Checks and balances on the regulatory powers of the International Seabed Authority

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Checks and Balances on the Regulatory Powers of the International Seabed Authority

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Abstract

The Part XI regime grants extensive administrative powers to the Authority to manage seabed operations. The purpose of this paper is to explore the legal framework for the exercise of these powers and the processes through which alleged unlawful action can be challenged by operators. This paper will consider what applicable standards exist in Part XI and associated instruments to prevent the abuse of discretionary power by the Authority, as well as how these standards should be interpreted to protect the interests of operators, without impeding the ability of the Authority to adopt a robust regulatory approach to managing seabed mining.

Keywords: checks and balances; regulatory powers; regulations, International Seabed Authority; power; standards; environmental protection

1. Introduction

The seabed beyond national jurisdiction is one of the most hostile environments on the planet. Nevertheless, at depths of up to 6000 metres, mineral-rich rocks have attracted the attention of humankind. The availability of copper, nickel, cobalt, manganese, rare earth elements and other minerals offers significant commercial opportunities for mining companies, particularly given the demand for these minerals for use in many modern technologies, including mobile phones, computer equipment, and renewable energy devices. States and private companies are beginning to invest significant sums in the machinery and mechanisms that will be necessary to recover these resources.

The exploitation of seabed minerals in the International Seabed Area (the Area) is subject to the regime established by Part XI of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which grants significant legislative and executive powers to the International Seabed Authority (the Authority) in order to regulate mining activities, whether carried out directly by States Parties or by private companies. The direct conferral of regulatory powers on an international organisation is unusual and this paper explores the checks and balances that apply to the exercise of those powers. By focussing on the exercise of discretionary powers of the Authority over deep seabed mining operators, this paper seeks
to contribute to a better understanding of how Part XI of UNCLOS and related instruments will operate in practice if deep seabed mining moves to the exploitation phase. The paper will argue that there is a need to achieve a balance between ensuring that the Authority respects the economic interests of operators who have invested in deep seabed mining, whilst also ensuring that the Authority is able to achieve its core objectives, including the effective protection of the marine environment and the orderly, safe and rational management of seabed minerals. In this respect, important lessons can be learnt from other areas of international law, where courts and tribunals have sought to balance similar competing objectives. The paper will therefore seek to draw analogies to other relevant jurisprudence to understand how the key provisions of UNCLOS and related rules may be interpreted, whilst noting any key differences in context which may influence how the Part XI regime is construed.

Section two of the paper will explain the emergence of the Authority as an international organisation responsible for regulating deep seabed mining, examining the key functions of the Authority and the legal relationship between the Authority and operators. Section three of the paper will further explore the nature of the powers exercised by the Authority and what mechanisms are in place to challenge any misuse of powers by the Authority. Section four of the paper moves on to consider particular conditions attached to the exercise of powers by the Authority, analysing the key legal provisions contained in UNCLOS and asking how these may be interpreted in practice. Section five draws some general conclusions.

2. The International Seabed Authority and the Regulation of Deep Seabed Mining
The existence of polymetallic nodules on the abyssal plains of the deep oceans was discovered in the late nineteenth century during the Challenger Expedition, led by Scottish natural historian Charles Wyville Thomson, but it was not until the second half of the twentieth century that thoughts turned to the commercial exploitation of these resources. In his famous speech to the United Nations General Assembly in 1967, Maltese Ambassador Arvid Pardo called for the resources of the deep seabed to be designated as the common heritage of mankind, meaning that no single state would be able to unilaterally exploit these resources for its exclusive benefit.¹ A key part of the UNCLOS negotiations concerned the

¹ This resulted in the adoption of United Nations General Assembly Resolution 2749 (XXV), Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, 17 December 1970.
development of an international regime for the management of deep seabed minerals in areas beyond national jurisdiction. Part XI of UNCLOS sets out the basic principles to guide the regulation of deep seabed mining and it also establishes the Authority, as an international organization to promote ‘the orderly, safe and rational management of the resources of the Area … in accordance with sound principles of conservation [and] the avoidance of unnecessary waste…’ 2 The Authority is also charged with promoting and encouraging the conduct of marine scientific research in the Area in order to further our knowledge of the remote and poorly understood biomes at the bottom of the ocean, 3 as well as to adopt necessary measures for the effective protection of the marine environment from harmful effects which may arise from deep seabed mining. 4 These basic objectives were not altered by the 1994 Agreement relating to the Implementation of Part XI of UNCLOS (Part XI Agreement), although this instrument did introduce some important modifications to the manner in which the Authority operates. 5 Ultimately, it is for the Authority to determine how to balance these various objectives through the development and implementation of regulations for the conduct of deep seabed mining. 6

The Authority is arguably a unique international organization 7 in that it not only operates as a forum in which states agree upon the rules and regulations to guide deep seabed mining, but, once adopted, those rules and regulations are automatically binding on all states wishing to carry out such activities, without any opportunity to object or opt out. 8 This is a genuine law-making power, which sets the Authority apart from the vast majority of other international organizations. 9 Moreover, these rules and regulations also apply to other non-state actors wishing to carry out seabed mining in the Area, and the Authority is given the powers to fully

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2 UNCLOS, Article 150.
3 UNCLOS, Article 143.
4 UNCLOS, Article 145.
6 UNCLOS, Article 162(2)(o)(ii).
8 UNCLOS, Article 137.
9 See e.g. Rüdiger Wolfrum, ‘Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations’, in Armin von Bogdandy et al. (eds.), The Exercise of Public Authority by International Institutions – Advancing International Institutional Law (Springer 2010) 917; Harrison (n. 5) 152.
administer those rules itself, including the ability to process and authorize applications to carry out deep seabed mining and to enforce the rules against mine operators, whether they are states, state-owned companies or private enterprises.\textsuperscript{10} As noted by Dingwall, ‘the central relationship in deep seabed mining is between the investor, on the one hand, and the [Authority] as regulator and overseer of deep seabed mining contracts, on the other.’\textsuperscript{11}

It is the Council, as the executive organ of the Authority, which wields many of these powers on behalf of the Authority, albeit on the basis of advice from the Legal and Technical Commission as an independent body of experts.\textsuperscript{12} However, where there is an urgent need for timely action or where administrative efficiency so dictates, it is possible that the political organs of the Authority could delegate certain functions to the Secretariat.\textsuperscript{13} It is important to emphasise that these functions involve the exercise of executive powers in relation to individual contractors. The degree of powers conferred upon the Authority as an international organization is largely unprecedented and this raises important questions about the nature of those powers.

At the heart of this unique international regulatory regime lies a well-established legal concept – a contract. According to the Convention, ‘activities in the Area shall be carried out in accordance with a formal written plan of work drawn up in accordance with Annex III and approved by the Council after review by the Legal and Technical Commission’\textsuperscript{14} and this provision goes on to specify that ‘… the plan of work shall, in accordance with Annex III, article 3, be in the form of a contract.’\textsuperscript{15} In other words, all mine operators have to enter into a contractual arrangement with the Authority.\textsuperscript{16} The contract between the Authority and a mine operator is internationalised in the sense that it is directly governed by international law, rather than any national legal system.\textsuperscript{17}

\textsuperscript{10} For further information, see \textit{Note by the Secretariat – Implementing an Inspection Mechanism for Activities in the Area}, Document ISBA/25/C/5, 20 December 2018.
\textsuperscript{12} Ibid.
\textsuperscript{13} See e.g. Note by Secretariat – Delegation of functions by the Council and regulatory Efficiency, Document ISBA/25/C/6, 21 December 2018.
\textsuperscript{14} UNCLOS, Article 153(3).
\textsuperscript{15} Ibid. See also UNCLOS, Annex III, Article 3(5): ‘Upon its approval by the Authority, every plan of work, except those presented by the Enterprise, shall be in the form of a contract concluded between the Authority and the applicant or applicants.’
\textsuperscript{16} This requirement was extended to the Enterprise under the Part XI Agreement, Annex, Section 2, para. 4.
\textsuperscript{17} E.g. \textit{Decision of the Assembly of the Authority of the International Seabed Authority relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area (Polymetallic Sulphides
The contract is central to the regulatory regime in Part XI because it establishes a direct legal relationship between the Authority and each deep seabed mining operator. However, this is no ordinary contract. The content of the contract is to a large extent dictated by Part XI of UNCLOS and the related regulations adopted by the Authority. Indeed, the Authority has developed a set of standard clauses that are included in all contracts entered into by the Authority and these standard clauses directly incorporate the relevant rules and regulations of the Authority by providing that ‘the contractor shall carry out exploration in accordance with the terms and conditions of this contract, the Regulations, Part XI of the Convention, the Agreement and other rules of international law not incompatible with the Convention.’ In other words, the contract has the effect of imposing the entire regulatory regime developed by the Authority on the contractor. Furthermore, the Authority is given powers to oversee and enforce the contract on an ongoing basis. To this end, contractors are expected to report on a regular basis on their activities and the Authority is empowered to monitor compliance by the contractor, including through sending inspectors to the site of operations. Ultimately, the Authority has the power to impose fines on contractors or even to suspend or terminate the contract if it considers that breaches of the regulatory regime have taken place. It is therefore clear that this is not a contract between two equal negotiating partners, but rather the contract confirms the regulatory power of the Authority over operators. Moreover, in many cases, the Authority is vested with significant discretion to determine how to apply its powers in individual cases. It is in this context that it is appropriate to ask what protection may be available to a contractor to challenge any perceived excess of jurisdiction or misuse of regulatory powers.

3. Limits to the Powers of the Authority and Procedures for Overseeing Their Exercise

Regulations), Document ISBA/16/A/12/Rev.1, 7 May 2010, Annex 4, section 27.1: ‘This contract shall be governed by the terms of this contract, the rules, regulations and procedures of the Authority, Part XI of the Convention, the Agreement and other rules of international law not incompatible with the Convention.’

There are some issues which are specific to each contract, such as the agreed plan of activities and the training programme.

Polymetallic Sulphides Regulations (n. 17) Annex 4, section 13.1. See also section 13.2: ‘The Contractor undertakes … to comply with the applicable obligations created by the provisions of the Convention, the rules, regulations and procedures of the Authority and the decisions of the relevant organs of the Authority.’

Ibid., Annex 4, section 10.

Ibid., section 14.

UNCLOS, Annex III, Article 18.

As noted by Karavias, ‘the contract is exceptional in the sense that the choice of law appears to operate, as it were, ex lege, rather than ex contractu. The significance of ‘party autonomy’ in deciding upon the governing law of the contract for exploration is minimal, if any at all’; Markos Karavias, Corporate Obligations under International Law (Oxford University Press 2013) 138.
The Authority may be unique in terms of the nature and scale of powers that it exercises, but it nevertheless remains an international organization and therefore is subject to the general principles of international institutional law. Within this field of international law, it is generally recognised that international organizations cannot act in a manner that exceeds the powers conferred upon them, unless such actions are justified by implied powers.\textsuperscript{24} International courts and tribunals have thus stressed the importance of giving effect to any conditions that have been attached to the exercise of discretionary powers by international organizations.\textsuperscript{25} At the same time, courts and tribunals have confirmed that where an organization is subject to express conditions on the exercise of powers, ‘these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example.’\textsuperscript{26}

The application of these principles to the Authority is expressly confirmed by UNCLOS, which provides in Article 157(2) that ‘the powers and functions of the Authority shall be those conferred upon it by this Convention.’ Moreover, the legal regime in Part XI is complemented by its own sui generis dispute settlement system in Section 5 of Part XI, whereby disputes between a contractor and the Authority may be submitted either to an international commercial arbitral tribunal or to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.\textsuperscript{27} In theory, the establishment of specialised judicial organs to oversee the operation of the Authority provides an important mechanism to ensure that the Authority does not exceed the scope of its conferred powers. However, the ability of dispute settlement organs to play this role must be understood in light of the scope of their jurisdiction as defined in Section 5 of Part XI.

Whilst UNCLOS establishes the Seabed Disputes Chamber as a specialist judicial body to hear disputes concerning the interpretation and application of Part XI\textsuperscript{28}, the drafters of


\textsuperscript{25} See e.g. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation Advisory Opinion (1960) ICJ Reports 150, 160.

\textsuperscript{26} Conditions of Admission of a State to Membership in the United Nations Advisory Opinion (1948) ICJ Reports 57, 62.

\textsuperscript{27} UNCLOS, Article 188(2) makes clear that only contractual disputes can be submitted to an international commercial arbitration, but if any questions of interpretation of UNCLOS arise, the arbitral tribunal must refer those questions to the Seabed Disputes Chamber for a decision.

\textsuperscript{28} UNCLOS, Articles 186-187.
UNCLOS expressly denied the possibility for the Chamber to assess the validity of the rules and regulations adopted by the Authority. In this context, Article 189 provides that ‘in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures.’ This provision was intended to shield the legislative functions of the Authority from interference by judicial bodies and it means in practice that any question concerning the compatibility of regulations adopted by the Authority with the Convention are left to the political organs of the Authority.\(^{29}\) It is possible that such questions could be submitted to an advisory opinion at the request of the Authority\(^ {30}\), but even if this were to happen, any determination by the Seabed Disputes Chamber of the validity of rules and regulations would not be binding without some further action on the part of the Authority to give legal effect to the advisory opinion.

Whilst Article 189 places a clear and obvious limitation on the ability of contractors to challenge the exercise of legislative power by the Authority, what about the executive powers of the Authority? In this respect, Article 189 provides that ‘the Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority...’. One interpretation of this provision is that any decision that involves an exercise of discretion is protected from judicial proceedings.\(^ {31}\) However, as has been pointed out by other authors, such a conclusion would lead to a ‘great gap in the dispute settlement mechanism’ and ‘from an applicant’s perspective, this gap results in an ineffective remedial mechanism.’\(^ {32}\) An alternative interpretation of this provision is not as a complete prohibition on the challenge of any decisions which are based upon a discretionary power—which would cover many, if not most, decisions of the Authority—but rather that it prohibits challenging any decisions which are made within the confines of the discretion that has been granted. Indeed, the following text goes on to say that ‘jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority

\(^{29}\) See further Harrison (n. 5) 150.

\(^{30}\) Article 189 is expressly ‘without prejudice to Article 191’, which confers a power on the SDC to give advisory opinions.


\(^{32}\) Ibid.
in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations.’ Taken as a whole, it is therefore reasonable to interpret Article 189 as confirming that it is possible to challenge the exercise of executive powers by the Authority, but any such challenge must be based upon an express limitation within the text of the Convention or the regulatory framework. 33 Beyond such instances, the Seabed Disputes Chamber must give deference to the discretionary powers of the Authority. This leads us to question what limits are imposed on the exercise of power by the Authority which could provide a substantive basis for such a challenge. The following sections will consider the main provisions which seek to limit the powers of the Authority vis-à-vis individual contractors and it will consider how these conditions should be interpreted in practice.

4. Challenging Misuse of Power by the International Seabed Authority

4.1 Security of Tenure and Its Limits

The first key protection for contractors embedded in Part XI is security of tenure. Article 153(6) of UNCLOS expressly provides that ‘a contract shall provide for security of tenure …’ 34 and Article 19(2) of Annex III goes on to specify that ‘any contract entered into in accordance with Article 153, paragraph 3, may be revised only with the consent of the parties.’ In other words, it means that changes to the contractual relationship cannot be imposed on operators against their will. This is also reflected in standard contract clauses, which only permit the contract to be amended by agreement. 35 Any attempt by the Authority to unilaterally change the terms of the contract will therefore be ultra vires and an abuse of power.

There have already been some consequences of this principle in practice. For example, when the Authority decided to institute a fixed overhead charge (of US$47,000) to be paid by contractors annually to cover the costs of supervision and administration, it amended the standard clauses contained in the Regulations for all future contracts, but it also recognized that any existing contractors would have to agree to the change and the Assembly ‘urged the

33 In support, see Dingwall (n. 11) 919.
34 See also UNCLOS, Annex III, Article 16.
Secretary-General to consult as soon as possible with all contractors whose contracts were entered into as a result of applications made before the date of adoption of the present decision with a view to renegotiating those contracts.36 There were fourteen contractors in this position and the Secretary-General entered into consultations with a view to amending the existing contracts. Some operators accepted these changes with immediate effect, whereas other operators appeared to hold out in the negotiations for several years.37 At the same time, in its correspondence on the topic, the Authority made clear that any operator seeking an extension of its contract, which for certain operators was imminent, would be required to accept the amendments,38 thereby demonstrating some practical limits of security of tenure in the context of the monopoly held by the Authority over authorizing access to the resources of the Area. Yet even the powers of the Authority to refuse extensions may be limited. To this end, paragraph 9 of Annex 1 of the Part XI Agreement provides that ‘contractors may apply for … extensions for periods of not more than five years each [and] such extensions shall be approved if the contractor has made efforts in good faith to comply with the requirements of the plan of work but for reasons beyond the contractor’s control has been unable to complete the necessary preparatory work for proceedings to the exploitation stage or if the prevailing economic circumstances do not justify proceeding to the exploitation stage.’39

It is possible to circumvent the protection offered by the principle of security of tenure by drafting contractual terms so that they are inherently evolution in character. For example, the March 2019 version of the Draft Exploitation Regulations provides that a contractor must comply with the regulations of the Authority as amended from time to time,40 meaning that the content of the contract will change as the regulations evolve and the individual consent of the contractor will not be needed on a case-by-case basis. Whilst such an approach provides significant flexibility to the Authority in allowing it to amend the regulatory framework, it

36 Decision of the Assembly of the International Seabed Authority concerning overhead charges for the administration and supervision of exploration contracts, Document ISBA/19/A/12, 25 July 2013.
37 See e.g. Status of contracts for exploration in the Area: Report of the Secretary-General, Document ISBA/22/C/5, 10 May 2016, Annex II, indicating that 11 of the 14 contractors had accepted the amendments by 2016. Moreover, two contractors (Government of India and UK Seabed Resources Ltd) had paid the additional fees, without formally having accepted a change in the contract. Only Institut français de recherche pour l’exploitation de la mer had not accepted the amendments at that stage.
38 Ibid., para. 9.
39 See also Polymetallic Sulphides Regulations (n. 17) Regulation 24.
potentially undermines legal certainty for contractors. Article 19(1) of Annex III may provide some recourse for contractors in this context: ‘when circumstances have arisen or are likely to arise which, in the opinion of either party, would render the contract inequitable or make it impracticable or impossible to achieve the objectives set out in the contract or in Part XI, the parties shall enter into negotiations to revise it accordingly.’ This provision at least establishes an obligation for the Authority to discuss any changes to the contractual regime in good faith with contractors.

Nor does security of tenure as embedded in the Part XI regulatory regime guarantee complete protection of a contract in all circumstances, although the conditions under which a contract may be suspended or terminated are strictly prescribed by UNCLOS. To this end, Article 18(1) of Annex III provides that: ‘A contractor’s rights under the contract may be suspended or terminated only in the following cases: (a) if in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and willful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority; or (b) if the contractor has failed to comply with a final binding decision of a dispute settlement body applicable to him…’. This is presented as an exhaustive list, meaning that the Authority cannot suspend or terminate a contract for other reasons not listed in this provision.41 Article 18(3) of Annex III is also relevant in this respect as it provides that: ‘… the Authority may not execute a decision involving … suspension or termination until the contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to him pursuant to Part XI, section 5.’ The standard clauses specify that the Authority shall give 60 days’ notice of an intention to suspend or terminate the contract and the contractor may begin dispute settlement proceedings within this period.42

Several issues may arise in the interpretation of these provisions concerning termination or suspension of contracts. In particular, they raise questions about how to determine whether the breach related to a ‘fundamental’ term of the contract and whether the breach was ‘serious, persistent and willful.’ Such concepts are not unheard of in municipal contract law

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41 It is also worth noting that the withdrawal of sponsorship may also lead to the termination of the contract if the operator is unable to find an alternative sponsor within six months of the notice of withdrawal; see Polymetallic Sulphides Regulations (n. 17) Annex, Regulation 31.
42 Ibid., Annex 4, Section 21.3.
or in the law of treaties, where, for example, a ‘material breach’ also gives rise to a right to suspend or terminate the treaty.\textsuperscript{43} However, the different context means that these terms must be given meaning informed by the objectives underpinning Part XI and the regulatory relationship between the Authority and the contractor. In this context, it is important to understand that such a breach may not only concern failure to fulfill the agreed plan of work, but it may relate to other fundamental aspects of the regulatory regime, such as the protection and preservation of the marine environment. Given the lack of scientific knowledge about the marine environment of the deep seabed and the importance of developing a regulatory framework based upon the best scientific evidence, even a failure to report data on environmental baseline conditions could be considered a serious violation of a fundamental term of the contract. In practice, whether a contractual term is ‘fundamental’ or not would appear to be an objective question, which is ultimately to be decided by an international court or tribunal. In other words, the Authority has no discretion in determining what is a fundamental term. In contrast, whether a particular violation is ‘serious, persistent and wilful’ may depend in part upon the circumstances of a particular case and there may be some discretion to be exercised by the Authority in determining whether this latter condition is met, particularly when it comes to determining the seriousness of a breach. In accordance with Article 189, any court or tribunal would therefore have to respect the discretion of the Authority on this matter, unless it could be shown that one of the other more general limits on the decision-making powers of the Authority, discussed in the following section, had been breached.

\textbf{4.2 General limits on the decision-making powers of the Authority}

We will now turn to those provisions that seek to control the general conduct of the Authority in all of its interactions with operators, including in relation to the approval, extension, and suspension/termination of contracts. Three distinct but interrelated standards may be relevant in this context.

\textit{Non-discrimination}

\textsuperscript{43} 1969 Vienna Convention on the Law of Treaties, Article 60. In its commentary on this provision, the International Law Commission explained that it preferred the term material breach instead of fundamental breach because ‘the word fundamental might be understood as meaning that only the violation of a provision directly touching on the central purposes of the treaty can ever justify the other party terminating the treaty.’
Article 152 provides that ‘the Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.’ Non-discrimination is a familiar legal concept found in many fields of international law, including international human rights law, international investment law and international trade law.\(^{44}\) Non-discrimination has in general been interpreted as a broad standard that not only prohibits treatment that is intentionally discriminatory, but also captures treatment that is discriminatory in practice.\(^{45}\) In this context, non-discrimination has been held to require an ‘even-handedness’ in the application of provisions between actors, rather than demanding identical treatment.\(^{46}\) Yet, non-discrimination does not prevent a regulator from pursuing a policy that differentiates between different actors based upon a ‘legitimate regulatory distinction’\(^{47}\), meaning a distinction that can be justified by the policy objectives being pursued. For example, there may be a reason for the Authority to introduce differences in its approach to regulating the exploitation of polymetallic sulphides compared to the exploitation of polymetallic nodules given the differences between the nature of the resources and their means of extraction. In contrast, a distinction that was based upon extraneous considerations, such as the nationality of the contractor, would not be permitted. The initial burden of proof falls on a complainant to demonstrate that a measure or action was *prima facie* discriminatory, but the burden may shift to the regulatory body itself to prove that any discriminatory conduct was justified by a legitimate regulatory distinction.\(^{48}\)

**Uniform application of the law**

Article 17(1) of Annex III provides that ‘the Authority shall adopt and uniformly apply rules, regulations, and procedures ... for the exercise of its functions as set forth in Part XI...’ The requirement of ‘uniform application’ has a precedent in international trade law, where it is reflected in Article X(3)(a) of the 1947 General Agreement on Tariffs and Trade (GATT), which provides that: ‘each contracting party shall administer in a uniform, impartial and

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\(^{44}\) See e.g. Nicolas Diebold, ‘Standards of Non-Discrimination in International Economic Law’ (2011) 60 *International and Comparative Law Quarterly* 831-865.


\(^{47}\) Ibid.

reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article…’. This provision has been interpreted to require consistent and predictable application of the law.\(^{49}\) From this perspective, there would appear to be some overlap between non-discrimination and uniformity, as the latter also covers ‘uniformity of treatment in respect of persons similarly situated…’\(^{50}\). However, uniformity in the application of the law would appear to go further than requiring uniformity of treatment between operators, by also requiring a coherent approach to regulation by the Authority in relation to a single operator. In other words, the Authority must be consistent in its treatment of an operator over time. In this respect, it may also be useful to consider the jurisprudence concerning the protection of investors developed through investment treaty arbitration and particularly the standard of fair and equitable treatment.\(^ {51}\) The latter has been interpreted as preventing a regulatory body from reneging on clear and explicit representations relied upon by investors: the so-called doctrine of legitimate expectations.\(^ {52}\) Such an understanding of uniformity ensures fairness in the treatment of contractors by holding the Authority to its word, preventing arbitrary changes in policy or practice. However, the doctrine of legitimate expectations only promotes uniformity where it is reasonable for an investor to rely upon the representation made by the regulator\(^ {53}\) and it does not necessarily prevent changes in policy, provided that the regulator can explain the reasons behind the change and the interests of the investor have been taken into account.\(^ {54}\) In other words, there is an inherent balancing process involved in determining whether there has been a breach of the fair and equitable treatment standard.\(^ {55}\) Indeed, it is worthwhile noting that the jurisprudence under international investment law has rowed back from some of the early extreme cases where decisions of states were criticized for failing to meet the highest possible standards of


\(^{50}\) Ibid.

\(^{51}\) Dingwall (n. 11) 910.

\(^{52}\) Mobil and Murphy Oil v Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, para 156; see also Glamis Gold v United States of America, UNCITRAL Arbitration, Award of 8 June 2009, para. 621; Suez and others v Argentina, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 226.

\(^{53}\) See e.g. International Thunderbird Gaming v Mexico, UNCITRAL Arbitration, Award, 26 January 2006, para. 147.

\(^{54}\) See e.g. Mesa Power Group v Canada, PCA Case No. 2012-17, Award, 24 March 2016, para. 502; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina, ICSID Case No. ABR/03/19, Decision on Liability, 30 July 2010, paras 228-230.

transparency and fairness\(^{56}\) and more recent investment tribunals have emphasized that the threshold for a breach of relevant investment standards is a high one\(^{57}\), which requires something more than a ‘perceived unfairness’\(^{58}\) but rather demonstrates ‘a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.’\(^{59}\) Indeed, investment tribunals have recognised that states often deserve a ‘high level of deference … [and] it is not for an investor-state tribunal to second-guess the substantive correctness of the reasons which an administration were to put forward in its decisions, or to question the importance assigned by the administration to certain policy objectives over others.’\(^{60}\) Such reasoning mirrors the restraint called for by Article 189 of UNCLOS which forbids the Seabed Disputes Chamber from substituting its discretion for that of the Authority. All in all, this calls for a balanced approach to the interpretation of the requirement to apply the law ‘uniformly’ and it must be recognised that the Authority may require some flexibility to adapt its policies and practices, provided that it can demonstrate a legitimate reason for doing so.

**Good faith**

The standard contract clauses require the Authority ‘to fulfill in good faith its powers and functions under the Convention and Agreement in accordance with article 157 of the Convention.’\(^{61}\) Good faith is an ambiguous standard, found in a number of treaties\(^{62}\), but with no clearly defined meaning.\(^{63}\) Nevertheless, it has been applied to the conduct of international organizations in previous international jurisprudence. For example, in the *Advisory Opinion on Admission of a State to Membership of the United Nations*, the International Court of Justice held that the relevant provision of the Charter, whilst laying

\(^{56}\) *Chemtura Corporation v Canada*, UNCITRAL Arbitration under Chapter 11 of North American Free Trade Agreement, Award, 2 August 2010, para. 214, where it is noted that the principle of fair and equitable treatment ‘does not hold government agencies to a standard of perfection.’

\(^{57}\) See e.g. *Mesa Power Group v Canada* (n. 54) para. 504.

\(^{58}\) *Perenco v Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 559. See also *Bilcon v Canada*, UNCITRAL Arbitration, Award, 17 March 2015, para. 444.

\(^{59}\) *Waste Management v Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98. See also *Glamis Gold v United States of America* (n. 52) para. 627.

\(^{60}\) *Crystalllex International Corporation v Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 583.

\(^{61}\) Polymetallic Sulphides Regulations (n. 17) Annex 4, section 13.4.

\(^{62}\) E.g. UNCLOS, Article 300.

\(^{63}\) In many cases, courts and tribunals have been reluctant to interpret this provision, even when it has been central to the pleadings of a case; see e.g. *Duzgit Integrity Arbitration*, Award, PCA Case No. 2014-07, 5 September 2016, para. 262.
down an exhaustive list of conditions for membership, ‘does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article.’ From this perspective, the good faith doctrine would appear to require that the powers of international organizations are exercised in pursuit of the purposes for which they were conferred and not used to achieve other ends. This is in line with a broader understanding of good faith incorporating a general prohibition on abus de droit, which forbids the use of any powers in a manner so as to harm the rights and interests of other actors through deception, subterfuge or intentionally destructive behaviour. Such conduct is unusual in international relations, but there are examples where international courts and tribunals have been willing to identify conduct that is intended to cause unnecessary harm or damage to others. Yet, bad faith cannot be assumed and the standard of proof in this context is a high one given the seriousness of the charge.

4.3 The exercise of discretionary powers in the context of environmental protection

One area of discretionary decision-making deserves particular attention, namely the protection of the marine environment. This is a topic that has attracted significant attention in the drafting of the exploitation regulations to date, in part because of the uncertainty that surrounds the possible impacts of deep seabed mining on marine ecosystems. Furthermore, the tension between environmental protection and economic interests has been a key issue in a number of cases brought against states in the context of international investment law and international trade law, thus demonstrating the potential for disputes to arise concerning the...
exercise of regulatory powers. It is therefore important to understand what functions may be exercised by the Authority in this respect and what limits may apply.

The Convention does expressly permit an application to be rejected on environmental grounds, but it sets a high threshold to do so.\(^{71}\) In particular, the Convention requires that ‘substantial evidence indicates the risk of serious harm to the marine environment.’\(^{72}\) It is explicitly recognised that this refusal could in theory extend to ‘part or all of the area covered by the proposed plan of work.’\(^{73}\) These conditions emphasize that the Authority must take a science-based approach to decision-making. Nevertheless, both of these conditions raise questions of interpretation. How much evidence is required before it can be classified as ‘substantial’? What is ‘serious harm’?

Some guidance is found in the March 2019 version of the Draft Exploitation Regulations, which defines serious harm as ‘any effect from activities in the Area on the Marine Environment which represents a significant adverse change in the Marine Environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognised standards and practices informed by Best Available Scientific Evidence.’\(^{74}\) This definition would still seem to leave some leeway for the Authority to determine when this threshold is met.

Further guidance on this matter can also be sought from broader principles of international environmental law, which call, *inter alia*, for a precautionary approach to regulation where there is scientific uncertainty, in order to avoid threats of serious and irreversible damage to the environment.\(^{75}\) The great uncertainty surrounding the risks to deep sea ecosystems\(^{76}\) inevitably calls for a precautionary approach to regulation\(^{77}\) and this principle is itself recognised by the regulations adopted by the Authority.\(^{78}\) It follows that the need for ‘substantial evidence’ cannot be interpreted as a demand for conclusive proof, but rather the

\(^{71}\) See UNCLOS, Annex III, Article 6(3)(b).
\(^{72}\) UNCLOS, Article 162(2)(x).
\(^{73}\) UNCLOS, Annex III, Article 6(3)(b).
\(^{74}\) Draft Exploitation Regulations (n. 40) Schedule 1.
\(^{75}\) See e.g. Rio Declaration on Environment and Development, Principle 15.
\(^{78}\) See e.g. Polymetallic Sulphides Regulations (n. 17) Annex, Regulation 33(2).
evidentiary threshold may be much lower, even though ultimately there must be some 
evidence pointing to ‘plausible indications of potential risks.’ Moreover, the concept of 
‘risk of serious harm’ must be interpreted in light of the potential irreversible harm that could 
be caused to the slow-growing species that are often found to inhabit the deep seabed or to 
sensitive ecosystem functions, such as nutrient recycling or carbon burial. Taken together, 
these arguments point towards recognising a wide discretion on the part of the Authority in 
pursuit of its objective to promote the protection of the marine environment of the Area, 
leaving less space for judicial interference, unless it can be shown that there is a complete 
lack of evidence of any risk or the powers have otherwise been exercised in violation of the 
general limits discussed in the previous section.

Another issue which may raise questions about the scope of the Authority’s environmental 
decision-making is the response to environmental emergencies. For example, Regulation 35 
of the existing Polymetallic Sulphides Regulations expressly provides that where an incident 
has caused or poses a threat of serious harm, the Council may issue emergency orders ‘as 
may be reasonably necessary to contain and minimise serious harm or the threat of serious 
harm.’ Indeed, it is also anticipated that the Secretary-General may take ‘immediate 
measures of a temporary nature as are practical and reasonable in the circumstances’ pending 
any action by the Council. Both sets of powers are subject to conditions, which appear to 
limit the scope of the discretion exercised by the Authority. However, the inclusion of the 
term ‘reasonable’ within these powers suggests that the Authority retains some discretion in 
determining the precise nature of the measures to be taken. The concept of reasonableness is 
often incorporated into legal texts in order to preserve some flexibility in the application of 
the law. Reasonableness is generally understood as demanding that decisions are based 
upon clear reasons, taking into account all relevant considerations and ignoring irrelevant 
considerations. It has been emphasized that this standard of review is an objective one, 
but the principle of reasonableness does not necessarily dictate the weight to be given to 
particular factors in the decision-making process and such balancing is left in the first

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79 Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area Advisory Opinion, ITLOS Case No 17, 1 February 2011, para. 131.
80 For a fuller discussion, see Lisa A. Levin et al., ‘Defining “Serious Harm” to the Marine Environment in the Context of deep-seabed mining’ (2016) 74 Marine Policy 245-259.
81 Polymetallic Sulphides Regulations (n. 17) Regulation 35(6).
82 Ibid., Regulation 35(2).
84 Ibid., para. 15.
instance to the decision-maker. In other words, reasonableness calls for a degree of transparency and coherence in the exercise of discretion, but there is otherwise a significant margin of appreciation. 86

Returning to the current context, it is interesting to contrast the language used in respect of emergency measures relating to deep seabed mining with other similar provisions in the Convention on urgent environmental action. For example, coastal States are limited to taking measures in response to shipping casualties that are ‘proportionate to the actual or threatened damage.’ This requirement of proportionality would seem to set a much higher threshold to be met by the decision-maker.

4.4 Proportionality of monetary penalties

There is one clear provision in the Part XI regime which would seem to demand courts and tribunals play a greater role in controlling the discretionary decision-making powers of the Authority; Article 18(2) of Annex III of UNCLOS provides that ‘the Authority may impose upon the contractor monetary penalties proportionate to the seriousness of the violation.’ This very specific limitation opens the door to operators challenging any penalties as being disproportionate.

Traditionally proportionality is understood as a relatively strict restriction on the discretion of decision-makers, requiring an assessment of the extent of the impact of the measure on the interests affected and whether other alternative measures could have been used to achieve the same outcome. 88 To understand the implications of this limitation, lessons may be learned not only from relevant principles of investment law relating to proportionality, 89 but also from other aspects of the law of the sea. Thus, in the M/V Virginia G Case, ITLOS held that the sanction applied by Guinea Bissau against the arrested tanker (i.e. confiscation) was not necessary to ensure compliance with the laws and regulations adopted by the coastal State. In doing so, the Tribunal considered the reasoning of the coastal State in imposing the fines,

86 Corten (n. 83) para. 15.
87 UNCLOS, Article 221.
including an analysis of whether or not the violation was intentional and a comparison of fines given to other vessels arrested in similar circumstances.\textsuperscript{90} Similarly, in the 	extit{Duzgit Integrity Arbitration}, the arbitral tribunal also condemned the penalties imposed by São Tomé against the arrested tanker as ‘misplaced and disproportionate’, emphasizing \textit{inter alia} the fact that it was a first offence and the Master had been prepared to cooperate with the coastal State authorities.\textsuperscript{91} In both cases, the reasons behind the decision were analysed to determine whether they were legitimately linked to the objectives being sought and whether alternative measures would have been sufficient to meet those objectives. Such a test interferes to a much greater extent with the discretion of the original decision-maker compared to a reasonableness or good faith standard.

Whilst proportionality is an objective standard which can be applied by a court or tribunal, the case law also highlights that a decision-maker may be granted some deference, although there are significant differences of opinion as to how much deference is appropriate when carrying out proportionality review.\textsuperscript{92} These are issues with which any court or tribunal determining a dispute between a contractor and the Authority will no doubt have to grapple when seized with a challenge to the proportionality of monetary penalties.

\section*{5. Conclusion}

This paper has considered the circumstances in which deep seabed mining operators in areas beyond national jurisdiction can hold the International Seabed Authority to account for the exercise of its regulatory powers under Part XI of UNCLOS and associated regulations. Whilst the Authority is a unique international organisation in terms of the powers that it wields, Part XI contains some important safeguards in order to ensure that the Authority does not misuse those powers vis-à-vis contractors. In particular, Part XI establishes a \textit{sui generis} system of judicial review, whereby the Seabed Disputes Chamber is called upon to ensure that the Authority complies with the legal constraints imposed upon it by its constituent instrument and related rules. Whilst the Seabed Disputes Chamber may be prevented from interfering with the legitimate exercise of discretionary decision-making on the part of the

\textsuperscript{90} \textit{M/V Virginia G}, ITLOS Case No 19, Judgment, 14 April 2014, para. 268 onwards.
\textsuperscript{91} \textit{Duzgit Integrity Arbitration} (n. 63) para. 257.
\textsuperscript{92} See discussion in James Harrison, ‘Patrolling the boundaries of coastal state enforcement powers: The interpretation and application of UNCLOS safeguards relating to the arrest of foreign-flagged ships’ (2017) 42 \textit{L’Observateur des Nations Unies} 117, 138-140.
Authority, this paper has argued that the Chamber is nevertheless competent to define the scope of that discretion in the first place, in particular through the interpretation and application of the express conditions attached to the decision-making powers of the Authority.

Although none of the relevant provisions have been interpreted to date, this paper has suggested that some lessons can be learned about their potential operation in practice by considering how similar questions have been settled in other contexts. Indeed, many of the conditions that must be met by the Authority - such as non-discrimination, good faith, reasonableness, or proportionality – are common legal concepts found in other international treaty regimes. Whilst it is important to recognize the specific context in which the Authority operates, some general guidance can be gleaned from the decisions of courts and tribunals taken in similar circumstances, particularly in the fields of international trade law and international investment law, where courts and tribunals are also faced with controlling the discretionary decision-making powers of states in the regulation of economic activities through the interpretation and application of very similar standards.

The core of this paper has sought to identify the principal elements of the various conditions attached to the discretionary decision-making powers of the Authority, drawing upon the broader jurisprudence from other regimes. As well as the general limits on the powers of the Authority, the paper has also highlighted the specific limits that apply to some important areas of decision-making, such as environmental protection and the imposition of monetary penalties. In each case, the paper has sought to identify the types of considerations that may be taken into account by a court or tribunal in identifying whether the Authority has overstepped its powers, as well as highlighting the scope of discretion that is protected from scrutiny by the jurisdictional limits contained in section 5 of Part XI.

In practice, many of the provisions considered in this paper will have to be applied on a case-by-case basis and it is only over time, as disputes are initiated and decided, that we are likely to fully understand how the discretion of the Authority is constrained by the legal framework for deep seabed mining. Nevertheless, establishing a clear and coherent approach to the interpretation of these conditions will be vital to ensuring the effective operation of the system of checks and balances introduced by Part XI of the Convention, as well as to ultimately enhancing the legitimacy of the Authority as the principal regulator of deep seabed
mining in areas beyond national jurisdiction. In this context, if the Authority wished to gain some clarity over the meaning of key terms prior to the emergence of disputes, both in order to avoid such disputes arising in the first place, but also to provide greater legal certainty to all concerned, it could request an advisory opinion from the Seabed Disputes Chamber on these key issues.93

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93 See UNCLOS, Article 191.