Deep seabed mining is increasingly seen as commercially feasible within the Pacific region. This is because it has vast seabed mineral deposits located outside sovereign territory.1

Despite advances in seabed mining technology, scientific knowledge concerning the unique biophysical character of the deep sea environment remains sparse. This means there is relatively little information concerning the potential risk of environmental damage associated with proposed seabed mining activities.

Obligations

The exploration and development of natural resources outside sovereign territory is governed under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Mining the seabed located under the high sea, more commonly known as the Area, is controlled under Part XI of the UNCLOS. Likewise, the right of states to undertake mining within their Exclusive Economic Zone (EEZ) and continental shelf is also established under UNCLOS. These rights to develop natural resources located within the seabed are attended by the corresponding obligations to protect and preserve the marine environment.

States and state-sponsored companies proposing to engage in exploration or exploitation of resources in the Area must obtain approval from the International Seabed Authority (ISA).

The Republic of Nauru and the Kingdom of Tonga applied to the ISA to explore the Clarion-Clipperton Zone in April 2008. Located in the Pacific Ocean, to the south and south-east of the Hawaiian Islands, this part of the Area is considered to hold the most promise in terms of commercially viable manganese nodule recovery.

Nauru and Tonga subsequently became concerned about their potential liability for damage to the marine environment resulting from seabed mining and postponed their applications. Nauru then requested the ISA obtain an advisory opinion on state parties’ obligations and liability for seabed mining from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (the Chamber).

Advisory opinion

The Chamber delivered an advisory opinion on 1 February 2011 answering that each state party has a general obligation of due diligence to adopt “laws and regulations” and to take “administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”.2

The Chamber identified a number of direct obligations through which law-making and enforcement might be given effect. Key obligations identified included the precautionary approach, best environmental practices and environmental impact assessment (EIA).3

These obligations would feature strongly in future regulatory efforts within the Pacific region designed to address the lack of information and uncertainty in relation to the impacts of mining on the marine environment.

The Chamber went on to find that state parties would be liable for damage arising from the failure of a state to carry out its obligations. On the other hand, adoption of the precautionary approach, best environmental practices and EIA within a state’s legislative framework would reduce the risk of liability in cases where environmental damage did occur as the result of seabed mining activities.

Wave of action

The Chamber’s opinion led to a wave of regulatory action throughout the Pacific region. The precautionary approach, best environmental practices and EIA have since found their way into a number of regulatory initiatives including the:

■ European Union and Secretariat of the Pacific Community Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration
and Exploitation (Regional Framework); and
- Cook Islands National Seabed Minerals Policy 2014;
- Tongan Seabed Mining Act 2014; and
- New Zealand Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

These initiatives can be said to have firmly established the key obligations within the Pacific as central to regulating seabed mining activities.

Moreover, the recent decisions of the Environmental Protection Authority (EPA) in Trans-Tasman Resources and Chatham Rock Phosphate, concerning applications for seabed mining under New Zealand’s EEZ Act, have demonstrated that consideration of the precautionary approach, best environmental practices and EIA require an adequate understanding of the existing marine environment before development can proceed.

In declining both applications, the EPA has made clear that lack of information and uncertainty does not require regulators to prevent exploration and development from taking place.

However, the precautionary approach does require the collection of adequate baseline data on existing environments before commencing exploration or development. This is to ensure that any potential environmental changes arising out of lack of information or uncertainty as to the impacts of seabed mining are able to be monitored and controlled to avoid significant adverse effects.

The key obligations identified in the Advisory Opinion have been adopted in the Pacific region as regulatory prerequisites to deep sea exploration and development.

The decisions made in New Zealand have, in turn, signalled that baseline data is required to proceed where there is imperfect information. It might be said that the obligations identified by the Chamber are serving the regulatory function for which they were intended.

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5 Trans-Tasman Resources Ltd Marine Consent Decision, Environmental Protection Authority, dated 17 June 2014; and Decision on Marine Consent Application by Chatham Rock Phosphate Limited, Application Ref: EEZ000006, Environmental Protection Authority, 10 February 2015.