

DEEP SEABED MINING INSIGHTS: DISPUTE SETTLEMENT OPTIONS UNDER UNCLOS

14 FEBRUARY 2024 • ARTICLE



This article forms part of Watson Farley & Williams' 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. Upcoming topics include UNCLOS's financial arrangements and obligations. Previous topics include an explanation of the International Seabed Authority's decision-making processes, an examination of proposals for a 'pause' on deep seabed mining, the role and rights of Sponsoring States, and the rights of contractors.

"UNCLOS also contains compulsory and binding dispute settlement provisions that enable aggrieved Sponsoring States and contractors to enforce these rights."

INTRODUCTION

As covered in our previous articles, the United Nations Convention on the Law of the Sea ("UNCLOS") establishes a range of rights for Sponsoring States and contractors regarding deep seabed mining of the seabed and ocean floor beyond the limits of national jurisdiction (the "Area"). UNCLOS also provides for binding and compulsory dispute settlement mechanisms that enable Sponsoring States and contractors to enforce their rights against other States Parties or the International Seabed Authority ("Authority"). This article sets out the dispute settlement options available to Sponsoring States and contractors, as well as the potential remedies that can be ordered by international courts and tribunals.

UNCLOS DISPUTE SETTLEMENT REGIMES

Our earlier articles set out some of the key protections that UNCLOS's deep seabed mining regime grants to States that sponsor activities in the Area and contractors that seek to carry out such activities. These include:

- the right of States to sponsor contractors to carry out activities in the Area;
- the right of States to share equitably in financial and other economic benefits derived from activities in the Area;
- the right of contractors to have security of tenure and exclusive rights to explore or exploit their allocated parts of the Area; and
- the right of contractors to be protected from arbitrary and unfair treatment and other regulatory changes.

UNCLOS also contains compulsory and binding dispute settlement provisions that enable aggrieved Sponsoring States and contractors to enforce these rights and ensure that the Authority and other member States comply with their Convention obligations. The two key dispute settlement regimes under UNCLOS are:

- a **deep seabed disputes regime** set out in Section 5 of Part XI of UNCLOS, which can be used by States Parties and contractors, including prospective contractors (the “DSM Disputes Regime”); and
- a **general disputes regime** set out in Part XV of UNCLOS, which is only available to States Parties (the “General Disputes Regime”).

These regimes allow States Parties and contractors to submit their disputes to a number of different bodies, depending on the nature of the dispute and counterparty. The key such bodies are:

- The **Seabed Disputes Chamber** (“SDC”) and Ad Hoc Chambers of the SDC – which can hear disputes involving States Parties, contractors and the Authority;
- an **ad hoc commercial arbitral tribunal** – which contractors can use to resolve disputes with the Authority regarding contractual issues; and
- The **International Tribunal for the Law of the Sea** (“ITLOS”), Special Chambers of ITLOS, the **International Court of Justice** (“ICJ”), and **ad hoc arbitral tribunals** – all of which can hear disputes involving States Parties in certain circumstances.

DISPUTE SETTLEMENT OPTIONS FOR CONTRACTORS

The primary body with jurisdiction to hear disputes brought by contractors is the SDC. The key categories of disputes that contractors are able to take to the SDC are:

- **contractual disputes between a contractor and the Authority** or another party to the contract (such as a State Party or the Enterprise);
 - this would, for example, allow a contractor to enforce its rights under an exploration contract – such as for priority rights to exploit its contract areas;
- **disputes between prospective contractors and the Authority** concerning the refusal of a contract or a legal issue in the negotiation of a contract;
 - this would, for example, allow an applicant that considers it has improperly been denied a contract by the Authority to contest such a decision; and
- **disputes between contractors and the Authority where it is alleged that the Authority has incurred a liability** for damage arising out of wrongful acts in the exercise of its powers and functions;
 - this would, for example, allow a contractor to recover damages from the Authority for misuse of confidential information by Authority staff.

"The option to have a dispute resolved through UNICTRAL arbitration provides a familiar and tested dispute settlement route for contractors."

As noted above, contractors are also able to submit contractual disputes to binding commercial arbitration. In such a case, the default rules for the arbitration are the UNCITRAL Arbitration Rules (although the Authority may specify a different default rule for arbitrations in a relevant rule, regulation or procedure (“RRP”).

The option to have a dispute resolved through UNICTRAL arbitration provides a familiar and tested dispute settlement route for contractors. It also may provide greater flexibility in a dispute, allowing the disputing parties to tailor the process to suit the specific needs of the dispute.

DISPUTE SETTLEMENT OPTIONS FOR SPONSORING STATES AND STATES PARTIES

States Parties to UNCLOS have a broader range of dispute settlement options as compared to contractors. The key dispute settlement options for States Parties regarding deep seabed mining are:

- **the SDC** – which can consider disputes between States Parties or between States Parties and the Authority relating to deep seabed mining. This includes disputes regarding UNCLOS's deep seabed mining provisions, the acts and omissions of the Authority, and contracts and plans of work for activities in the Area; and
- **ITLOS, an ad hoc arbitral tribunal or the ICJ** – which can consider disputes between States Parties regarding any aspect of UNCLOS. The availability of any of these specific bodies will depend upon the relevant States Parties having opted to select that body to govern UNCLOS disputes. In the absence of a common selection between disputing States Parties, the relevant dispute will go to ad hoc arbitration.

States Parties can also opt to submit disputes regarding the interpretation or application of UNCLOS's deep seabed mining provisions to a Special Chamber of ITLOS or an Ad Hoc Chamber of the SDC.

REMEDIES

"The availability of independent dispute settlement options will be an important check against arbitrary or unlawful decision-making."

The key remedies that are available in a dispute regarding UNCLOS's deep seabed mining regime are orders to:

- cease the act that is in breach of the relevant obligation;
- require certain action be taken in compliance with a relevant obligation; and
- make full reparation for any injury caused by a wrongful act.

In relation to reparation, this can take the form of:

- **restitution** – to re-establish the situation that existed before the breach;
- **compensation** – for any damages caused by the breach, including material damages such as loss of profits or opportunity and, in exceptional circumstances, moral damages; and
- **satisfaction** – such as an acknowledgement of the breach, an expression of regret or formal apology.

Where reparation takes the form of a financial payment, the amount paid can also be subject to interest calculated from the date the payment was due.

CONCLUSION

WATSON FARLEY & WILLIAMS

UNCLOS establishes a detailed regulatory regime for deep seabed mining in the Area. This is accompanied by options for binding and compulsory dispute settlement that allow participants in deep seabed mining to ensure their rights are protected and upheld.

While to-date there is yet to be a contentious dispute regarding deep seabed mining under one of these regimes, their presence provides useful security for contractors and Sponsoring States making investments in work in the Area. This is particularly relevant as the Authority aims to finalise its RRP for exploitation in the Area in 2024 and it is likely that it will soon need to start considering applications for plans of work for exploitation. The availability of independent dispute settlement options will be an important check against arbitrary or unlawful decision-making and to ensure that the legitimate expectations of contractors and Sponsoring States are upheld.

KEY CONTACTS



NATHAN EASTWOOD
PARTNER • SYDNEY

T: +61 2 9276 7613

NEastwood@wfw.com



DEVON WHITTLE
SPECIAL COUNSEL • SYDNEY

T: +61 2 9276 7624

dwhittle@wfw.com



IULIIA SAMSONOVA
SENIOR ASSOCIATE • SYDNEY

T: +61 2 9276 7625

isamsonova@wfw.com



AARON MURPHY
ASSOCIATE • BANGKOK

T: +66 2 665 7812

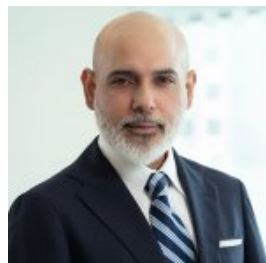
amurphy@wfw.com



JAN MELLMANN
PARTNER • LONDON

T: +44 20 7814 8060

jmellmann@wfw.com



SUMET MALHOTRA
PARTNER • SINGAPORE

T: +65 65519133

smalhotra@wfw.com

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

WATSON FARLEY & WILLIAMS

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.