online: <www.isa.org.jm/files/documents/EN/NatLeg/Brazil/BrazilNv.pdf>; ISA, *Laws, regulations and administrative measures adopted by sponsoring States and other members of the International Seabed Authority with respect to the activities in the Area,* 18th Sess, UN Doc ISBA/18/C/8 (2012) at 3, online: <www.isa.org.jm/sites/default/files/files/documents/cookislands.pdf>.

20 In some instances (for example, India and Korea), the contractor is the government itself, rather than a separate entity. The extent to which this obviates the need for domestic legislation to regulate activities under the contract is a moot point.

state versus the role of the ISA. For example, while the laws of the Czech Republic, the United Kingdom and Singapore do not require any regular reporting to the sponsoring state from its contractor, the laws of Belgium and Singapore do not include any provisions to empower the state to inspect contractor activities. On the other hand, the laws in China, Nauru, Kiribati and Tonga reserve considerable state regulatory and inspection powers and place substantial requirements upon contractors to provide regular data on a range of subject matters.

All the laws, apart from those of France, incorporate some sanctions in the event of non-compliance by a contractor, including financial penalties or revocation of sponsorship.

Treatment of Liability within National Laws

Table 2 summarizes the national laws examined for the purpose of this paper and whether particular aspects relevant to liability are addressed in those laws.

Table 2: Treatment of Liability within National ISA Sponsorship Laws

Country and Title of Measure	Liability Expressly Addressed?	Causes of Action/ Standard of Harm?	Fund or Bond?	Insurance?	Contractor Indemnity for State?	Access to Domestic Courts?	Enforcement of Judgments?
United Kingdom Deep Sea Mining (Temporary Provisions) Act 1981, as amended by Deep Sea Mining Act (2014) Deep Sea Mining (Exploration Licences) Regulations (1984)	No	No	Not expressly covered, but sponsorship licences "may contain such terms and conditions as the Secretary of State thinks fit."		Yes (model contract terms)	No	SBD decisions and LOSC arbitral awards can be enforced domestically.
Japan Act on Interim Measures for Deep Seabed Mining (1982)	Yes	Yes	Not expressly covered, but conditions may be placed on sponsorship permits.			Yes	No
Germany Act Regulating Seabed Mining 1995 (revised 2010)	No	No	Not expressly covered, but sponsorship approval can be made subject to conditions necessary to meet the law's objectives (which include compliance with the LOSC).			No	No
Czech Republic Prospecting, Exploration for and Exploitation of Mineral Resources from the Seabed beyond Limits of National Jurisdiction (2000)	No	No	No	Yes	No	No	No

Country and Title of Measure	Liability Expressly Addressed?	Causes of Action/ Standard of Harm?	Fund or Bond?	Insurance?	Contractor Indemnity for State?	Access to Domestic Courts?	Enforcement of Judgments?
Belgium Law on Prospecting, Exploration and Exploitation of Seabed Mineral Resources Beyond National Jurisdiction (2013)	Yes	LOSC	No	Yes	No	No	No
Tonga Seabed Minerals Act (2014)	Yes	LOSC	Yes	Yes	Yes	No	No
Nauru International Seabed Minerals Act (2015)	Yes	LOSC	Yes	Yes	Yes	Yes	No
Singapore Deep Seabed Mining Act (2015)	Yes	LOSC	Not expressly, but conditions can be set for each licence by the minister.	No	Yes	Yes	SBD decisions and LOSC arbitral awards can be enforced domestically.
China Law on Exploration and Exploitation of Resources in the Area (2016)	No	No	No	No	No	No	No
France Ordinance No. 2016-1687 relating to Maritime Areas under the Sovereignty or Jurisdiction of the French Republic (2016)	No	No	No	No	No	No	No
Kiribati Seabed Minerals Act (2017)	Yes	LOSC	Yes	Yes	Yes	No	No

Source: Author.

To What Extent is LOSC Article 235 Realized in National Sponsorship Laws?

Is Recourse Available within the Legal System? Jurisdiction, Access to Courts and Enforcement of Judgments

The laws of Japan, Nauru and Singapore have the clearest provisions regarding access for third parties to domestic courts for settlement of claims for environmental harm.

- The Japanese law gives complainants a right to seek compensation for environmental damage via national courts within three years of becoming aware of the damage or within 20 years of its occurrence. It also gives complainants a right to access domestic government-run mediation processes established under national terrestrial mining laws (sections 27 and 28 of Japan's Act on Interim Measures for Deep Seabed Mining 1982).
- Nauru's law provides: "The Supreme Court has jurisdiction under this Act to conduct [...] proceedings to establish liability and to provide recourse for prompt and adequate compensation in the event of an unlawful damage caused by Seabed Mineral Activities, in accordance with Article 235(2) of the UNCLOS" (section 46 of Nauru's International Seabed Minerals Act 2015).
- Singapore's law empowers the national high court to hear third-party claims made against Singapore-sponsored contractors for "wrongful acts" (citing LOSC Annex III, article 22) (section 17 of Singapore's Deep Seabed Mining Act 2015).

The United Kingdom's law specifies that proceedings for an "offence" under the law or under its subsidiary legislation may be brought against any person in any place in the United Kingdom (section 14[1] of the United Kingdom's Deep Sea Mining [Temporary Provisions] Act 1981, as amended). "Offence" is not expressly defined, but in this act, and in English law generally, the term appears to refer to criminal offences only. The United Kingdom's law (section 8A) also expressly enables decisions of the Seabed Disputes Chamber to be enforced via national courts in relation to a dispute of a type described in article 187(c), (d) or (e) of the LOSC. Such decisions relate exclusively to disputes arising between the sponsoring state, the ISA and/or the contractor. It is not clear whether this might, in any circumstances, serve to avail a third-party claimant of national remedy.

Other laws (for example, section 122 of Tonga's Seabed Minerals Act 2014 and section 130 of Kiribati's Seabed Minerals Act 2017) also provide mechanisms within national courts or mediation/arbitration systems for the hearing of disputes between the state and the contractor, but do not expressly address domestic judicial avenues for aggrieved third parties.

The Chinese law has a section entitled (in the English translation version) "Legal Liability" (section 23 of China's Law on Exploration and Exploitation of Resources in the Area 2016), but this only gives recourse to the state to impose monetary fines (or criminal sanctions) upon contractors for environmental harm caused by failure to comply with the national law or the ISA contract.

Prompt and Adequate? Bond, Fund or Insurance

Use of a financial bond or liability fund (or insurance) is a mechanism that can enable speedy access to sufficient funds in the event of unanticipated costs arising.

Nearly all of the sponsoring state laws require an applicant to provide evidence or written undertaking as to their financial capacity at the application stage; some laws expressly include capacity for adequate compensation for any environmental damage in that requirement. But few follow this through to require financial guarantees or security after sponsorship has been granted.

The Pacific laws (of Kiribati, Nauru and Tonga) empower the respective governments to require a contractor to deposit security as a guarantee of performance of its obligations (Kiribati's law [section 107] and Tonga's law [section 93], before sponsorship is granted; Nauru's law [section 45] after sponsorship, but before exploitation activities commence). These laws specify that this security may be used by the government to take steps toward fulfilling any obligations that the contractor fails to fulfill or to rectify any damage or loss caused as a result of such failure. The Kiribati and Tonga law specifies that this includes covering clean-up or compensation costs in respect of any damage caused by pollution or other incident occurring as a result of the contractor's activities.

A requirement for contractor insurance seems to be a more popular regulatory option, appearing in five of the sponsorship laws (Czech Republic, Tonga,

Nauru, Belgium and Kiribati). The terms are often rather vague, which may be due to the lack of an existing insurance market for seabed mining at the time of legislative drafting. For example, Belgium's law requires its contractor to take out "appropriate international insurance policies from internationally known insurance companies in accordance with generally accepted international practice" (section 9[2] of Belgium's Law on Prospecting, Exploration and Exploitation of Seabed Mineral Resources Beyond National Jurisdiction 2013).

Compensation or Other Relief: What Can Be Claimed?

There is scant coverage in the sponsorship laws regarding what type of relief could be claimed by an affected claimant. Several laws mirror the LOSC Annex III, article 22 exactly and without elaboration, by specifying that contractor "liability in every case shall be for the actual amount of damage" (for example, Belgium, Kiribati, Nauru, Singapore and Tonga).

The Singapore law (section 17) also provides that a national high court can order compensation or other such remedy "pursuant to" Annex III, article 22 of the LOSC, providing no further detail for what this might encompass.

The Japanese law (section 27[5], by reference to a 1950 on-land mining statute [section 111 of Japan's Mining Act 1950]), provides that either the claimant or the contractor may request restoration in place of monetary compensation where practicable. This suggests that the cost implication for a contractor could exceed the "actual amount of damage" threshold otherwise applicable[21] — although this is tempered somewhat by the stipulation in the Japanese law that the cost of restoration demanded must be proportionate to the alternative quantum for compensation for loss (and, of course, restoration to an original state must be a reasonable possibility).

The Belgian law specifies that a claimant's costs of taking reasonable measures to prevent or limit damage to the marine environment (flowing from the contractor's act) can be recovered within the definition of "actual damage" (section 9[1] of Belgium's Law on Prospecting, Exploration and Exploitation of Seabed Mineral Resources Beyond National Jurisdiction 2013).

China's law (article 26) contains a statutory power to impose monetary fines (or criminal sanctions) upon contractors for environmental harm caused by failure to comply with the national law or the ISA contract. This does not appear to envisage any award of such funds to injured third parties nor is the state empowered by the sponsorship law to order clean-up or restoration.

Although the Czech law is difficult to interpret exactly using the English translation that was lodged with the United Nations,[22] it is possible that it (section 11[c] of the Czech Republic's Act on Prospecting, Exploration for and Exploitation of Mineral Resources from the Seabed beyond Limits of National Jurisdiction 2000) requires contractors to restore ("remove the consequences of") damage caused by activities in the Area, including harm to the marine environment.

In Respect of Damage Caused by Pollution of the Marine Environment: Causes of Action/Standard of Harm

Sponsoring states are empowered by the LOSC Annex III, article 21(3) to impose a stricter environmental liability regime within their national law: "No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority shall not be deemed inconsistent with Part XI."[23]

However, the sponsorship laws reviewed do not generally provide much detail as to what type or degree of harm is actionable nor expand upon what standard of liability is applied to a contractor by the sponsoring state's national regime.

Several laws mirror the LOSC Annex III, article 22 exactly, by specifying that contractor liability is "for any damage arising out of wrongful acts in the conduct of its operations" (for example, Belgium, Kiribati, Nauru, Singapore and Tonga), but do not elaborate on what constitutes a "wrongful act."

Nauru also uses the terminology "unlawful damage caused by Seabed Mineral Activities" in its statutory provision that empowers third parties to take proceedings within national courts (section 46[b]).

21 *LOSC*, *supra* note 1, Annex III, art 22.

22 United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea*, Bulletin No 51 (New York: United Nations, 2003), online: <www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin51e.pdf>.

23 See SDC Advisory Opinion 2011, *supra* note 4, discussion at para 231ff.

This could be taken to imply a fault-based approach — or at least to exclude contractor liability in a circumstance in which the contractor had adhered to the rules and yet still caused unanticipated damage.

The Belgian law states that persons carrying out activities in the Area must take into account the "polluter pays" principle, meaning that the costs of repairing any damage caused are borne by the polluter (section 4[3]). This may be taken to imply a strict liability approach. Furthermore, the law states that "[t]he Crown may, by decree deliberated in the Council of Ministers, determine rules relating to the protection of the marine environment, the protection of human life and the conditions that apply to facilities used for activities carried out in the Area, which are more stringent than the rules, regulations and procedures of the [ISA]" (section 5) (reflecting LOSC Annex III, article 21[3]).

The Japanese law provides that claims can be brought for fair and appropriate compensation for damage caused by discharge of wastewater, accumulation of tailings or release of plumes occurring as a result of activities under Japanese control (section 27[5], which incorporates section 111 of Japan's Mining Act 1950). This does not appear to be restricted to fault-based damage, nor only to such damage that the contractor was not permitted by the ISA to cause.

The United Kingdom's law contains a clause stating that civil liability for breach of statutory duty can be prescribed in regulations, but only in relation to personal injury actions (section 15[1]). This rather suggests that no claims for environmental harm could be brought by third parties under the sponsorship legislation.

Analysis of Sponsoring State Liability Regimes in Current Domestic Law

Although the existing sponsoring state laws differ quite significantly from each other (save for the three Pacific Islands' laws, which are based on the same model),[24] one can make a few general observations upon surveying the way that liability issues are addressed.

Liability Lacunae

First, the sponsorship laws adhere closely to the LOSC provisions, which expressly address liability.

The same approach (direct quotation from the LOSC Annex III, article 22) is taken in the ISA's Exploration Regulations (ISBA/16/A/12/Rev.1, ISBA/18/A/11 and ISBA/19/C/17), and in the latest iteration of the draft Exploitation Regulations shared with stakeholders in August 2017 (ISBA/23/LTC/CRP3/Rev).[25]

Unlike the ISA, as noted above, sponsoring states are empowered by the LOSC Annex III, article 21(3) to impose a stricter regime within its national law. Apart from Japan, and, possibly, Belgium, with its incorporation of the polluter pays principles and allowance for future statutory instruments, it appears no states have taken up this opportunity.

While it is perhaps understandable that legislators felt most comfortable to echo exactly LOSC terminology, the outcome is a composite regime in which contractor liability is limited both by the ISA and by sponsoring states to damage arising out of wrongful acts only, and to the actual amount of damage only.

This gives rise to possible liability lacunae situations, such as when:

- unanticipated damage occurs (for example, plumes travel much farther than anticipated), despite the contractor and sponsoring state complying with all obligations;
- damage occurs as a result of a third-party actor who does not have sufficient funds to meet the liability (for example, a collision caused by another ship);

24 The development of their laws by the sponsoring states of Tonga, Nauru and Kiribati (as well as the non-sponsoring states of Fiji and Tuvalu) was supported by the Secretariat of the Pacific Community-European Union (SPC-EU) Deep Sea Minerals Project, which provided tailored technical assistance to Pacific Island nations in the development of seabed mineral laws and promoted the potential benefits of regional harmonization within those laws. See EU, Pacific Community, "About the SPC-EU Deep Sea Minerals Project", online <http://dsm.gsd.spc.int/>.

25 ISA, Polymetallic Sulphides, *supra* note 15; ISA, Cobalt, *supra* note 15; ISA, Polymetallic Nodules, *supra* note 15; ISA, Mineral Resources, *supra* note 16.

- damage occurs as a result of an "act of god" (for example, a tsunami); or
- an emergency disaster response is needed (for example, due to a fuel spill), but no party admits fault within the urgent time frame.

Sponsoring states have not yet taken the opportunity to address such lacunae in their laws.

The bare reliance on LOSC language may also leave national claims open to dispute on grounds that wrongful acts and actual damage should be interpreted and applied narrowly. For example, does "wrongful" require a breach of the LOSC or could a breach of domestic tort law also trigger a claim? Does "actual damage" include measures to prevent damage, restoration costs or pure ecological loss? Adherence in national laws to the actual damage terminology would also obviate the possibility of compensation claims being uplifted, for example, to penalize wrongdoing or to fund additional remediation measures.

None of the laws studied appear definitively to adopt a strict liability approach, which — perhaps combined with holding in-country financial security from contractors — might be considered the most effective way for a sponsoring state to ensure adequate and prompt recompense for an injured third party.

Another lacuna may arise as a matter of jurisdiction. The sponsorship laws apply to nationals of the relevant state. This should capture all sponsored contractors who, pursuant to article 153 of the LOSC, must be nationals (or effectively controlled by nationals) of the sponsoring state. However, a situation may arise where the act giving rise to a damage claim was caused by a third party, for example a sub-contractor, who is not a national of the sponsoring state and therefore not subject to the liability regime contained in the sponsorship (or other national) law.

Domestic Procedures for Pursuing Liability Claims

Secondly, while the regimes restate LOSC principles about where liability lies, they lack operational detail as to how claims against that liability could be actioned by a claimant in the sponsoring state.

A number of the sponsoring state laws refer to the ITLOS SDC as a forum for resolution of disputes relating to sponsorship. While ITLOS has jurisdiction to hear disputes between states parties and/or the ISA, which include matters of interpretation of the liability provisions of the LOSC,[26] reference to ITLOS is unlikely to provide "prompt and adequate compensation"[27] to third parties adversely affected by contractor action. Not least because non-state/non-ISA contracting parties do not have standing to access the relevant chamber of ITLOS.[28] The practical accessibility, and promptness, of international court procedures may also be questionable (as well as the adequacy of the types of relief that ITLOS can order).

In general, there is a distinct lack of procedural clarity in national sponsorship law as to whether and how an affected party may claim within a sponsoring state for damages against a contractor. Certainly, it is not apparent from the sponsorship laws examined that within sponsoring state national legal systems "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 persons under their jurisdiction"[29] — save for the Japanese law (which indicates that national Mining Act mediation processes will apply) and the Nauru law (which refers such cases to the national court). This seems to be a startling omission. Article 235 of the LOSC places a direct obligation on states. Non-compliance constitutes a clear-cut failure by a sponsoring state, sufficient in itself to expose that state to liability in the event of wrongdoing by its sponsored contractor.

The existing laws are also largely silent as to mechanisms in place to enforce any judgment that may be made against a contractor, presuming domestic court procedures *are* accessible. This latter point may be important in the event of a sponsored contractor not holding significant assets within the country of sponsorship.

These procedural points may well be addressed by national (general) civil law regimes. This would, however, require such laws to enable extraterritorial claims.[30] State immunity rules (or absence of separation of powers), may hinder actions where

26 *LOSC, supra* note 1, art 186.

27 *Ibid,* art 235.

28 *Ibid,* Annex VI, art 37.

29 *Ibid,* art 235(2).

30 The author's experience with environment laws under Commonwealth jurisdictions, for example, is that they are limited to acts and impacts that occur within national jurisdictions.

state liability is alleged. It may also be a stretch to the current capacity and adequacy of some national court systems to entertain what might prove to be highly complex, lengthy multiparty cases.

It is outside the scope of this paper to examine the individual legal regimes in each of the 20 sponsoring states to identify to what extent non-sponsorship-specific national laws may provide appropriate access to remedy for third parties claiming losses as a result of sponsored contractor action in the Area. Further investigation on this point — or even elaboration in statements made to the ISA by sponsoring states — could assist in clarifying to concerned stakeholders what established procedures, if any, would be available for an injured party to seek recourse for damage occurring in the Area, within national courts.

Channelling State Liability to the Contractor

Five sponsoring states have incorporated broad-based statutory provisions whereby the sponsored contractor indemnifies the sponsoring state against all proceedings, costs and demands that may be made by any third party in relation to the contractor's activities in the Area. This appears to apply regardless of possible state failure, wrongdoing or contributory act.

Perhaps unsurprisingly, the four "developing" sponsoring states (Nauru, Tonga, Kiribati and Singapore) include such provisions in their law (the fifth country is the United Kingdom). This could assist to close a possible liability gap, that is, where damages occur as a direct result of a sponsoring state failure, but the sponsoring state is a developing country that cannot meet the liability. To what extent such provisions are desirable and/or effective may be open to question, in particular if the effect might be for sponsoring states to feel "off the hook" with regard to their sponsorship obligations.

Contractual Arrangements between Sponsoring State and Contractor

Individual state/contractor contractual agreements appear to be the norm under current sponsorship arrangements, although not a requirement.[31] Some of the sponsorship laws (tending to be shorter and more "framework" in style, for example, those of the United Kingdom and Germany) refer to obligations or additional terms that states may place on their contractors outside of the primary legislation, which presumably covers *inter alia* contractual agreements.

None of these agreements have been made publicly available. It is therefore difficult to ascertain the content of such contracts and to what extent these may constitute an additional administrative measure for the purpose of discharging the "responsibility to ensure" or may impose different requirements upon contractors relating to liability for environmental damage. In any event, it is hard to see how any such private contractual arrangements could assist a harmed third party seeking redress, due both to a lack of knowledge of their content and the law of privity of contract.

Conclusion

From a Sponsoring State Perspective

Sponsoring states that wish to meet their LOSC obligations and to limit the state's exposure to liability arising from their sponsorship should take the following actions:

- enact a sponsorship law, which holds the contractor to compliance with the LOSC, the ISA regulations and contract, and sets domestic sanctions for non-compliance;
- provide greater detail, and possibly more stringent standards, in national law for a contractor's liability obligations than are currently provided by the LOSC;
- ensure clear and accessible legal and judicial processes in-country for any claimant against a contractor, indicating causes of action and remedies available;
- consider the use of indemnities in the event of state liability; and

31 SDC Advisory Opinion 2011, *supra* note 4 at para 225.

- consider requiring insurance and/or some form of financial security from the contractor on terms that enable its use to cover costs incurred by arising damage.

It seems somewhat surprising that so few of the current sponsoring states have taken the above steps.

Such issues — and the content of sponsoring state regulatory laws more widely — may benefit from further focus. The establishment of a working group of ISA sponsoring states may assist in this regard.

From an ISA Perspective

There have been repeated requests by member states for the ISA to delve further into the matter of sponsoring state legislation.[32] The ISA Secretariat's capacity challenges (and need to focus on other priorities) have delayed a substantive response to this request, but it would certainly assist with some of the current ambiguities to see such work advanced in the near future, whether by the ISA, as the ISA Secretary-General has indicated will be the case,[33] or by/with other actors.[34]

Guidance, or comparative analysis, about what might constitute adequate legislative content (or other measures) sufficient to meet a sponsoring state's obligations (including the "responsibility to ensure" and the "responsibility to assist the ISA") could, in particular, serve to:

- set (informal, perhaps) minimum standards, or at least regulatory options, to assist member governments to develop their national laws in a way that avoids inequalities between different regimes and the possibility of liability lacunae or "sponsorship shopping" by contactors; and
- assist in determining whether this threshold has been reached by an individual country, in the event of a sponsored application for exploitation, or a claim for any damage against a sponsoring state.

The current draft regulations do not appear to assist in this regard to any great degree.

In any event, while apparently "the existence of such laws, regulations and administrative measures is not a condition precedent for concluding a contract with the Authority,"[35] it may be prudent for the ISA (via the Legal and Technical Commission and the Council), in considering any future contract applications, at least to *enquire* as to the status of sponsoring-state measures and, specifically, how the state proposes to address or meet liability for potential damage arising.

Although the ISA will not want to impugn matters of state sovereignty, it is hard to see how the ISA would be meeting its mandate to act on behalf of (hu)mankind as a whole[36] if its rules allow the permitting of exploitation under the sponsorship of, for example, a sponsoring state that has not taken basic steps necessary to ensure compliance by the contractor, does not enable civil law claims against contractors within its domestic legal system, and/or has insufficient state resources or mechanisms to meet potential third-party losses. This will be especially important in the event that the overall liability regime for seabed mining in the Area continues to be predicated on principles of state liability and access to judicial remedy via (unharmonized) domestic legal systems.

32 See *Statement of the President of the Council of the International Seabed Authority on the work of the Council during the seventeenth session*, 17th Sess, UN Doc ISBA/17/C/21 (2011) at para 13, online: <www.isa.org.jm/sites/default/files/files/documents/isba-17c-21_0.pdf>; *Statement of the President of the Council of the International Seabed Authority on the work of the Council during the eighteenth session*, 18th Sess, UN Doc ISBA/18/C/30 (2012) at para 17, online: <www.isa.org.jm/sites/default/files/files/documents/isba-18c-30_0.pdf>; *Summary report of the President of the Council of the International Seabed Authority on the work of the Council during the twentieth session*, 20th Sess, UN Doc ISBA/20/C/32 (2014) at para 26, online: <www.isa.org.jm/sites/default/files/files/documents/isba-20c-32_0.pdf>; *Summary report of the President of the Council of the International Seabed Authority on the work of the Council during the twenty-first session*, 21st Sess, UN Doc ISBA/21/C/21 (2015) at para 8, online: <www.isa.org.jm/sites/default/files/files/documents/isba-21c-21_1.pdf>; *Summary report of the President of the Council of the International Seabed Authority on the work of the Council during its twenty-third session*, 23rd Sess, UN Doc ISBA/23/C/19/Rev.1 (2017) at para 8, online: <www.isa.org.jm/sites/default/files/files/documents/isba-23c-19rev.1_1.pdf>.

33 ISA Summary, *supra* note 3 at 3 ("Secretary-General Lodge recalled that the Council had requested the Secretariat to develop a comparative study of existing national legislation and derive common elements, noting that it could prove a useful first step towards developing a model law, reporting that the Secretariat had been unable to carry out the study yet due to limited resources and expressing hope that it could be done in the next biennium").

34 The Commonwealth Secretariat is willing to produce a model sponsorship law, which would draw *inter alia* on the organization's in-house experience of working on five of the sponsorship laws in existence.

35 SDC Advisory Opinion 2011, *supra* note 4 at para 219.

36 *LOSC*, *supra* note 1, arts 137(2), 153.

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org