

DEEP SEABED MINING INSIGHTS: THE RIGHTS OF SPONSORED CONTRACTORS UNDER THE UNCLOS REGIME

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This article forms part of WFW's Deep Seabed Mining Insight Series, which draws on the firm's unparalleled experience and expertise in deep seabed mining matters to provide insightful, timely and commercially relevant updates on deep seabed mining legal and regulatory issues. Previous topics include a preview of the July 2023 session of the International Seabed Authority, the rule-making process of the International Seabed Authority, potential issues with calls to adopt a 'precautionary pause' on deep seabed mining, and the role and rights of Sponsoring States.

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INTRODUCTION

Non-State contractors are a critical part of the international regulatory framework governing deep seabed mining activities in areas of the ocean beyond the limits of national jurisdiction ("the Area"). They enable private investment and provide expertise to contribute to the development of this important mineral resource. In recognition of this, Contractors are granted a range of rights under the United Nations Convention on the Law of the Sea (the "Convention" or "UNCLOS"). This article examines the role of Contractors under UNCLOS and their rights under international law when undertaking activities in the Area.

BACKGROUND

The Convention and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (the "1994 Agreement") establish the legal and regulatory framework governing deep seabed mining in the Area. That framework is centred around the International Seabed Authority (the "ISA" or the "Authority"), which is tasked with sustainably managing the Area's natural resources and overseeing commercial exploration and exploitation.

All activity in the Area is conducted pursuant to an Exploration or Exploitation Contract between a Contractor, sponsored by an UNCLOS State Party, and the Authority. The Authority has both law-making and enforcement powers and is the international regulator of activities in the Area. It is also the vehicle through which member States of UNCLOS fulfil their treaty obligations under the Convention.

WHAT TYPE OF RIGHTS DO CONTRACTORS ENJOY?

Contractors have two key categories of rights under the UNCLOS regime:

- rights contained in their Exploration or Exploitation Contract with the Authority, which also incorporates elements of the Convention; and
- rights under customary international law relating to the protection of investments.

The two categories of rights are interrelated. The explicit rights contained in a contract incorporate and reflect certain standards under customary international law and must be interpreted in accordance with those standards. Customary international law also offers an independent (and in some cases broader) source of protections coming from international economic law, particularly the settled legal standards governing protection of foreign investments. This body of law is explicitly and implicitly incorporated into the Convention's regulatory regime. Contractors can claim its protections in the event of adverse and harmful action or inaction by the Authority and its member States.

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RIGHTS UNDER EXPLORATION AND EXPLOITATION CONTRACTS

Commercial activities in the Area can only be *"carried out in accordance with a formal written plan of work"* established *"in the form of a contract"* between the Authority and a Sponsored Contractor (UNCLOS, Article 153(3)). At present, Contractors have only entered into Exploration Contracts allowing them to conduct necessary exploration activities before beginning commercial production. To commence commercial production, Contractors will need to seek and be granted an Exploitation Contract. The contracts establish a direct legal relationship between the Authority and the Contractor. Among other things, the contracts result in Contractors having the right to bring claims directly against the Authority and its member States on the international plane.

Whilst the specifics of individual contracts may vary depending on the parties involved, standard clauses for Exploration Contracts have been published by the Authority. Under these standard clauses, Sponsored Contractors enjoy three broad categories of rights:

- **security of tenure:** Contractors *"shall have security of tenure"*, and contracts *"shall not be suspended, terminated or revised"* except in accordance with their specific (and limited) terms;
- **exclusive exploration rights and priority in relation to exploitation rights:** Contractors have the *"exclusive right to explore for polymetallic nodules in the area in accordance with the terms and conditions of this Contract"* and the Authority must ensure that *"no other entity"* intrudes on those rights. Contractors also have *"a preference and a priority among applicants for a plan of work covering exploitation of the same area and resources"*; and
- **protection from arbitrary, unfair and bad faith regulatory changes:** the Authority must *"adopt and uniformly apply"* its rules, regulations and procedures. It must also *"avoid discrimination in the exercise of its powers and functions"* while fulfilling them *"in good faith"*.

Security of tenure, exclusivity and priority rights are vital components of the Convention's regulatory framework. They are reiterated in the Convention itself, as well as the Authority's exploration regulations. They enable Sponsored Contractors to engage in the lengthy (and expensive) deep seabed mining process, and promote legal certainty, consistent and routine oversight, the development of capacity, efficient regulation, and a host of other objectives.

Meanwhile, protection from arbitrary regulatory behaviour ensures that the Authority cannot revise contracts unilaterally, apply amended regulations that are inconsistent with a contract without the Contractor's consent or otherwise discriminate against the Contractor in the exercise of its powers and functions.

RIGHTS UNDER CUSTOMARY INTERNATIONAL LAW

Contracts between Contractors and the Authority also incorporate a variety of broader international law rules and principles. Importantly, the contracts require the Authority to implement its obligations in accordance with UNCLOS, thereby incorporating the Convention itself into the contractual framework which imports a variety of rights for Contractors. In particular, States Parties (and thereby the Authority through which they act) are required to conduct themselves in accordance with "*other rules of international law*". This includes customary international law, including as it relates to investor protections.

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Customary international law on investment protection contains several key rights for Contractors vis-à-vis the Authority, its member States and activities in the Area.

These include:

- **protection from unlawful expropriation:** which is the expropriation of an investment or asset not done for a public purpose, in a non-discriminatory manner, and on the payment of proper compensation. This can be direct (outright seizures) or indirect (through regulatory measures that severely degrade an investment's value);
- **fair and equitable treatment ("FET"):** which includes prohibitions against discrimination and arbitrary treatment; guarantees of good faith, transparency and predictability; and protections of a Contractor's legitimate expectations; and
- **full protection and security:** which requires the Authority to prevent harm to and ensure the security of an investment. This standard is closely linked to FET and is primarily concerned with physical security. However, it has also been found to protect against certain non-physical interferences and legal security with investments as well.

WHY ARE THE RIGHTS OF SPONSORED CONTRACTORS IMPORTANT?

The rights of Contractors are likely to receive increasing attention as the Authority works to remedy its failure to adopt regulations on exploitation, which it was required to finalise by 9 July 2023. Following the expiry of the 9 July 2023 deadline, Contractors are now able to submit applications for plans of work for exploitation, which the Authority is mandated to consider and provisionally approve. The Council of the Authority recently recognised this right at Part II of its 28th Session.

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On 21 July 2023 the Council adopted a decision recognising “the expiration of the two-year deadline on 9 July 2023” and setting out a roadmap for the elaboration and adoption of regulations for exploitation during the thirtieth session of the Authority. Further delays to this timeline, or any refusal to consider any application lodged, may give rise to further explicit breaches of the Contractors’ rights set out in this article. In such an event, Contractors may be able to make use of UNCLOS’s mandatory and binding dispute settlement procedures to enforce their rights against the Authority and member States. This would include by seeking appropriate remedies for breach of their rights, such as orders of specific performance requiring the Authority and its member States comply with their obligations under the Convention or alternatively monetary compensation for their sunk costs and loss of profit.

CONCLUSION

Contractors have invested significant resources in preparing to undertake commercial activities in the Area for decades. They have conducted large-scale exploration activities in the Area, collected key environmental baseline data and geological information, and tested commercial mining equipment under exploration regulations previously passed by the Authority. Understanding their rights and how they can be enforced if needed will be key to protecting and realising the full potential of these investments (and the promise of UNCLOS’s deep seabed mining regime) in the future.

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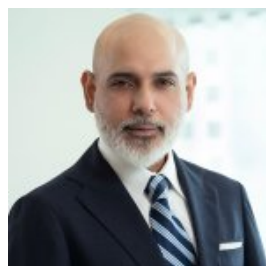
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