



Limits to Blue Growth in the Deep Sea

Workshop 8

Congress Centre Bremen, 19 May 2014, 11-12:30

Chairs: Stephan Lutter, WWF / Prof. Dr. Andree Kirchner, ISRIM

Speakers:

Dr. Ximena Hinrichs Oyarcé, Head, Legal Office, International Tribunal for the Law of the Sea (ITLOS), Hamburg

Prof. Dr. Lorenzo Schiano di Pepe, Professor of International Law, University of Genoa, Italy

Aurore Maillet, European Commission, DG Environment

Marta Chantal Ribeiro, Assistant Professor, Faculty of Law, University of Porto, Portugal

1. Three key messages

Deep sea mining plans have to respect UNCLOS provisions to protect the marine environment (Art. 145 & 192) and pertinent EU Directives (HD, MSFD, EIA, SEA), as well as OSPAR, CBD asf.

Keep activity on hold in EU waters until obligations to protect marine biodiversity e.g. designation of MPAs, VMEs, identification of EBSAs are fully implemented

Increase resource efficiency to minimise ecological and socio-economic impact of deep sea mining

2. Setting the scene (chairs)

Deep sea biodiversity at stake – Blue Growth - Legal status of the sea-bed and subsoil within and beyond national jurisdiction

- **Marine biodiversity aspects:** Deep water ecosystems potentially threatened by deep sea mining (reefs, seamounts, vents) - extent of (deep) ocean space so far designated as marine protected areas and/or closed to bottom fishing in Europe.
- **Blue Growth opportunities for marine and maritime sustainable growth (COM(2012) 494 final):**
 - **What is the Blue Economy?** *The blue economy needs to be sustainable and to respect potential environmental concerns given the fragile nature of the marine environment.*
 - **Marine mineral resources:** *By 2020, 5% of the world's minerals, including cobalt, copper and zinc could come from the ocean floors. This could rise to 10% by 2030. Global annual turnover ... up to €10 billion The most promising deposits are found in metallic sulphides which emerge from hydrothermal ore deposits ... EU engagement would help to ensure that high environmental, legal and security standards are upheld. This includes protecting the marine environment in line with the provisions of UNCLOS, to which the EU and all its Member States are contracting parties.*
- **Background on UNCLOS – the constitution for the oceans:**
Sketch of the different maritime zones: territorial sea, contiguous zone, EEZ (water column and surface). Legal definition of continental shelf – sea-bed- subsoil) and areas beyond national jurisdiction: High Seas (water column and surface) - The Area (sea-bed and ocean floor and subsoil thereof – 'common heritage of mankind').

3. Summary of the interventions from the panel

Dr. Ximena Hinrichs Oyarce – Activities in the Area and on the continental shelf under UNCLOS

- Activities in the 'Area' and marine environmental protection: a source of contention?
 - Means the sea-bed and oceans floor and subsoil thereof beyond the limits of national jurisdiction

- Regulations part XI, 1994 agreement on the implementation of part XI of the convention.
- Rules and procedures adopted by the international sea-bed authority.
- 'activities in the area' means all activities and exploration for and exploitation of the resources of the Area
- 'Resource-related'
 - Means all solid, liquid or gaseous mineral resources in situ at or beneath....
 - Polymetallic (manganese) nodules
 - Polymetallic sulphides
 - Cobalt crusts
 - Functional – exploration, exploitation, and prospection.
- Principles governing the Area – common heritage of mankind – UNCLOS article 136
- International Sea-bed Authority – acts on behalf of 'mankind'
- Environmental Aspects
 - Protection of the marine environment article 192
 - Article 145 – main obligation to protect marine environment
- Means of resolution
 - International Tribunal for the Law of the Sea (ITLOS)
 - Sea-bed Disputes Chamber (SBDC)
- Advisory Opinion rendered by the SBDC (case number 17)
 - Obligation of 'due diligence' bound to make best possible efforts to secure compliance by the sponsored contractors.
 - Apply precautionary approach, best environmental practices, recourse for compensation, etc.
 - This advisory opinion of the SBDC paved the way for the future as a means to assist states in resolving issues arising within the scope of activities of the authorities and filling gaps (of UNCLOS).

- Provides guidance with regard to environmental standards in relations to the conduct of activities in the Area.

Prof. Dr. Lorenzo Schiano di Pepe – *Sea-bed mining under international, EU and national law* - focus on EU Law

- Legal framework already in place
- Further rules that should be put in place
- One specific aspect regarding the scope of application of a possible new EU legal regime on DSM.
- EU and its Member States (MS) – as a Contracting Party to UNCLOS in 1982 – and bound by its obligations and rights
- Crucial environmental law principles (precautionary principle, polluter pays principle and principle of high level of protection) are included into the EU legal order the EU treaties and fundamental rights and charter.
- EU legislative process subject to judicial control as well as social control.
- Also a legislative framework is place – MSFD exists – but, as a framework – it is not explicit.
- Industry needs specific and carefully drafted norms and regulations – frameworks are not enough – how such rules like (EIA and SEA, habitats protection, environmental liability) should or must apply to a new sector must be resolved.
- Need good scientific basis – which is why accessibility of data on the sea-bed from EMODnet is really welcome.
- Scope of application of any new measure to be carefully considered.
 - Scope should include areas of the sea-bed that are subject to the sovereignty or jurisdiction of MS.
 - However, the scope of application could also be extended to EU based entities operating in non-EU waters.
 - Such 'extraterritorial' approach has been adopted in other sensitive areas (shipping and aviation) and has attracted both praise and criticism.

Aurore Maillet – *Deep sea mining in the light of requirements by the Marine Strategy Framework Directive, Natura 2000, EU Biodiversity Strategy*

- Sea-bed mining in the Blue Growth communication
 - Opportunities to develop but also to control and regulate
- High environmental, legal and security standards – what does this mean?
 - Precautionary principle
 - Deep sea mining is a new activity – EU still assessing gaps in legislative framework
 - Careful approach due to lack of knowledge
- EC has launched public consultation on sea-bed mining – open to 16 June 2014
- Marine Strategy Framework Directive (MSFD) – does apply according to UNCLOS:
 - Objective to achieve Good Environmental Status (GES) by 2020 – ecosystem approach – 11 GES descriptors – some could be impacted by deep sea mining (DSM).
 - Six year implementation and/or review cycles – thus DSM could impact this and if so, MS will need to address this accordingly.
 - Looks at the cumulative pressures of all activities.
 - MSFD not intended to legislate for a specific activity.
- Habitats Directive (HD)
 - If a DSM activity is likely to affect a Natura 2000-site, it will need an assessment. Possible authorization if integrity of area not affected or imperative reasons of public interest.
 - Cf. brochure on non-energy mineral extraction and Natura 2000.
- Other relevant legislation: EIA, SEA, Mining Waste
- Not to neglect resource efficiency:
 - Blue growth must be sustainable and resource efficient: healthy ecosystems are the basis on which Blue Growth can take place.

- Raw Materials initiative has 3 pillars: Fair and sustainable from global markets - Foster sustainable supply in EU - Boosting resource efficiency and promoting recycling
- Potential of marine resource efficiency needs to be developed - UNEP – international Resource Panel – identify Marine Resource Efficiency as a potential priority area.
- EU is supporting the identification of Ecologically or Biologically Significant Areas (EBSAs)

Marta Chantal Ribeiro – *Case study from Portugal: emerging deep sea mining interests vs. hydrothermal vent conservation*

- Legal framework
 - OSPAR
 - EU
- Rush for exploration and exploitation of mineral resources in Portugal
 - Prospective areas include several hydrothermal vent fields.
 - Possible DSM activities very close to MPAs
 - Areas concerned are larger than the MPAs.
 - Representativeness? Connectivity? Habitats Directive as interpreted by the European Court of Justice (ECJ)?
 - Legal framework in Portugal is vague and insufficient.
 - All the tools are there – but how to use them to achieve balance is the question.
- Conclusions
 - No clear strategy but time window for this now.
 - Emergence of a regional system of governance could help influence the national one.
 - OSPAR can importantly contribute
 - Habitats Directive, MSFD, EIA – should be more clear on regarding their application on the deep sea.
 - More consideration should be given to the precautionary principle

- Immanuel Kant: 'in the planet we only have a right of visit'

4. Questions (Q) & Answers (A) – Discussion (D)

- **Q** From the grassroots PNG people are rejecting the exploration. PNG has been a testing ground for years – for nuclear and now to test technology for sea-bed mining. Where are the "high-seas"? For us in the Pacific they are our EEZ. When we talk about sea-bed mining – who are we talking about? Whose sea, whose money – what about the people? We talk about the species – but do we also consider the people as well?

A UNCLOS should apply as a protective tool – (common heritage of mankind). Regime between the outer continental shelf and 'The Area' – power to regulate this rests with the coastal state. If the mining will take place in the 'Area' beyond the outer continental shelf – no state can undertake activity there without approval by International Sea Bed Authority.

- **Q** 2006 UN resolution on sustainable fishing: landmark regulation for fishing on the high seas (ABNJ) to prevent adverse impacts from bottom fishing and protect deep sea fish stocks. 2012 – EU debating implementing this within EU waters in NE Atlantic – status of deep sea bottom trawling? Deep Sea Conservation Coalition is now looking at consistent standards being applied across all uses. Now looking at new implementing agreement of UNCLOS to try and address this. Don't want double standards for the high seas. Should have a similar process in the EU with regard to mining?

- **Q** How will the existing UNCLOS regime change in the future?

A If there are gaps to be filled – these will need to be addressed perhaps by tribunal. Legislative power is the sea-bed authority.

- **Q** Focus of the presentation is on environmental impacts – what about social aspects – especially given the 'common heritage of mankind' issue. How can we ensure that what we are doing is of a common interest?

A International Sea Bed Authority 'is taking care of that, exploitation is not happening yet – just exploration. Money that comes out of any activity would then be shared. We don't know yet what this will look like – 'fair and equitable' sharing of benefits need to be developed – rules exist but they haven't been applied yet.

- Q** Is there anything to copy from the High Seas?

A Synergies exist – lessons to be learned but question of applicability. Different regimes. Hope for a much better regime than fisheries in the High Seas.

- **Q** Sad development that question isn't framed as 'if' we should do this instead of 'how'. Why can't we instead focus on recycling and other areas and leave this issue? Can't there still be a window of opportunity to stop it?

D If not enough scientific knowledge that mining can be sustainable, then precautionary approach. Before we can define the ecosystem boundaries – we should, under the precautionary principle, not do sea-bed mining at all. - In Europe, the Habitats Directive, applicable also to the extended continental shelves of coastal states, will be instrumental in protecting the deep sea environment. However, currently insufficient coverage of deep sea habitats. Environmental impact assessments/Appropriate assessments further hurdle which can stop unsustainable developments.

- **Q** No one discusses ecosystem boundaries – only territorial boundaries. EBM is also not discussed. Technology advances in harsh conditions – why can't the legal system adapt similarly.
- **Q** UK developing deep sea mining legislation. What does the panel think – should the UK and other MS wait until some of these other legislative developments are in place – is it premature for them to move ahead already now?
- **Q** Research on trade off – what about jobs from tourism – not just jobs and revenue from sea-bed mining – how to measure the tradeoffs?

Final Panel Statements

- Currently, regulatory gap in areas beyond national jurisdiction
- Science has an important role to play, driving developments
- Emphasis on social implications. First the concept of sustainability itself includes a social component. Impact assessment implies that an assessment will also take future generations into account. Principles of integration – social and environmental issues need to be addressed. Scientific understanding must be the driver for any legislation in the field. Precautionary principle critical.
- Habitats Directive is indeed a good tool but it needs to be fully implemented. Need to implement MPAs – reach the CBD goal.
- Question of MPAs though is a small part of the puzzle. We need EIAs, SEA.

- Guidelines associated to Habitats Directive not binding but do not mean they are toothless. The European Court of Justice case law endorsed them and may decide in future.
- Ecosystem boundaries: MSFD – is trying to define these. GES must reach by 2020 and we are far from this now.
- Need a regime to protect biodiversity in the High Seas. Sustainable Development Goal (SDG) for the Oceans is also very important.
- Habitats Directive not as good a tool as possible: deep sea habitats need priority status
- Appropriate assessments required for activities outside N2000 areas but with significant negative on the protected species and habitats

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