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Obligation Under the LOSC

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# The Role of the International Seabed Authority in the Implementation of “Due Regard” Obligation Under the LOSC: Addressing Conflicting Activities

Yu Long

## Structured Abstract

*Article Type:* Research Paper

*Purpose*—Under the *United Nations Convention of the Law of the Sea (LOSC)*, the “due regard” obligation provides a normative basis for the coordination of competing uses of the Area, including deep seabed mining and submarine cable activities. Nevertheless, the lack of a framework for implementing the “due regard” obligation impedes the effectiveness of the coordination of these activities in practice. This paper aims to discuss the role and potential of the International Seabed Authority (ISA) in filling the gap.

*Design, Methodology, Approach*—This paper introduces an analytical perspective on the role of international organization concerning the implementation of the “due regard” obligation. In the context of the conflict between submarine cable activities and deep seabed mining, this paper discusses what the ISA can learn from other international organizations’ experience.

*Findings*—This paper proposes that the ISA, which is the competent international organization over deep seabed mining, can develop a coordinating framework

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for the implementation of “due regard” obligation through the exercise of its rule-making function. Such a function enables the ISA to make a model that affects the relationships among mining operators, cable operators, and the ISA.

*Practical Implications*—This paper provides an innovative approach in addressing the conflict between deep seabed mining and submarine cable activities.

*Originality, Value*—This paper examines what the ISA can contribute to the implementation of “due regard” obligation in the context of the conflict between deep seabed mining and submarine cable activities.

Key words: deep seabed mining, due regard obligation, rule-making functions of international organizations, submarine cable activities

## 1. Introduction

The *United Nations Convention of the Law of the Sea (LOSC)*<sup>1</sup> establishes a legal regime for deep seabed mining in the “Area.” The “Area” refers to the deep seabed outside areas of national jurisdiction as defined by the LOSC (Article 1[1]). Deep seabed mining includes all activities of prospecting, exploration and exploitation for mineral resources in the Area. At the same time, the establishment of the deep seabed mining regime does not exclude other legitimate uses of the Area, such as the laying and maintenance of submarine cables. Against this background, this regime envisages that some coordination of the competing uses of the Area may be achieved through implementing the “due regard,” which means an awareness of mutual respect, obligation in the context of how the freedom of the high seas and rights related to deep seabed mining are exercised (Articles 87[2] and 147 [1, 3]). Nevertheless, with the growing interest in deep seabed mining in recent years,<sup>2</sup> the lack of any framework for coordinating the implementation of the “due regard” obligation gives rise to concerns among stakeholders in relation to the existing deep seabed regime.<sup>3</sup>

Besides, the LOSC stipulates that the ISA is the competent international organization over deep seabed mining (Articles 136 and 157). The terms “competent international organization” or “competent international organizations” mean that one or more intergovernmental bodies or institutions are assigned “with the relevant expertise and mandate to deal with specific areas of the seas or particular maritime activities.”<sup>4</sup> This paper assumes that “the relevant expertise and mandate” of the ISA enables it to not only deal with deep seabed mining but also with associated issues, such as the relationship between deep seabed mining and submarine cable activities.

Therefore, this paper focuses on the role and potential of the ISA in developing a framework for coordinating the implementation of the “due regard” obligation in the context of the conflict between submarine cable activities and deep seabed mining.

Section 2 introduces an analytical perspective on the role of international organizations concerning the implementation of the “due regard” obligation. This paper

argues that while there are already sufficient discussions among scholars regarding the contribution of various international courts and tribunals, the role of competent international organizations has not yet received enough attention. So, it briefly explores reasons why scholars tend to underestimate the latter, and then discusses what others like the ISA can learn from the IMO's experience in developing a coordinating framework.

As the subjects that owe and are owed the "due regard" obligation are states rather than the ISA, there needs to be a discussion of the incentives for the ISA to act as a coordinator before discussing how it can fulfill this role. This is explored in Section 3.

Section 4 discusses how the ISA can develop such a coordinating framework. This article argues that it can be attributed to the ISA's rule-making function, which is one of the key functions of the ISA assigned by the LOSC. This function enables the ISA to develop the deep seabed mining regime gradually in response to meet new challenges.<sup>5</sup> To be specific, this article examines the legal basis for the ISA to develop the coordinating framework, as well as the limitations of the ISA in exercising its rule-making functions.

Moreover, the on-going negotiation of the Draft Exploitation Code<sup>6</sup> is expected to be able to put such a coordinating framework into practice. Section 5 elaborates and analyzes what the ISA has done to develop this coordinating framework until now, and finally Section 6 discusses how the Draft Exploitation Code could be further improved.

## 2. The Implementation of the "Due Regard" Obligation: An Analytical Perspective on the Role of International Organizations

In customary international law of the sea, the obligation of "due regard" has a historical basis as a rule of self-restraint. Professor Bernard Oxman points out that this rule is significant in two intersecting contexts: in the first context, states exercise freedom of action with self-restraint so that others will respect their freedom; as for the second context, states exercise jurisdiction with self-restraint, which is a guarantee that others respect *quid pro quo* jurisdiction.<sup>7</sup> Without a "supreme" government in the international community, these rules of self-restraint play a significant role in coordinating competing activities by different states. Professor Oxman stresses that the customary high sea regime has two characteristics that illustrate this intersection: (i) each state enjoys the freedom to use the high seas; and (ii) each state enjoys the authority to confer its nationality on ships to make use of the freedom of the high seas.<sup>8</sup> Such characteristics of the customary high sea regime protect common areas like the high sea from anarchy.<sup>9</sup>

With the codification of the law of the sea, treaties like the LOSC broaden the applicable circumstances of the "due regard" obligations, which reflect on diverse

provisions, such as “reasonable regard” and the avoidance of “unjustifiable interference.” A number of new regimes, such as the Exclusive Economic Zone, the continental shelf, and the Area, were gradually introduced into relevant treaties. These new regimes affect the traditional freedoms of the high seas to different extents. To strike a delicate balance between new interests or needs and traditional freedoms, the rules of “due regard” have been embedded throughout these regimes.

More significantly, some international organizations can facilitate the implementation of “due regard” obligation by virtue of their responsibilities assigned by these treaties. In the LOSC, these international organizations can be divided according to their responsibilities. The first group includes various international courts and tribunals, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA). These international courts and tribunals are conferred with responsibilities, such as the interpretation of the LOSC provisions, to guide the application of the LOSC. Such responsibilities enable them to make “a notable, although preliminary, contribution”<sup>10</sup> for facilitating the implementation of the “due regard” obligation. For example, they can elaborate on the contents of the “due regard” obligation. In the *Chagos Protected Area Arbitration* case, the Arbitral Tribunal set out that consultations are essential to the assessment of the implementation of the “due regard” obligation.<sup>11</sup> Such a role has already been wide discussed by scholars.<sup>12</sup>

As for the implementation of the “due regard” obligation, the role of the other group of international organizations which are referred as competent international organizations by the LOSC is often ignored or underestimated. This group includes the International Maritime Organization (IMO), Regional Fisheries Management Organizations (RFMOs) and the ISA.

Compared to the members of the first group, little attention has been paid to their roles regarding the implementation of the “due regard” obligation. The main reason may be that decisions of such international organizations are only directly applicable to one of the parties for the competing uses of the oceans or seabed. For example, the ISA has jurisdiction over deep seabed mining, and its decisions are binding on applicants and contractors. However, in conflicts regarding deep seabed mining and submarine cables, the ISA cannot regulate entities who conduct submarine cable activities. Moreover, the obligation of “due regard” is reciprocal, which means no one has priority over any of the competing rights.<sup>13</sup> Finally, member parties’ willingness plays a significant impact on the final effect of decisions concerning submarine cable activities.<sup>14</sup> Therefore, these factors limit the room available to these international organizations to adopt binding measures for facilitating the implementation the “due regard” obligations.

Nevertheless, this does not mean that the second group of international organizations cannot play any role regarding the implementation of the “due regard” obligation. In 2010, in response to requests from three littoral states in the Straits of Malacca and Singapore (Malaysia, Indonesia and Singapore), the IMO published a circular that proposed the establishment of a regional submarine cable protection regime. The circular includes a proposal to designate non-anchoring areas in the

Straits of Malacca and Singapore and to require the prompt sharing of information among relevant stakeholders when submarine cable damage occurs.<sup>15</sup>

Although the content of the circular was brief (only two pages), its referential significance for members of the second group of international organizations regarding how to facilitate the implementation of the “due regard” obligation cannot be underestimated. The first reason for this is that a decision distributed in the form of a circular constitutes the exercise of the rule-making function of the IMO. Through the exercise of such functions, the IMO can develop a framework to coordinate the implementation of the “due regard” obligation in the context of international shipping and submarine cable activities. Such a framework involves a tripartite relationship between the IMO, parties who conduct international shipping, and cable owners or operators. The IMO, which has already acted as a coordinator, can develop this framework progressively and flexibly. The other significance of this circular is that although some of the measures adopted under the framework are non-compulsory, they can be practical for facilitating the implementation of the “due regard” obligation. These measures include procedures for notifying and exchanging information.

Therefore, the IMO’s experience can inspire other international organizations like the ISA to explore their role regarding the implementation of “due regard” obligations. However, before discussing what the ISA could do in this regard, it is necessary to discuss why the ISA needs to take into consideration the very existence of the competing uses of the Area, namely deep seabed mining and submarine cable activities. This is because the subjects that owe and are owed the “due regard” obligation in the context of the conflict between deep seabed mining and submarine cable activities are states rather than the ISA itself.<sup>16</sup>

### **3. Why Should the ISA Play the Role of Coordinator in Conflicts Between Deep Seabed Mining and Submarine Cable Activities?**

According to provisions of the LOSC (e.g., Articles 136, 137 and 157), the main tasks of the ISA is to govern deep seabed mining in the Area. The process of the ISA’s governance consists of two phases: (i) approval and (ii) post-approval. In the first phase, the ISA needs to confirm each notification of prospecting or approve the proposed written plan of work for exploration and exploitation. Applicants can conduct prospecting only after the ISA has received a satisfactory written undertaking to comply with the convention and the relevant regulations (Article 2 of Annex III), while proposed contractors can conduct exploration or exploitation only after the ISA approves their plans of work (Articles 4 and 6 of Annex III). In the second phase, the ISA has the responsibility to ensure the performance of the undertaking of the written plan of work.

Against this background, this article argues that there are two main reasons

why the ISA should play the role as a coordinator in the context of the conflict between the deep seabed mining and submarine cable activities.

First, the ISA's role as a coordinator is essential to enhance investors' confidence and encourage them to engage in investment activities in the Area. Potential conflicts between the two competing activities may affect the willingness of investors to engage in the exploitation operation in the Area. In the second workshop regarding deep seabed mining and submarine cable activities hosted by the ISA on October 29–30, 2018, in Bangkok,<sup>17</sup> several representatives expressed their concerns regarding commercial certainties:

I think that the greatest risk is not a rupture of a cable and it is not the liability of a mining operator, it is the postponement of investment in both activities. If all of a sudden I know that investing in seabed mining is going to create conflict with cable operators and reduce my profit margin or create problems for me, I would not invest in that area. At the same time, if I had a person that was willing to invest in cable operations and I begin to see the liability of the rupture of a cable, I would think twice before I made that investment as well.<sup>18</sup>

Thus, it can be argued that the coordination between two competing activities through the ISA is necessary to safeguard investors' interests in the Area.

Secondly, such conflicts may make the ISA unable to guarantee "security for tenure" for contractors with existing exploration or exploitation contracts with the ISA. After the approval of a plan of work, the ISA will sign a contract with the applicant, and the applicant will then become a contractor. Within this contract is embedded the mutual commitments of the ISA and the contractor.<sup>19</sup> On the one hand, the contractor accepts the direct jurisdiction of the ISA, and on the other, the ISA guarantees the contractor's "security of tenure."

In the LOSC, "security of tenure," in the context in question, is a fundamental principle regarding exploration and exploitation contracts.<sup>20</sup> Such a principle implies two types of duties: negative and positive. Negative duties prohibit the ISA from modifying contracts unilaterally except in certain circumstances (Articles 18 and 19 of Annex III). As for positive duties, they require the ISA to endeavor to ensure the continuous operation of exploration and exploitation. The LOSC states that contractors enjoy the exclusive exploration and exploitation rights, which requires the ISA to protect them from any interference from other entities operating in the same area for another category of resources (Article 16 of Annex III). Further, this article argues that the positive duties of the ISA do not limit the coordination between different operations in relation to deep seabed mining. It is illustrated that the guarantee of both "security of tenure," as well as the right to undertake marine scientific research, is essential for "[the ISA's] good governance and administration of the [mineral] resources of the Area."<sup>21</sup>

Therefore, in light of the influence of potential conflicts on the ISA's governance over deep seabed mining in the Area, the ISA should play a proactive role in facilitating the implementation of "due regard" obligations. In this regard, the ISA's rule-making function enables it to take up the same role of coordinating between conflicting activities as IMO has held.



## 4. The ISA's Rule-Making Function and the Implementation of the "Due Regard" Obligation

The LOSC confers the ISA with a rule-making function to develop a legal regime for deep seabed mining in the Area. The ISA exercises its rule-making function by detailed rules, regulations, and procedures, among which the development of three sets of regulations regarding different types of mineral resources is central. These regulations are: *Nodules Exploration Regulations*,<sup>22</sup> *Sulphides Exploration Regulations*,<sup>23</sup> and *Crusts Exploration Regulations*.<sup>24</sup> These three sets of regulations related to prospecting and exploration are supposed to "consolidate the provision on the mining system contained in the Convention and where appropriate elaborate upon the practical application of those provisions."<sup>25</sup>

When the ISA exercises its rule-making function, one of the criteria that it should take into consideration is the "prevention of interference with other activities in the marine environment" (Article 17 [1, b, ix] of Annex III). This provides a legal basis for the ISA to develop a framework for coordinating the implementation of the "due regard" obligation. This is illustrated by three situations envisaged by the three sets of regulations. Firstly, prospectors shall minimize or eliminate actual or potential conflicts with existing or planned marine scientific research activities.<sup>26</sup> Secondly, prospective contractors shall ensure that installations are not established where interference may be caused to "the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity."<sup>27</sup> Thirdly, upon finding archaeological or historical objects, contractors have the duty to notify the ISA and suspend their operations.<sup>28</sup>

Such a framework developed by the ISA through the exercise of its rule-making function would consist of two parts. In the first part of the framework, the ISA would take the implementation of the "due regard" obligation into consideration at the approval phase. In this regard, there is a precedent regarding this implementation in the development of the three sets of regulations relating to prospecting and exploration. The LOSC stipulates that when deciding whether or not to approve a plan of work, the Legal and Technical Commission of the ISA should make its decision on the basis of the requirements of applicants (Article 4 of Annex III) and the criteria in the plan of work (Article 6 of Annex III). The scope of these considerations is further expanded by the regulations relating to prospecting and exploration. For example, as mentioned above, the ISA shall determine whether the proposed plan of work for exploration ensures that installations for deep seabed mining are not established where interference may be caused to certain international navigation and fisheries. However, it should be noted that the method of adding a new consideration is conditional rather than arbitrary. Judge Tullio Treves points out that, as an exemption to the general reciprocal "due regard" obligation, the conditions for adding a new consideration must be narrowly described, for example, "not [as] fishing in general but 'intense fishing activity,' not navigation in general but navigation through 'recognized sea lanes essential for international navigation.'"<sup>29</sup>

Another part of the suggested framework envisages that the ISA would develop procedural mechanisms for consultation and notification at the post-approval phase.



To give an example of such a mechanism: when encountering any archaeological and historical objects, contractors would immediately notify the secretary-general and then the ISA would transmit such information to the director-general of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and any other competent international organization.<sup>30</sup> Under the LOSC, cooperation between the ISA and UNESCO would mainly be driven by the ISA's duty to preserve "all objects of an archaeological and historical nature found in the Area" (Article 149). Although the ISA would not have such a duty in other circumstances, the cooperation model regarding the exchange of information could be invoked when the ISA cooperates with other international organizations.

Furthermore, the framework developed by the ISA through the exercise of its rule-making function could be applied to the coordination of the implementation of the "due regard" obligation in the context of deep seabed mining and submarine cable activities. There is a consensus among both parties to the competing uses, which stressed that engagement between the cable industry and applicants should be done as early as possible.<sup>31</sup> As for the ISA, it means that it should take the implementation of "due regard" obligations by applicants into consideration at the approval phase. Besides, notifications and consultations are essential to the implementation of the "due regard" obligation. However, there lacks any procedural mechanism for conducting notifications and consultations. In this regard, the ISA could provide relevant procedural mechanisms to enhance this implementation. For example, considering the need for practical cooperation between deep seabed mining and submarine cable activities, the ISA and the International Cable Protection Committee (ICPC) have signed Memorandums of Understanding (MOU) to this effect.<sup>32</sup> The MOU stresses that these two international organizations should have mutual cooperation obligations regarding the exchange of information:

To exchange where practicable, or to facilitate by direct liaison with the owners of international cable systems, information on cable routings and prospecting and exploration areas, subject to confidentiality provisions.<sup>33</sup>

In this regard, several useful measures adopted by the ICPC and others would be used for reference, such as the exchange of information between the Sargasso Sea Commission, which is an intergovernmental body with a mandate for the protection of the Sargasso Sea,<sup>34</sup> and the ICPC.<sup>35</sup>

Nevertheless, it should be noted that the ISA has limitations in exercising its rule-making function. On the one hand, international organizations decide the scope of their competence by themselves, as nobody does this for them.<sup>36</sup> So the ISA enjoys a certain extent of discretionary power to exercise its functions. On the other hand, it would be impractical to expect that the ISA, which mainly consists of mining stakeholders, would be willing to take protective measures for other economic activities at the expense of their own economic interests.

To be specific, in the exercises of its rule-making function, the ISA may face two types of challenges. One challenge is the ISA's "consensus-based" decision-making procedure.<sup>37</sup> "Consensus-based" means that whether a decision will be taken

mainly depends on achieving consensus between state parties to the ISA. Although such a decision-making rule does not exclude the use of the majority rules, scholars point out that “the more important a decision is for seabed mining interests, the more it is insulated from simple majority decision-making within the Authority.”<sup>38</sup> Another one is that contractors’ compliance depends on the cooperation between the ISA and state parties (Article 139[1]). Although the ISA has overall management powers regarding deep seabed mining, the extent to which decisions are implemented relies on the assistance of state parties, especially sponsoring states.<sup>39</sup> In this regard, the final effect of a decision is still subject to the acceptance of state parties.

Therefore, the ISA’s functions for rule-making enable it to develop a coordinating framework for the implementation of “due regard” obligations. However, if the ISA developed a framework through the exercise of its rule-making function, it should consider the balance between the interests of deep seabed mining and submarine cable activities. The next section discusses how such a balance could be achieved when developing the framework for facilitating the “due regard” obligation in the Draft Exploitation Code.

## **5. Development of a Coordinating Framework for Implementing the “Due Regard” Obligation in the Draft Exploitation Code**

This section discusses how the ISA could put such a framework into practice through the exercise of its rule-making function, using a window to draft an exploitation code. It should be noted that, although provisions of the Draft Exploitation Code have used a set of terms similar to “due regard,” such as “reasonable regard” and “due diligence,” this article uses them interchangeably. There are two main reasons. First, there exists a close historical relationship between some terms, especially “due regard” and “reasonable regard.”<sup>40</sup> Second, as for other terms like “due diligence,” it is still uncertain whether they would be accepted in the later stages of the negotiation.

### *5.1 The Approval Phase*

In order to encourage applicants for exploitation rights to coordinate with cable owners or operators at an early stage of their project planning, the negotiators of the Draft Exploitation Code have discussed how they might perform the “due regard” obligation. To be specific, this includes the criteria for approving a proposed plan of work and the qualifications of applicants.

#### 5.1.1 THE CRITERIA FOR APPROVING A PROPOSED PLAN OF WORK

The latest version of the Draft Exploitation Code<sup>41</sup> stipulates that the Commission should ensure the proposed plan of work gives due regard to the laying of submarine cables:

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### **Draft Regulations (“DR”) 13 Assessment of Applicants**

The Commission shall determine if the proposed plan of work: ... (d) Provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, including navigation, the laying of submarine cables and pipelines, fishing and marine scientific research, as referred to in article 87 of the Convention.<sup>42</sup>

This provision requires applicants to give due regard to other legitimate uses within the freedom of the high seas, including the laying of submarine cables. It adds a number of new considerations for determination by the ISA at the approval phase. As mentioned in Section 4, adding a new consideration for determination by the ISA must be in keeping with the LOSC. In this regard, adding these new considerations may be attributed to the ISA’s responsibility regarding the “prevention of interference with other activities in the marine environment” (Article 17 [1, b, ix] of Annex III).

Furthermore, some stakeholders suggest further elaborating this provision in two ways. The first suggestion is that, excluding Article 87 of the LOSC, sources to be considered by the ISA should also include guidelines pertaining to the “due regard” obligations issued by the ISA.<sup>43</sup> These guidelines form part of the rules, regulations and procedures adopted by the ISA.<sup>44</sup> They will enable the ISA to make determinations according to a changing environment. Moreover, DR 31(1), which refers to the general requirements of the “due regard” obligation at the post-approval phase, contains the expression: “consistent with the relevant Guidelines.” To be consistent with DR 31(1), one stakeholder claims that the relevant guidelines should also be taken into account during the phase of determining whether or not to approve a plan of work.<sup>45</sup>

Another suggestion regarding the provision is that the scope of due regard given by applicants should be expanded to cover the maintenance and repair of submarine cables. These activities are considered to be associated with the operation of submarine cables, which in turn is one of the freedoms of the high seas under Article 87 of the LOSC.<sup>46</sup>

## *5.2 The Qualifications of Applicants*

Currently, as for the qualifications of applicants, the Draft Exploitation Code does not include requirements that involve submarine cable activities. Some stakeholders, such as Australia, who have submitted the proposal of having the qualification requirement added into the provisions:

### **DR 13(1) in Australia’s Proposal**

The Commission shall determine ... if the applicant: ...

(g) has demonstrated, in relation to the accommodation of other activities in the marine environment, due diligence to:

(i) identify in-service and planned submarine cables and pipelines in, or adjacent to, the area under application using the publicly available data and resources as listed in the Guidelines;

(ii) where such submarine cables and pipelines are identified, consult with the operators of the cables and pipelines to agree measures the Contractor will take to reduce the risk of damage to the in-service and planned submarine cables and pipelines (i.e., such as an easement, or a mining exclusion zone within a reasonable radius).<sup>47</sup>

The provision aims to elaborate upon the “due regard” obligation of applicants. Firstly, applicants should demonstrate that they have given “due regard” to identifying whether there exists any in-service or planned submarine cables in a proposed contract area, on the basis of “publicly-available data and resources as listed in the Guidelines.” As for these types of information sources, the ISA can cooperate with the ICPC to exchange information regarding submarine cable activities in the Area and then make public this information in the form of Guidelines. Besides, “planned submarine cables” should be covered because the period of an exploitation contract is shorter than the lifespan of submarine cables. According to the Draft Exploitation Code, the initial period of an exploitation contract is 30 years (DR 20), while the lifespan of almost all submarine cables is shorter than this period. Consequently, some cable companies emphasize that the ISA should still consider submarine cable protection after the adoption of a plan of work.<sup>48</sup>

When there exists any submarine cable in a proposed contract area, the applicant in question should consult with the owner or operator of the submarine cables to agree on protective measures. Such a requirement may be helpful for the implementation of the “due regard” obligation by applicants. However, it is doubtful to what extent the negotiators of the Draft Exploitation Code will accept the measures. For example, the draft text proposes that applicants “should consult with cable owners to agree measures ... such as an easement or a mining exclusion zone within a reasonable radius.” Such requirements imply some advanced requirements of the “due regard” obligation compared with its basic ones, i.e., notice and consultation.<sup>49</sup> Although it does not deny the meaning of these advanced requirements for the implementation of the “due regard” obligation, this article argues that it would not be inappropriate to require them in a manner that relies on the ISA’s compulsory power.

### *5.3 The Post-Approval Phase*

At the post-approval phase of the plan of work, the Draft Exploitation Code sets out both the general and specific requirements regarding the implementation of the “due regard” obligation.

#### 5.3.1 GENERAL REQUIREMENTS FOR IMPLEMENTATION OF “DUE REGARD” OBLIGATIONS

The Draft Exploitation Code sets out the general requirements of the implementation of the “due regard” obligation from the perspectives of contractors and other users respectively:

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### **DR 31 Reasonable Regard for Other Activities in the Marine Environment**

1. Contractors shall carry out Exploitation under an exploitation contract with reasonable regard for other activities in the Marine Environment in accordance with article 147 of the Convention and the approved Environmental Management and Monitoring Plan and Closure Plan and any applicable international rules and standards established by competent international organizations. In particular, each Contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables or pipelines in the Contract Area.

2. The Authority, in conjunction with member States, shall take measures to ensure that other activities in the Marine Environment shall be conducted with reasonable regard for the activities of Contractors in the Area.<sup>50</sup>

Paragraph 1 requires that when carrying out an exploitation contract, contractors shall give attention to their “due regard” obligations with respect to other activities in the marine environment. Contractors in particular are required to ensure that their operations do not damage submarine cables in the contract area. However, as there is no competent international organization that has jurisdiction over all submarine cable activities, there is a lack of any “relevant international rules and standards” in this field. To fill this gap, a stakeholder proposes to add a reference to “relevant national laws and regulations of sponsoring States and flag States.” In this regard, there exists some domestic legislation regarding the legal relationships between sponsoring states and their sponsored parties. For example, Fiji, Kiribati, Nauru, Tonga and Tuvalu require that “the sponsored party shall not proceed or continue with the activities if they are likely to cause significant adverse impact to other existing or planned legitimate sea uses including submarine cables.”<sup>51</sup> It should be noted that a possible shortcoming of this approach is that such national laws and regulations only apply to contractors who are sponsored by corresponding states, and the ISA does have the power to force all state parties to issue such national laws and regulations.

Paragraph 2 indicates the “due regard” obligation of states that conduct other activities in the Area. It should be noted that the ISA does not have jurisdiction over these other users, and so cannot impose mandatory measures on them. However, according to some stakeholders, “it is expected that the Authority plays a role as mediator and facilitates between Contractors and other activities in the Marine Environment through information sharing at least at the initial stage.”<sup>52</sup> Therefore, it is possible that this paragraph may consider how to contribute to the ISA’s role as a coordinator, such as through the establishment of crossing agreements.<sup>53</sup>

### *5.4 Specific Requirements for Implementation of “Due Regard” Obligations*

Schedule 1 includes “damage to a submarine cable” in the definition of “incident,” and the main body sets out measures to address such incidents in DR 32 “[reducing] risks of incident” and DR 33 “preventing and responding to incidents.”

#### **DR 32 Risk of Incidents**

A Contractor shall reduce the risk of Incidents as much as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction, taking into account the relevant

Guidelines. The reasonable practicability of risk reduction measures shall be kept under review in the light of new knowledge and technology developments and Good Industry Practice, Best Available Techniques and Best Environmental Practices. In assessing whether the time, cost and effort would be grossly disproportionate to the benefits of further reducing the risk, consideration shall be given to best practice risk levels compatible with the operating being conducted.

### **DR 33 Preventing and responding to Incident**

(1) The Contractor shall not proceed or continue with Exploitation if it is reasonably foreseeable that proceeding or continuing would cause or contribute to an Incident or prevent the effective management of such Incident.

(2) The Contractor shall, upon becoming aware of an Incident:

(a) Notify its sponsoring State or States and the Secretary-General immediately, but no later than 24 hours from the incident occurring;

(b) Immediately implement, where applicable, the Emergency Response and Contingency Plan approved by the Authority for responding to the Incident;

(c) Undertake promptly, and within such time frame as stipulated, any instructions received from the Secretary-General in consultation with the sponsoring State or States, flag State, coastal State or relevant international organizations, as the case may be;

(d) Take any other measures necessary in the circumstances to limit the adverse effects of the Incident; and

(e) Record the Incident in the Incidents Register, which is a register to be maintained by the Contractor on board a mining vessel or Installation to record any Incidents or notifiable events under regulation 34.

(3) The Secretary-General shall report any Contractor that fails to comply with this regulation to its sponsoring State or States and the flag State of any vessel involved in the Incident for consideration of the institution of legal proceedings under national law.<sup>54</sup>

Appendix I likewise includes “contact with submarine cables” in the definition of “notifiable event,” and DR 34 lists the actions to be taken by contractors in case of “notifiable events.”

### **DR 34 Notifiable events**

1. A Contractor shall immediately notify its sponsoring State or States and the Secretary-General of the happening of any of the events listed in appendix I to these regulations.

2. The Contractor shall, as soon as reasonably practicable, but no later than 24 hours after the Contractor becomes aware of any such event, provide written notification to the Secretary-General of the event, including a description of the event, the immediate response action taken (including, if appropriate, a statement regarding the implementation of an Emergency Response and Contingency Plan) and any planned action to be taken.

3. The Secretary-General shall consult with the sponsoring State or States and other regulatory authorities as necessary.

4. The Contractor shall ensure that all regulatory authorities are notified and consulted, as appropriate.

5. Where a complaint is made of a Contractor concerning a matter covered by



these regulations, the Contractor shall record the complaint and shall report it to the Secretary-General within seven Days of the complaint being received.<sup>55</sup>

Taking these provisions together, they elaborate on the specific requirements of the “due regard” obligations of contractors in case of interruption of submarine cable operations. The contents of these requirements mainly focus on the process for notification and consultation between the contractors in question and the ISA. In this regard, from the perspective of cable industries, two aspects are still possible to improve.

First, the obligation of contractors to notify is limited to “providing written notification to the Secretary-General [of the ISA]” and “all regulatory authorities.” As mentioned above, there is no competent international organization which has jurisdiction over all submarine cable activities. Consequently, only requiring contractors to notify the Secretary-General or relevant national authorities may be insufficient in the event of a cable fault. In order to ensure the speedy repair of submarine cables, some cable companies propose that contractors should be required to notify the owners or operators of the submarine cable in question as soon as they become aware of any direct contact with a submarine cable in their contract areas.<sup>56</sup> This article agrees that this proposal is reasonable. At the same time, in order to avoid overburdening contractors, the subjects that must notify should be qualified, such as by limiting them to those cable owners or operators who already exchange information with the ISA, both directly or through the ICPC.

Furthermore, some stakeholders claim that contractors should be required to consider notification that may be received from cable owners or operators.<sup>57</sup> Such a claim is supported by the reasonable argument that cable owners or operators are more knowledgeable and professional than contractors. Nevertheless, there is a lack of a reciprocal guarantee from these cable owners or operators in the event of faults during mining operation due to submarine cable activities. In this situation, it may be expected that both parties sign a crossing agreement for mutual notification.

## 5.5 Summary

In summary, the current version of the Draft Exploitation Code provides a coordinating framework for the implementation of the “due regard” obligation in the context of the conflicts between deep seabed mining and submarine cable activities. It covers both the approval and post-approval phases of the ISA’s governance over deep seabed mining. On the one hand, when addressing the potential conflicts between deep seabed mining and submarine cable activities, this framework indicates that the Draft Exploitation Code is expected to make up for the insufficiency of the existing deep seabed mining regime. On the other hand, this framework could be further improved if the ISA would consider some flexible economic incentives like the reduction of fees, as well as encouragement of both parties of competing uses to advance their mutual cooperation by entering into a crossing agreement.



## 6. Further Suggestions Regarding Improving the Coordinating Framework of the Draft Exploitation Code

This section proposes that it is possible to further improve the framework developed in the Draft Exploitation Code by the incorporation of economic measures. Two types of economic measures could be applied according to different circumstances:

i) At the approval phase, the ISA could encourage applicants to identify whether there are any in-service or planned submarine cables in a contract area under application by reducing fees in comparison to a later period;

ii) During the whole process of the ISA's governance, contractors and cable owners or operators could negotiate practicable protective measures like cable protection zones. These measures should be accompanied with a crossing agreement for sharing corresponding costs.

### 6.1 *The Economic Measures Adopted by the ISA*

There is a certain amount of cost for applicants who want to identify whether there are any in-service or planned cables in a contract area under application. In response, the ISA can encourage applicants to identify by cutting application or administrative fees. Such economic measures have been considered in addressing the issues regarding prospecting operations and maritime scientific research.

The boundary between prospecting operations and maritime scientific research is vague. It appears that many activities may be carried out on the basis of marine scientific research which is pursuant to Article 87 of the LOSC.<sup>58</sup> Consequently, there is very little incentive for prospectors to submit notification to the ISA of their activities, most of which may be carried out under the cover of marine scientific research. There have been merely two cases of prospecting on record.<sup>59</sup> In response, some scholars propose that one incentive for would-be prospectors to notify the ISA of their activities is found in regulation 5(2), which would allow prospectors who declare their financial expenditure to the ISA to set off such expenditure as part of the development costs incurred prior to commercial production.<sup>60</sup>

Similarly, economic measures could be taken into account by the ISA as applicants may need to bear extra costs when there exists any submarine cable in their proposed area. The development of the Draft Exploitation Code needs to fully consider sufficient incentives for companies to engage in deep seabed exploitation in light of the technical and economic difficulties they face.<sup>61</sup> When a proposed area overlaps with one or more submarine cable routes, the contractors in question will suffer potential economic and logistical competitive disadvantages vis-à-vis contractors whose contract areas do not contain any cables.<sup>62</sup> In this situation, if an area is merely supposed to have any submarine cable route, it will discourage an applicant to consider such an area, let alone identifying them.

Therefore, if the ISA could adopt measures to reduce the fees for the operation of a contract area that has a cable, applicants would have more incentives to identify whether any cables exist.<sup>63</sup> For example, economic measures could be incorporated into Appendix II, “Schedule of annual, administrative and other applicable fees,” and elaborated in corresponding regulations for its implementation.

## 6.2 *Crossing Agreements*

Another type of economic measure is one in which contractors and cable owners or operators can negotiate certain protective measures such as cable protection zones, accompanied with a crossing arrangement to share corresponding expenditure.

DR 35 of the Draft Exploitation Code stipulates that when finding any archeological or historical remains, contractors shall suspend exploration or exploitation within a reasonable radius to avoid disturbing such remains. In other words, the contractors are obligated to establish a protection zone for these remains. If the council of the ISA decides to discontinue the exploration or exploitation, the contractor will suffer certain economic loss. In this situation, some stakeholders comment that the ISA should consider compensating the contractor, including through providing another exploitation area with the same size or value as that of the affected area, or reducing the contractor’s payments.<sup>64</sup> Therefore, the ISA’s economic support can contribute to the establishment of a cable protection zone.

A zoning approach would also be applicable to address the conflicts between deep seabed mining and submarine cable activities. Some cable companies point out that the establishment of cable protection zones is more economical than rerouting cables.<sup>65</sup> Nevertheless, an obstacle for the establishment of cable protection zones is that it may cause losses to contractors. These include the direct loss of resources as well as the operational cost of maintaining and moving equipment carefully from one area to another at those depths.<sup>66</sup> As opposed to the protection of archeological or historical remains, the protection of submarine cables with economic support is beyond the responsibility of the ISA. In this situation, a more practical countermeasure is to encourage cable owners or operators to negotiate with applicants or contractors on cable protection zones. These measures should be accompanied with a crossing arrangement for sharing corresponding costs. To be specific, when identifying submarine cables in an area under application or contract area, the applicant or contractor can draft a tailored crossing arrangement that aims to reduce the risk of inadvertent damage to such cables. At the same time, the cable owners or operators provide a certain amount of compensations to the applicant or the contractor.<sup>67</sup> In this manner, this arrangement permits the superposition of submarine cables with deep seabed mining when necessary, and the loss of deep seabed mining would be mitigated by compensation.

Such a crossing arrangement could be incorporated into the Draft Exploitation Code. For example, as for other users’ “due regard” obligation in DR 31(2), it can encourage both parties to negotiate a crossing arrangement. Moreover, when dealing

with specific requirements at both the approval and post-approval phases, especially procedural mechanisms in DRs 32, 33, and 34, this kind of arrangement will provide a means to incorporate them on a goodwill basis.

Nevertheless, it should be stressed that both economic measures are significant for the implementation of “due regard” obligations. That is not to say that any economic measures will be workable. For example, when deep seabed mining causes damage to submarine cables, cable companies cannot access the Special Chamber of the ITLOS. In response, some cable companies suggest adding financial guarantee provisions, which they could cancel when damage to cables occurs.<sup>68</sup> In theory, these measures would indeed be beneficial in protecting submarine cables. However, due to a lack of reciprocal enforcement by a competent authority, it would be difficult for contractors to the ISA to accept them.

## Conclusion

Although the LOSC has incorporated the “due regard” obligation as a normative basis for the coordination of competing uses of the Area, including deep seabed mining and submarine cable activities, the lack of any framework for implementing this obligation impedes its effectiveness in practice. In response, this article has discussed the role of ISA in filling the gap.

The ISA is the competent international organization over deep seabed mining. It is argued that the role of competent international organizations concerning the implementation of “due regard” obligation has not yet received enough attention. However, the IMO’s experience indicates the potential of other competent international organizations to act as coordinators. Besides, in light of the influence of potential conflicts on the ISA’s governance over deep seabed mining, it is necessary that the ISA should bear such a responsibility.

Furthermore, this article has analyzed that the ISA can do this by exercising its rule-making function, and the on-going negotiation of the Draft Exploitation Code provides a precious opportunity. Through analyzing the latest version of the Draft Exploitation Code, it can be argued that the ISA has already formulated a basic coordinating framework for the implementation of the “due regard” obligation. Such a coordinating framework is expected to make up for the insufficiency of the existing deep seabed mining regime. Furthermore, this article proposes two types of economic measures to further improve this framework: one is a reduction in the application or administrative fees, another is using a crossing-agreement for sharing costs.

## Notes

1. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

2. The Authority has entered into 15-year contracts for exploration for three types of mineral resources in the Area with thirty contractors, available at: “Exploration Contracts,” *International Seabed Authority*, [https://www.isa.org/jm/deep-seabed-minerals-contractors?qt-contractors\\_tabs\\_alt=0#qt-contractors\\_tabs\\_alt](https://www.isa.org/jm/deep-seabed-minerals-contractors?qt-contractors_tabs_alt=0#qt-contractors_tabs_alt), accessed November 6, 2020.

3. For example, a French Polynesia's telecommunications company (OPT French Polynesia) had expressed its concerns regarding the potential conflicts between its submarine cable routes and a contractor's plan of work for exploration. See Kent Bressie, "Stakeholder Submission by OPT French Polynesia," *Harris, Wiltshire & Grannis*, May 15, 2015, <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/optfrenchpoly.pdf>, accessed November 6, 2020.; Jean-Francois Martin, "Comments of OPT French Polynesia on Draft Exploitation Regulations," *OPT French Polynesia*, December 19, 2017, <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/documents/EN/Regs/2017/Other/OPT.pdf>, accessed November 6, 2020.
4. Thomas A. Mensah, "The Competent International Organizations: Internal and External Changes," in Peter B. Payoyo (ed.), *Ocean Governance: Sustainable Development of the Seas* (United Nations University Press, 1994), p. 278.
5. James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011), p. 116.
6. Ongoing development of regulations on exploitation of mineral resources in the Area, available at: "Draft Exploitation Regulations," *International Seabed Authority*, <https://isa.org/jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area>, accessed November 6, 2020.
7. Bernard Oxman, "The Principle of 'Due Regard,'" in *International Tribunal for the Law of the Sea: The Contraction of the International Tribunal for the Law of the Sea to the Rule of Law (1996–2016)* (Brill Nijhoff Publisher, 2018), p. 108, [https://doi.org/10.1163/9789004356832\\_013](https://doi.org/10.1163/9789004356832_013).
8. *Ibid.*
9. *Ibid.*
10. ISA Technical Study No. 24, p. 12.
11. *Chagos Protected Area Arbitration, Mauritius v. United Kingdom*, Award of 18 March 2015, para. 540.
12. For examples, in the book, *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016*, Tullio Scovazzi and Bernard Oxman have discussed the role of ITLOS in developing international law, including the "due regard" obligation.
13. ISA Technical Study No. 24, pp. 16–17.
14. Zoe Scanlon, "Addressing the Pitfalls of Exclusive Flag State Jurisdiction: Improving the Legal Regime for the Protection of Submarine Cables," 48 *J. Mar. L. & Com.* 295, pp. 311–312.
15. IMO Circular 282, November 27, 2009. However, it should be noted that, in the context of IMO, the necessity of establishing a non-anchoring area is dependent on to what extent anchoring may damage the marine environment. Consequently, it seems that protecting submarine cable is viewed as a part of the protection of the marine environment. See IMO Circular 215 (January 19, 2001).
16. ISA Technical Study No. 24, p. 19.
17. To find practical solutions for the peaceful coexistence of both uses in the Area, the International Cable Protection Committee (ICPC) and the ISA had already held two workshops in 2015 and 2018, respectively. As the output of these workshops, the ISA have issued two technical studies: ISA Technical Study No. 14 and ISA Technical Study No. 24.
18. ISA Technical Study No. 24, p. 76.
19. Neil Craik, "Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining," *ISA Discussion Article No. 4*, June 2016, p. 7.
20. Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary, Volume VI* (Martinus Nijhoff Publisher, 2002), p. 297.
21. ISA, ISBA/22/C/3 (12 May 2016).
22. *Regulations on Prospecting and Exploration for Polymetallic Nodule in the Area*, ISBA/6/A/18(2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014) (hereinafter "Nodules Exploration Regulations").
23. *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014) (hereinafter "Sulphides Exploration Regulations").
24. *Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area*, ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013), regulation 1(3)(a)-(b) (hereinafter "Crusts Exploration Regulations").

25. Satya Nandan, "Administering the Mineral Resources of the Deep Seabed," *The British Institute of International and Comparative Law, Law of the Sea Symposium*, London, March 22 & 23, 2005.
26. *Nodules Exploration Regulations*, Regulation 5(1b); *Sulphides Exploration Regulations*, Regulation 5(1b); *Crusts Exploration Regulations*, 5(1b).
27. *Nodules Exploration Regulations*, Regulation 21(4c); *Sulphides Exploration Regulations*, Regulation 23(4c); *Crusts Exploration Regulations*, 23(4c).
28. *Nodules Exploration Regulations*, Regulation 35; *Sulphides Exploration Regulations*, Regulation 37; *Crusts Exploration Regulations*, 37.
29. ISA Technical Study No. 24, p. 18.
30. *Nodules Exploration Regulations*, Regulation 35; *Sulphides Exploration Regulations*, Regulation 37; *Crusts Exploration Regulations*, 37.
31. ISA Technical Study No. 24, p. 83.
32. "Memorandum of Understanding Between the International Cable Protection Committee and the International Seabed Authority," February 25, 2010, <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/documents/EN/Regs/MOU-ICPC.pdf>, accessed November 6, 2020.
33. *Ibid.*
34. "About the Commission," *Sargasso Sea Commission*, <http://www.sargassoseacommission.org/about-the-commission>, accessed November 6, 2020.
35. For example, it was suggested that the Sargasso Sea Commission could:
- a. Identify areas in the Sargasso Sea that are environmentally sensitive in a database or otherwise and this information could be fed into the desktop survey for future cable installation;
  - b. If any navigational recommendations or requirements for vessel traffic in the Sargasso Sea were developed then these would be communicated as appropriate to the ICPC. The ICPC, in turn, might consider reflecting these measures in an ICPC recommendation, which are non-binding but experience a high level of compliance from the cable industry.
- See: "Submarine Cables in the Sargasso Sea: Final Workshop Report," *Sargasso Sea Commission*, January 1, 2015, pp. 23–24.
36. "The organ must determine the limits of its own competence, because no other organ can do so; but its decisions will be illegal if it assumes powers that it does not have." See Henry G. Schermers and Niels M. Blokker, *International Institutional Law*(6th) (Brill Nijhoff Publisher, 2018), p. 531.
37. Section 3, paragraph 2 of the Annex, 1994 Implementation Agreement of the LOSC.
38. Robin Churchill and Vaughan Lowe, *The Law of the Sea (3rd)* (Juris Publishing, 1999), p. 245.
39. Rüdiger Wolfrum, "Identifying Community Interest in International Law," in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (Oxford University Press, 2018), p. 25, <https://doi.org/10.1093/oso/9780198825210.003.0002>.
40. Oxman, 2018, pp. 109–111.
41. ISBA/25/C/WP.1 (22 March 2019).
42. *Ibid.*
43. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) Submitted by the Government of Japan, October 2019.
44. Costa Rica's submission in accordance with paragraph 7 of ISBA/25/C/CRP.5, October 2019.
45. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1), Submitted by the Government of Japan, October 2019.
46. Douglas Burnett, Tara Davenport and Robert Beckman, "Overview of the International Legal Regime Governing Submarine Cables," in Douglas Burnet (ed.), *Submarine Cables: The Handbook of Law of the Policy* (Martinus Nijhoff Publisher, 2013), p. 79.
47. "Submission from Australia on Draft Regulations on Exploitation of Mineral Resources in the Area," October 2019, <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/australia-a.pdf>, accessed November 6, 2020.
48. ISA Consultation 2015/1, Stakeholder Submission by OPT French Polynesia.
49. "A number of further observations about the 'due regard' obligation can be made..." (a)

it implies certain conduct is expected but it does not articulate any specific details about the type of conduct expected; (b) its basic elements would be ascertaining and sharing information about activities (notice), and discussing options to resolve conflicts (consultation). See ISA Technical Study No. 24, p. 73.

50. ISBA/25/C/WP.1 (March 22, 2019).

51. “Comparative Study of the Existing National Legislation on Deep Seabed Mining,” ISA, <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/compstudy-nld.pdf>, accessed November 6, 2020, para 79.

52. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) Submitted by the Government of Japan, October 2019.

53. Crossing-agreements have already been used by cable industries in areas under national jurisdiction, See Lars Olav Askheim, “Commercial Arrangements and Liability for Crossing Pipelines, Power Cables and Telecom Cables (Connectors) on the Seabed,” in Catherine Banet (ed.), *The Law of the Seabed: Access, Uses, the Protection of Seabed Resources* (Brill Nijhoff, 2020), pp. 553–571, [https://doi.org/10.1163/9789004391567\\_025](https://doi.org/10.1163/9789004391567_025).

54. ISBA/25/C/WP.1 (March 22, 2019).

55. *Ibid.*

56. Comments on the “Draft Regulations on Exploitation of Mineral Resources in the Area,” submitted by the ICPC on August 25, 2017.

57. *Ibid.*

58. Michael Lodge, “International Seabed Authority’s Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area,” *Journal of Energy & Natural Resources Law* 20(3) (2002), p. 283, <https://doi.org/10.1080/02646811.2002.11433299>.

59. Personal communication.

60. Lodge, 2002, p. 283.

61. Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) Submitted by the Government of Japan, October 2019.

62. ISA Technical Study No. 24, p. 72.

63. *Ibid.*, p. 82.

64. Comments by the Government of the PRC on the Draft Regulations on Exploitation of Mineral Resources in the Area, October 15, 2019, pp. 15–16.

65. ISA Technical Study No 24, p. 76.

66. *Ibid.*, p. 81.

67. Response to ISA stakeholder survey questionnaire: “Developing a Regulatory Framework for Mineral Exploitation in the Area,” ISA, February 2014, <https://isa.org.jm/files/documents/EN/Survey/ISA-SSurvey.pdf>, accessed November 6, 2020.

68. Tara Davenport, “Responsibility and Liability for Damage Arising Out of Activities in the Area: Potential Claimants and Possible Fora,” *Centre for International Governance Innovation*, February 7, 2019, pp. 16–17.

## Biographical Statement

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