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OSPAR's competence with regard to deep seabed mining within the OSPAR maritime area

Introduction

This document sets out advice concerning the competence of the OSPAR Commission in relation to deep seabed mining activities within the OSPAR maritime area. The advice has been prepared by the OSPAR Group of Jurists and Linguists (JL) in response to a request from the Committee on Environmental Impacts of Human Activities (EIHA).

EIHA 2021 agreed that, in accordance with the OSPAR rules of procedure (rules 39(bis) and 46, Agreement 2013-02), a request for the formulation of legal advice by JL on the interpretation and application of the Convention in relation to deep seabed mining should be addressed to the OSPAR Commission. The request was approved at OSPAR 2021. The terms of reference for the advice are at Annex A.

This document:

- Analyses relevant UNCLOS provisions on deep seabed mining;
- Analyses relevant provisions from the OSPAR Convention;
- Draws conclusions in response to the principal question from EIHA on the extent of OSPAR's competence in relation to deep seabed mining in the OSPAR maritime area and the more specific questions which follow.

1. Preliminary remarks

1.1 The term "OSPAR competence" is used throughout the document to refer to the powers or mandate of the OSPAR Commission.

2. Relevant UNCLOS provisions on deep seabed mining

2.1. The International Seabed Authority (ISA) is the organisation through which States Parties to the UNCLOS shall, in accordance with the regime for the Area established in Part XI and the 1994 Agreement relating to the implementation of Part XI of the Convention, organize and control activities in the Area, particularly with a view to administering the resources of the Area (in particular, Articles 153 and 157 UNCLOS).

- "Activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area (Article 1 (1) (3) UNCLOS). [1] An additional description of the Activities in the Area is referenced in article 145 and Annex III, article 17, paragraph 2(f) of the Convention. The Authority is charged with adopting rules, regulations and procedures for the effective protection of the marine environment from such activities. These activities are also discussed in the ITLOS Advisory opinion of 2011. The description includes "drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities" (para. 87 ITLOS Advisory Opinion 2011).
- The "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (Article 1 (1) (1) UNCLOS).
- "Resources" means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules. Resources, when recovered from the Area, are referred to as "minerals" (Article 133 UNCLOS).

2.2. One of the main principles governing the Area is that the Area and its resources are the common heritage of humankind (Article 136 UNCLOS).

2.3. ISA shall adopt appropriate rules, regulations and procedures to ensure that necessary measures are taken to ensure an effective protection of the marine environment from harmful effects of DSM which may arise from activities in the Area (Article 145 UNCLOS).

2.4. Part XII UNCLOS on protection and preservation of the marine environment, in addition to Part XI and the 1994 Agreement relating to the implementation of Part XI of UNCLOS, are applicable to activities in the Area.

2.5. Part XII Article 197 UNCLOS requires State Parties to cooperate on a global basis and, as appropriate, a regional basis for the protection and preservation of the marine environment.

2.6. Article 208(3) UNCLOS requires that States, when regulating activities relating to the seabed that are subject to national jurisdiction, adopt rules that are no less effective than international rules, standards and recommended practices and procedures. Pursuant to Article 208 (4) UNCLOS States shall endeavour to harmonise their policies in this connection at the appropriate regional level.

2.7. Article 209 (2) of UNCLOS provides that States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by national flagged vessels etc. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures adopted under Part XI of UNCLOS.

2.8. UNCLOS Annex III Article 21 paragraph 3 provides that a State Party to UNCLOS may not impose conditions on a contractor that are inconsistent with Part XI, and further describes the extent of the power of States (as sponsoring States or flag States) to take stricter measures than those of ISA relating to DSM in the Area i.e.

> "No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI."

[1] The terms exploration and exploitation are defined in ISA regulations, available at https://isa.org.jm/mining-code

2.9 Articles 2, 56 and 77 of UNCLOS establish the sovereign and other jurisdictional rights of coastal States to regulate DSM activities within their national jurisdictions.

3. Relevance of OSPAR provisions to deep seabed mining

3.1. The OSPAR Convention requires its Contracting Parties to cooperate at a regional level for the protection and preservation of the marine environment in the North-East Atlantic. Preambular paragraph 7 of the Convention recalls relevant provisions of customary international law reflected in Part XII of UNCLOS and, in particular, Article 197.

3.2. The OSPAR maritime area is defined in Article 1 (a) of the OSPAR Convention. It includes the internal waters and the territorial seas of the Contracting Parties, the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal state to the extent recognised by international law, and the high seas, including the bed of all those waters and its sub-soil, situated within specified limits. Part of that maritime area lies within the Area as defined by UNCLOS.

3.3. Article 2 of the Convention describes the general obligations of Contracting Parties to protect the marine environment and adopt programmes and measures. According to Article 2 (1) (a) of the Convention OSPAR Contracting Parties shall take all possible steps to prevent and eliminate pollution and take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.

3.4. The OSPAR Convention makes no provision for the approval or non-approval of an application for a proposed exploration or exploitation activity, regardless of whether the activity is within or beyond national jurisdiction.

3.5 The OSPAR Commission's powers to adopt measures with respect to sources of pollution are set out in Articles 3, 4 and 5 of the Convention.

3.6 Article 4 and Annex II of the OSPAR Convention prohibit the dumping of all wastes or other matter, with a limited number of exceptions. Article 1 includes a definition of dumping.

3.7 Article 7 provides the Commission with powers to add further annexes to the Convention relating to sources of pollution not listed in Articles 3, 4 and 5, provided the condition (or test) at Article 7 is satisfied: 'not already the subject of effective measures agreed by other international organisations […]'.

3.8 Under Annex V of the OSPAR Convention which is based on Article 2 (1) the OSPAR Contracting Parties have, through the OSPAR Commission, developed programmes and measures, consistent with international law, for instituting protective, conservation, restorative or precautionary measures related to specific areas or sites or related to specific species or habitats. These programmes and measures include decisions and recommendations on marine protected areas and recommendations on furthering the protection and conservation of vulnerable species and habitats. As deep seabed mining is a human activity the measures adopted under Annex V in general also may apply to deep seabed mining. The agreement by which Annex V was established (Agreement 1998-15.1) includes operative paragraphs describing the need to avoid duplication with measures of other bodies.

3.9 The legal basis of OSPAR's competence pursuant to Article 2 depends on whether it wishes to take steps to prevent and eliminate pollution (Ref. Articles 3,4,5,7) or take measures to protect the maritime area against the adverse effects of human activities (Ref. Annex V). Whether a measure is adopted under Article 7 or Annex V will therefore depend on whether the OSPAR Commission decides to address the source of the pollution or to address the effects of a human activity.

3.10 It can be noted that the 1996 Protocol to the London dumping Convention[2] excludes from its provisions the disposal or storage of wastes or other matter directly arising from, or related to the exploration, exploitation and associated offshore processing of seabed mineral resources. No equivalent exclusion exists in the OSPAR Convention.

4. Conclusions

4.1 ISA is the international body through which States Parties to UNCLOS shall organise and control activities in the Area, particularly with a view to administering the resources of the Area. Accordingly, ISA is also the only international body which is entitled to approve or not approve applications for DSM activities within the Area.

4.2 Without an approval by the ISA, mining activities within the Area would be illegal. Activities in the Area require that the Enterprise, a State Party of ISA or a state enterprise or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by a state party to UNCLOS apply for an approval for a plan of work with ISA.

4.3 UNCLOS states that all rights in the resources of the Area are vested in humankind as a whole, on whose behalf ISA shall act. The recovery of minerals from the Area, has to be in accordance with Part XI, Annex III, the 1994 Agreement and the rules, regulations and procedures of the ISA.

4.4 UNCLOS Annex III Article 21 paragraph 3 is relevant to OSPAR's competence to make rules relating to seabed mining within the Area (as defined in UNCLOS Art 1). This provision of UNCLOS provides that a sponsoring State or a flag State may not impose conditions on a contractor that are inconsistent with UNCLOS Part XI. The provision further provides that measures more stringent than those adopted by the ISA pursuant to Annex III Article 17 paragraph 2(f) (being ISA rules relating to environmental protection) 'shall not be deemed inconsistent with Part XI'.

4.5 Before adopting a measure which could have the effect of requiring a Contracting Party to impose conditions on a contractor (sponsored by the OSPAR Contracting Party) relating to mining within the Area, the OSPAR Commission will need to consider whether the conditions are inconsistent with UNCLOS Part XI. Doing so the OSPAR Commission will also have to consider whether the measure is a more stringent measure in the sense of UNCLOS Annex III Article 17 paragraph 2(f). If the measure is judged to be inconsistent, the Commission should not adopt the measure since to do so would require OSPAR Parties to act in breach of UNCLOS.

4.6 UNCLOS requires States to cooperate on a global basis for the protection and the preservation of the marine environment as reflected in UNCLOS article 197 – and further requires States to cooperate regionally 'as appropriate'.

4.7 Given points 4.4 and 4.5 above, it follows that States could decide to collectively adopt more stringent measures within a regional cooperation framework such as OSPAR.

4.8 The ISA has exclusive competence in organizing and controlling activities in the Area; but this competence is not exclusive in terms of the protection of the marine environment. Given the nature of treaty provisions, OSPAR provisions are only applicable to DSM activities if – as a first condition – an OSPAR Contracting Party is involved (as a State or as sponsoring state) and if – as a second condition - DSM activities are undertaken within the OSPAR maritime area.

[2] 1996 Protocol to the Convention On The Prevention Of Marine Pollution By Dumping Of Wastes And Other Matter, 1972

4.9 The competence of OSPAR to address DSM activities is limited to OSPAR´s objective to protect the marine environment. Commercial aspects with respect to DSM such as benefit sharing are outside the competence of OSPAR for example.

4.10 The OSPAR Convention makes no provision for the approval or non-approval of an application for a proposed exploration or exploitation activity, regardless of whether the activity is within or beyond national jurisdiction. Thus, the OSPAR Commission has no competence to approve or not approve applications for DSM activities.

4.11 J/L's advice against each of the questions below explains OSPAR's competence to develop recommendations and decisions, in order to protect the marine environment within the OSPAR maritime area. These may have an impact on DSM activities, if (1) an OSPAR Contracting Party is involved in such an operation and (2) if the operation takes place in the OSPAR maritime area. In fact, existing OSPAR measures are already relevant to DSM operations if these conditions apply.

4.12 If DSM activities are conducted within the OSPAR maritime area and if an OSPAR Contracting Party is involved, OSPAR provisions with regard to the protection and preservation of the marine environment would need to be taken into account by this OSPAR Contracting Party depending on their binding or non-binding nature.

4.13 J/L did not conclude on and has not therefore provided advice on circumstances where a DSM activity involving an OSPAR Contracting Party is conducted outside the OSPAR maritime area, but may have impacts on the OSPAR maritime area.

4.14 Decisions are legally binding on Contracting Parties, while recommendations are not legally-binding (see Art 13 OSPAR Convention). The differing status of decisions and recommendations is significant in the cases where an OSPAR measure is *inconsistent* for the purposes of UNCLOS Annex III Article 21 paragraph 3, i.e., the OSPAR measure could have the effect of requiring a Contracting Party to impose conditions on a contractor (sponsored by the OSPAR Contracting Party) that are judged to be inconsistent with Part XI. If the OSPAR measure is a decision, the OSPAR Contracting Party will be in breach of its legal obligations under UNCLOS if they impose the OSPAR measure on the contractor. Conversely they will be in breach of the OSPAR Convention if they choose not to impose the measure of the OSPAR decision. If the OSPAR measure is a recommendation, there is no legal breach of either Conventions and the OSPAR Contracting Party may choose not to follow the OSPAR recommendation in order to avoid a breach of UNCLOS. Even though there is no legal breach, JL recommends not adopting recommendations that are inconsistent with UNCLOS Part XI.

4.15 The following advice is given in response to the specific questions raised by EIHA:

a) Does the disposal of waste arising from deep seabed mining activities based on current technologies (e.g., vessel-based systems) fall within the definition of dumping, set out in Article 1 of the Convention? If yes, does Annex II of the Convention apply?

The provisions of Article 4 and Annex II are relevant.

With respect to seabed mining, waste at sea resulting from 'shipboard processing of minerals derived from that mine site' falls within the scope of Article 4 of the OSPAR Convention. At this moment in time we are unaware of any mining technology that produces waste prior to minerals being processed on board ships, therefore we have not considered the application of Article 4 to any waste produced prior to shipboard processing – see the definitions of 'dumping' and 'vessels and aircraft' at Article 1 of the Convention.

Mining within the Area, compliance with UNCLOS: The release of such waste also falls within the scope of the International Seabed Authority's function to make rules, regulations and procedures to ensure marine protection (see UNCLOS, article 145 and Annex III, article 17, paragraph 2(f)). Therefore, with respect to that part of the OSPAR maritime area that includes the Area (as defined at Art 1 UNCLOS), the OSPAR Commission could adopt either measures that are more stringent than those adopted by the International Seabed Authority (see UNCLOS Annex III, article 21 paragraph 3) or measures which are not inconsistent with UNCLOS Part XI.

b) Does Annex V of the Convention apply to the human activity and possible adverse impacts on ecosystems from deep seabed mining? If no, can deep seabed mining be considered under Article 7 of the Convention?

The legal basis of OSPAR's competence pursuant to Article 2 of the Convention depends on whether it wishes to take steps to prevent and eliminate pollution (Ref. Articles 3,4,5,7) or take measures to protect the maritime area against the adverse effects of human activities (Ref. Annex V). Whether a measure is adopted under Article 7 or Annex V will therefore depend on whether the OSPAR Commission decides to address the source of the pollution or to address the effects of a human activity.

At present, mining for seabed minerals is not one of the sources of pollution falling within scope of Article 3, 4 and 5 of the OSPAR Convention. Therefore, the OSPAR Commission would need to adopt an Annex under Article 7 if it wishes to address deep seabed mining as a source of pollution. The Commission's use of the power at Article 7 is subject to the following test: 'such pollution is not already the subject of effective measures agreed by other international organisations or prescribed by other international conventions'.

Measures already adopted under Annex V are, in general, applicable to deep seabed mining – depending on their contents[3].

c) Are there any differences between OSPAR's competence on deep seabed mining activities in national jurisdiction and in areas beyond national jurisdiction?

Yes. Part XI is only applicable to the Area and does therefore not pose any jurisdictional limit to OSPAR's competence in areas within national jurisdiction.

In relation to DSM within the Area, OSPAR's competence to make rules relating to seabed mining within the Area (as defined in UNCLOS Art 1) should be exercised by reference to UNCLOS Annex III Article 21 paragraph 3. See paragraphs 4.4 and 4.5 of this advice.

In relation to mining within national jurisdiction, UNCLOS Article 208 paragraph 3 requires that States, when regulating mining subject to national jurisdiction, adopt rules that are at least as strict as ISA rules. The OSPAR Commission should consider this requirement on OSPAR Contracting Parties that are party to UNCLOS, when adopting measures controlling mining within national jurisdiction.

d) Can OSPAR measures on deep seabed mining go beyond those established by other competent authorities?

Answers are given with respect to Questions a – c.

[3] The Jurist/Linguist representative for the UK did not support inclusion of this statement within this advice.

Annex A

Terms of Reference for JL: Questions for legal advice on the interpretation and application of the Convention in relation to deep seabed mining

EIHA paper 21/07/11 aims to present 'an overview of which OSPAR measures are applicable/relevant to' Deep Seabed Mining (DSM).

In order to finalise the paper, EIHA agreed that it was important to consider OSPAR's competence in relation to DSM in the OSPAR maritime area, being recalled that the International Seabed Authority is the organization through which States Parties shall, in accordance with Part XI of the UNCLOS, organize and control activities in the Area, particularly with a view to administering the resources of the Area (UNCLOS Article 157). To do this EIHA agreed that the questions set out in below should be submitted to JL for their legal consideration.

This paper sets out Terms of Reference for JL in accordance with the OSPAR Rules of Procedure re (Reference Number: 2013-02) rules 39(bis) and 46.

For the purposes of documents developed by EIHA and also in formulating these questions, the following definitions for deep seabed mining (DSM) are used:

- For areas beyond national jurisdiction: all activities of exploration for, and exploitation of, the resources of the Area (UNCLOS Article 1(3)), where the "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (UNCLOS Article 1(1)), and where "resources" means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules (UNCLOS Article 133(a)).
- For areas within national jurisdiction: all activities of exploration for, and exploitation of, polymetallic nodules, polymetallic sulphides and polymetallic crusts.

EIHA paper 21/07/11 is provided for information (JL(Extra) 22/2/Info.1). The questions for legal interpretation and advice are mainly linked to the following paragraphs and their subsequent conclusions of paper 21/07/11 which state:

> "Under the OSPAR Convention, DSM needs to be considered in the context of Annex II (Dumping), Annex III (Pollution), Annex IV (Quality Assessment) and Annex V (Biodiversity) of the OSPAR Convention. Annex V states in §1(a) that Contracting Parties should: "*draw up programmes and measures for the control of the human activities identified by the application of the criteria in Appendix 3*". Unlike for fisheries and shipping measures, DSM is not covered under Annex V Article 4 and is therefore not excluded from OSPAR's competence. Appendix 3 of Annex V states:

1. *The criteria to be used, taking into account regional differences, for identifying human activities for the purposes of Annex V are:*
   a. *the extent, intensity and duration of the human activity under consideration;*
   b. *actual and potential adverse effects of the human activity on specific species, communities and habitats;*

c. *actual and potential adverse effects of the human activity on specific ecological processes;*

d. *Irreversibility or durability of these effects.*

2. *These criteria are not necessarily exhaustive or of equal importance for the consideration of a particular activity.*

Article 3 of Annex II of the Convention states that: "The dumping of all wastes or other matter is prohibited, except for those wastes or other matter listed in paragraphs 2 and 3 of this Article." Paragraph 2 does list inert materials but with the following qualification: "*inert materials of natural origin, that is solid, chemically unprocessed geological material the chemical constituents of which are unlikely to be released into the marine environment*", so the material and disposal should be considered in terms of the OSPAR Commission's remit.

It is worth noting that in many cases, the technical approaches are still under development, meaning that it is probably not possible to accurately assess some of the criteria required under OPSAR annexes, prior to the design and testing of certain equipment (e.g., to assess the 'extent, intensity and duration of the human activity' under appendix 3 in Annex V)."

Questions for legal advice on the interpretation and application of the Convention in relation to deep seabed mining

What is the extent of the jurisdiction of OSPAR with respect to deep seabed mining activities within the OSPAR maritime area, recalling that the International Seabed Authority is the organization through which States Parties shall, in accordance with Part XI of the UNCLOS, organize and control activities in the Area, particularly with a view to administering the resources of the Area (UNCLOS Article 157)? If applicable, which provisions in the OSPAR Convention are the source of its competence or powers and what is the scope of OSPAR's competence or powers?

including but not limited to;

a. Does the disposal of waste arising from deep seabed mining activities based on current technologies (e.g., vessel-based systems) fall within the definition of dumping, set out in Article 1 of the Convention? If yes, does Annex II of the Convention apply?

b. Does Annex V of the Convention apply to the human activity and possible adverse impacts on ecosystems from deep seabed mining? If no, can deep seabed mining be considered under Article 7 of the Convention?

c. Are there any differences between OSPAR's competence on deep seabed mining activities in national jurisdiction and in areas beyond national jurisdiction?

Can OSPAR measures on deep seabed mining go beyond those established by other competent authorities?