Marine Scientific Research in the Area: Consideration of Legal Issues in Coordinating a High Seas Freedom with Activities in the Area

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## **Importance of Marine Scientific Research**

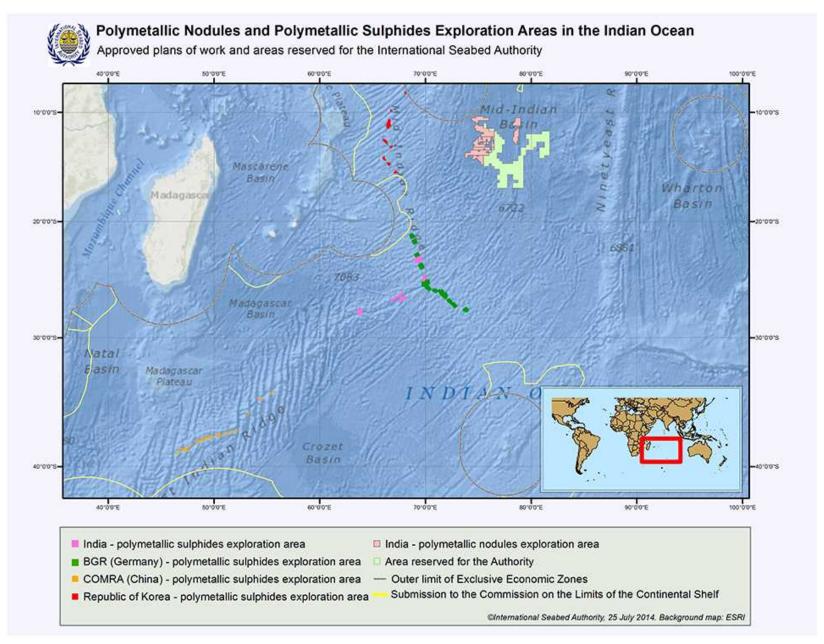
- Marine scientific research (MSR) is an important basis for management of the oceans
- Protection of the marine environment requires knowledge of its chemical, biological and physical processes
- Exploitation of seabed resources in the Area must be balanced with protection of the marine environment
- Environmental impact assessment for seabed activities require sufficient baseline data
- Scientific knowledge of the deep seabed is still limited
- The ISA and States are encouraged under UNCLOS to conduct marine scientific research in the Area

## MSR and "Activities in the Area"

- MSR in the Area may require coordination with "activities in the Area" in some situations
  - UNCLOS Art. 1(1)(3): " "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area"
- Contractors with contracts for exploration of deep seabed mineral resources have exclusive rights to explore resources in specified parts of the Area

#### **Question:**

What are the rights and obligations of researching States conducting MSR in an area subject to an exploration or exploitation contract ?



ISA website, https://www.isa.org.jm/contractors/exploration-area

## The right to conduct MSR in the Area

### Art. 256 Marine Scientific Research in the Area

All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area.

#### • Art. 87 Freedom of the High Seas

(1)(f) "freedom of scientific research, subject to Parts VI and XIII."

 Part XI : Art. 143 Marine Scientific Research <-</li>

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## Marine Scientific Research in the Area (Art. 143(1))

## Art. 143 Marine Scientific Research

**1.** Marine scientific research in the Area shall be carried out **exclusively for peaceful purposes** and for the **benefit of mankind as a whole**, **in accordance with Part XIII**.

 Article 240 General principles for the conduct of marine scientific research

 (a) marine scientific research shall be conducted exclusively

for peaceful purposes;

 Article 244 Publication and dissemination of information and knowledge

## Marine Scientific Research in the Area (Art. 143(2))

## Art. 143 Marine Scientific Research

2. The Authority may carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, and shall coordinate and disseminate the results of such research and analysis when available.

- The ISA has competence to carry out MSR (not limited to MSR concerning resources of the Area )
- The ISA must promote and encourage MSR
- No authority to regulate MSR by researching States

## Marine Scientific Research in the Area (Art. 143(3))

#### Art. 143 Marine Scientific Research

- **3. States Parties may carry out** marine scientific research in the Area. States Parties **shall promote international cooperation** in marine scientific research in the Area by:
- (a) participating in international programmes and encouraging cooperation in marine scientific research by personnel of different countries and of the Authority;
- (b) ensuring that programmes are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed States ...
- (c) effectively disseminating the results of research and analysis when available, through the Authority or other international channels when appropriate.

## Marine Scientific Research in the Area (Art. 143(3))

#### Art. 143 Marine Scientific Research

- **3. States Parties may carry out** marine scientific research in the Area. States Parties **shall promote international cooperation** in marine scientific research in the Area ...
  - Lex specialis to Art. 256 ('All States ... have the right to conduct MSR')
  - Creates an obligation to promote international cooperation in MSR in the Area, which only applies to States Parties
  - No additional restriction for researching States in carrying out MSR in the Area

# Accommodation of Activities in the Area and in the Marine Environment (Art. 147)

## Art. 147 Accommodation of Activities in the Area and in the Marine Environment

**1.** Activities in the Area shall be carried out with **reasonable regard** for other activities in the marine environment.

**3.** Other activities in the marine environment shall be conducted with **reasonable regard** for activities in the Area.

 "Activities in the Area" and "Other activities in the marine environment" (including MSR) must be conducted with reasonable regard for each other

## **Reasonable Regard / Due regard**

#### **1958 Convention on the High Seas, Art. 2**

... These [high seas] freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

#### **UNCLOS, Art. 87(2)**

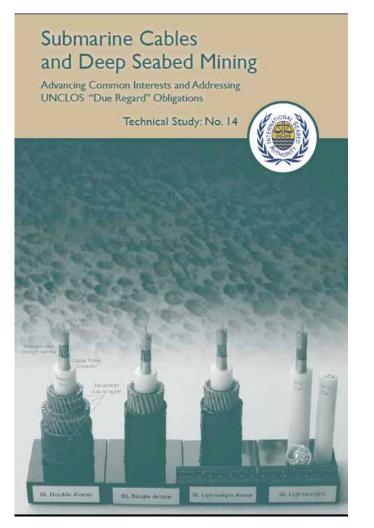
These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

## Concept of "Reasonable Regard"

## Fisheries Jurisdiction Cases (Iceland v. UK) (1974)

- Iceland's preferential fishing rights v. United Kingdom's historic fishing rights
- The ICJ made findings based on the "principle enshrined in Article 2 of the Geneva Convention of the High Seas 1958" to "pay reasonable regard".
  - unilateral action in disregard of the other constitutes an infringement of the principle
  - due recognition must be given to the rights of both Parties; neither is absolute

## "Due Regard" as Notification and Consultation



#### ISA Technical Study No.14, Submarine Cables and Deep Seabed Mining

- Addressed interferences between submarine cables and deep seabed mining
- Identified the "due regard" obligation as requiring notification and consultation

## **Notification and Consultation**

## "reasonable regard" or "due regard":

necessarily implies that (1) both parties must be aware of each other's activities and (2) there must be a certain balancing between the both activities

Researching States conducting MSR in the Area:

- Should at least notify contractors of their MSR project
  - Contractors and researching States are under an mutual obligation to exercise reasonable regard, but contract areas exist prior to MSR activities and are geographically defined and publicly known
- and enter into consultations to identify conflict of interests between their activities and ways to avoid them

## **Conflict of Interests for MSR in Contract Area**

#### **1** Interferences Between Different Activities

- Possible cases of interferences between MSR by researching States and activities and activities by contractors
- Similar issues have been considered for submarine cables and deep seabed mining; resolution of issues may be easier for MSR because of its transitory nature

### **2** Acquisition of Information Concerning Resources

- MSR in the Area and prospecting/exploration in the Area are both aimed at collecting data on the seabed
- There may be situations where acquired data would lead to significant knowledge about the resources of an area under an exploration or exploitation contract

## MSR and Acquisition of Resource-Related Data

- Contractors may argue that even pure MSR may infringe their "exclusive rights" if information on the resources are acquired, and that unregulated MSR would defeat the purpose of the "exclusive right to explore and exploit."
- **Researching States** may respond that the contractors rights do not give them monopoly over information on the contract area; their rights are only "exclusive" vis-à-vis other States' activities in the Area; there is no basis **under Part XI to exclude MSR**.

## **MSR vs Prospecting/Exploring**

 "When 'research' moves on to the stage of 'prospecting' or 'exploring' it is no longer unrestricted, but becomes subject to the provisions of Annex III."

(Churchill and Lowe, The Law of the Sea (1999), 404)

 "Research involving the actual prospecting or exploring for mineral resources would be applied research that could only occur with the approval of the ISA, as MSR of this character would constitute "activities in the Area". However, pure MSR, which may extend to identification of the mineral resources of the seabed, and MSR for non-mineral resources such as genetic materials are not matters subject to ISA control."

(Rothwell and Stephens,

in Oxford Handbook of the Law of the Sea (2015), 572)

## MSR and Acquisition of Resource-Related Data

- The provisions of Part XI place no restrictions on "pure MSR" activities, which are not "activities in the Area." It seems difficult to argue that the acquisition of resource-related data by MSR necessarily violates the exclusive rights of contractors
- However, it is not impossible to envisage situations where the contractor's exclusive rights would be undermined by MSR. Certain MSR activities in such cases should be regarded as an infringement of the obligation to exercise "reasonable regard".

## **Some Guidance for Balancing ?**

- In the EEZ and the continental shelf, where the coastal States have sovereign rights over the resources, coastal States may withhold consent for MSR when the research project 'is of direct significance for the exploration and exploitation of natural resources, whether living or non-living' (Art. 246(5)(a))
- Art 246(5)(a) shows that MSR (≠ exploration) may affect rights over resources; similar kind of balance should be sought for MSR in the Area
- However, coastal States have tended to exercise powers under Art. 246(5)(a) very broadly in practice; balancing under the "reasonable regard" test should look to whether there are any real dangers to the commercial interests of the contractors