

Sustainability Aspect in Deep Sea Mining Contracts



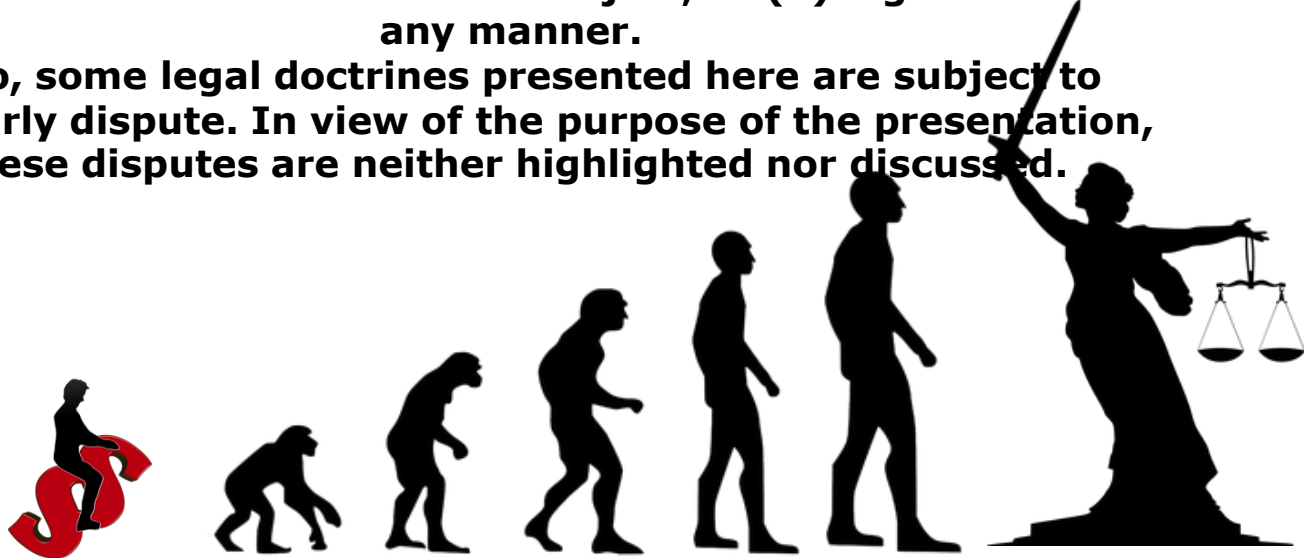
More closely asked:

To what extent, and with which rules, can the Sponsoring State, or ISA for that matter, force a mining company to adhere to environment friendly and sustainable methods when extracting ocean floor minerals.

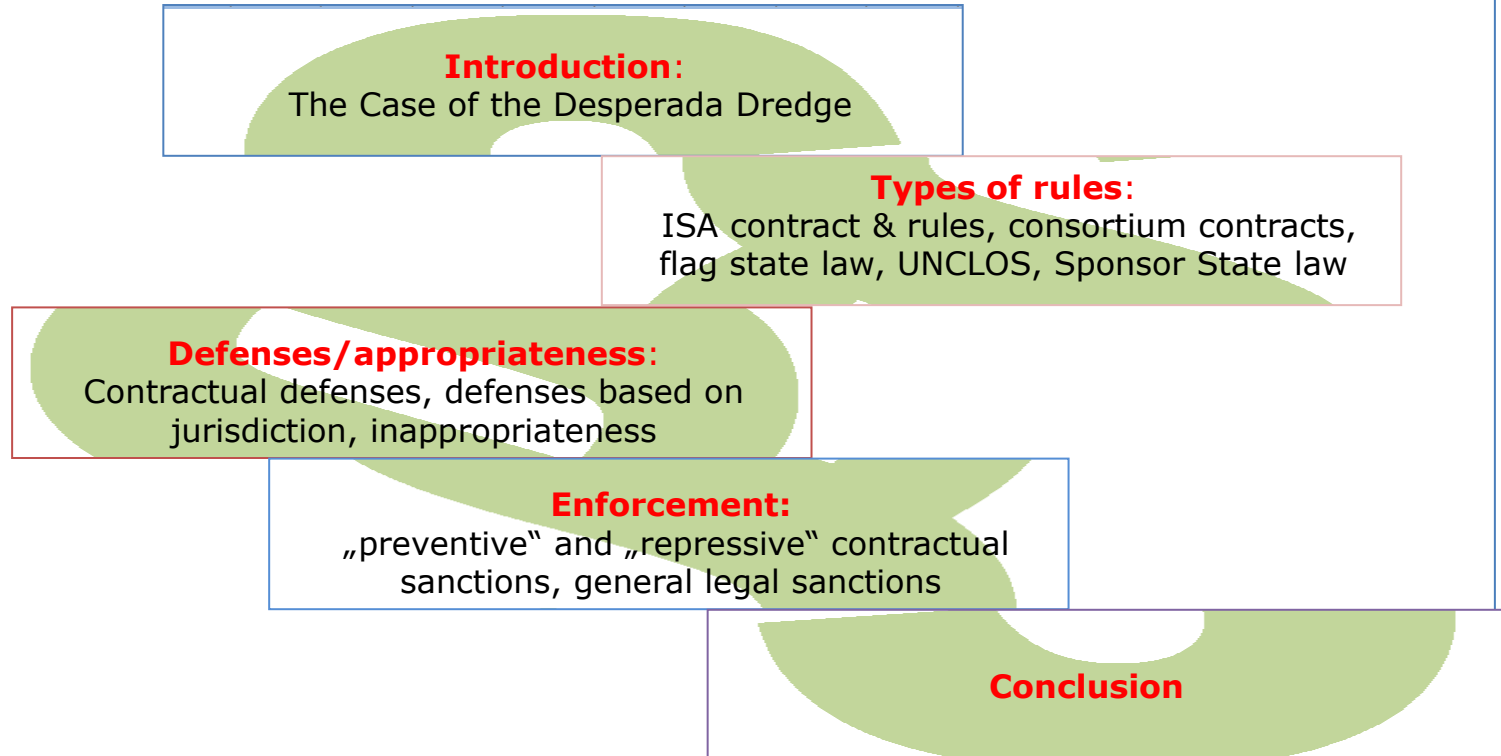
Disclaimer:

The following presentation sets out the personal findings and opinions of the author. It is not intended to provide (a) a comprehensive treatise on the subject, or (b) legal advice in any manner.

Also, some legal doctrines presented here are subject to scholarly dispute. In view of the purpose of the presentation, these disputes are neither highlighted nor discussed.



Sustainability Aspect in Deep Sea Mining Contracts

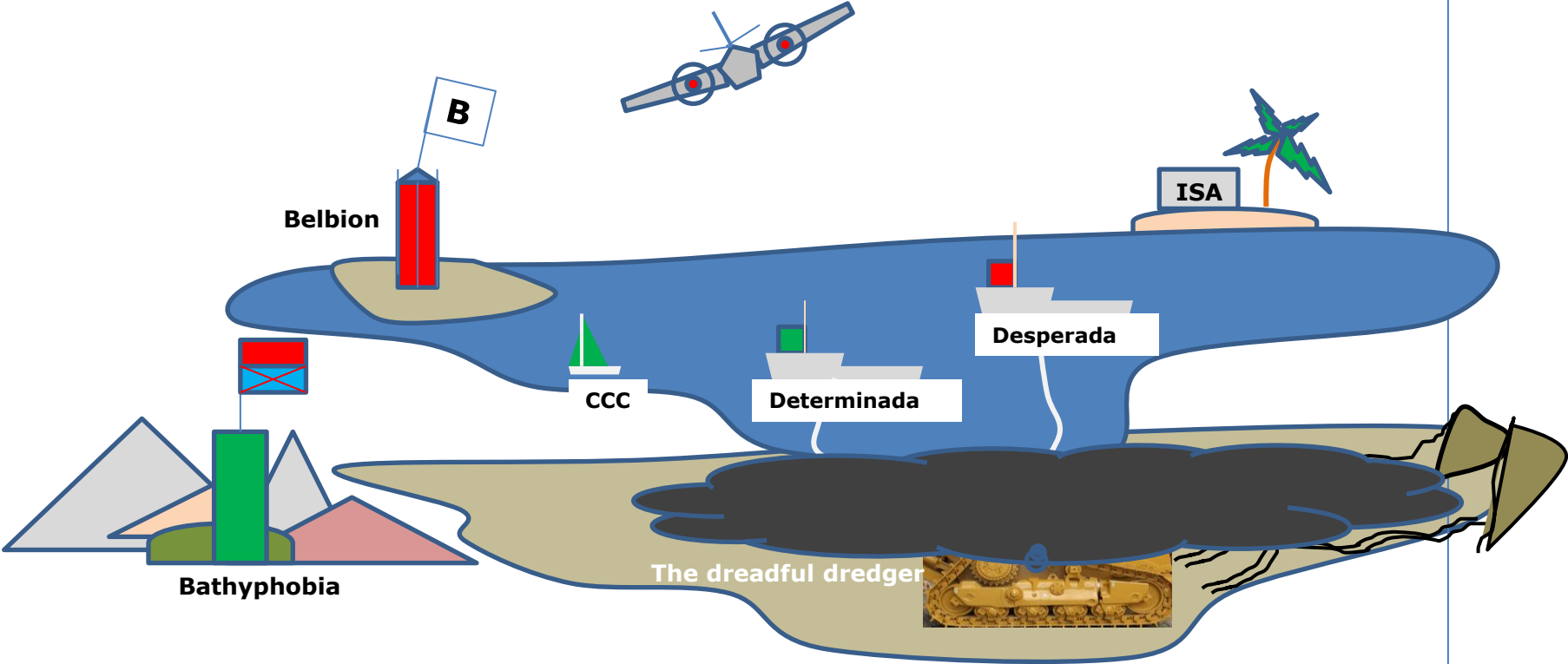


Sustainability Aspect in Deep Sea Mining Contracts



Introduction: The Case of the Desperada Dredge
Types of rules: ISA contract & rules, consortium contracts, flag state law, UNCLOS, Sponsor State law
Defenses/appropriateness: Contractual defenses, defenses based on jurisdiction, inappropriateness
Enforcement: „preventive“ and „repressive“ contractual sanctions, general legal sanctions
Conclusion

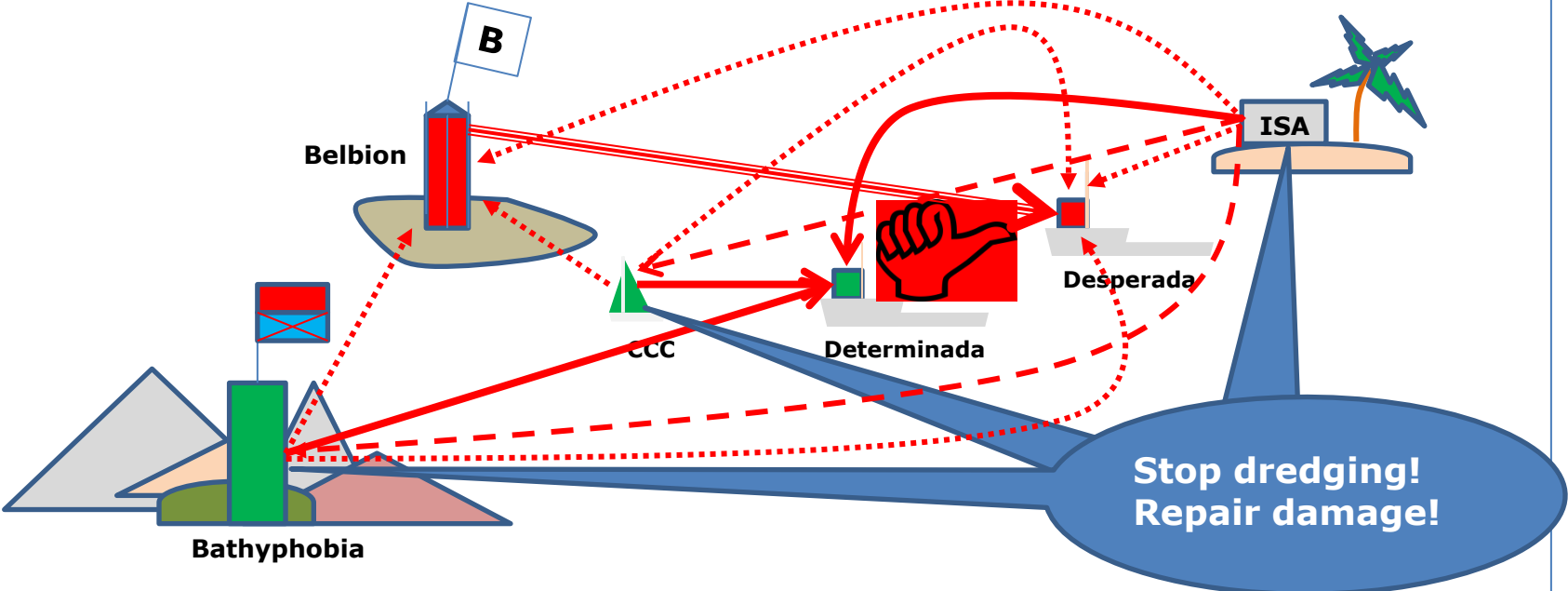
Sustainability Aspect in Deep Sea Mining Contracts



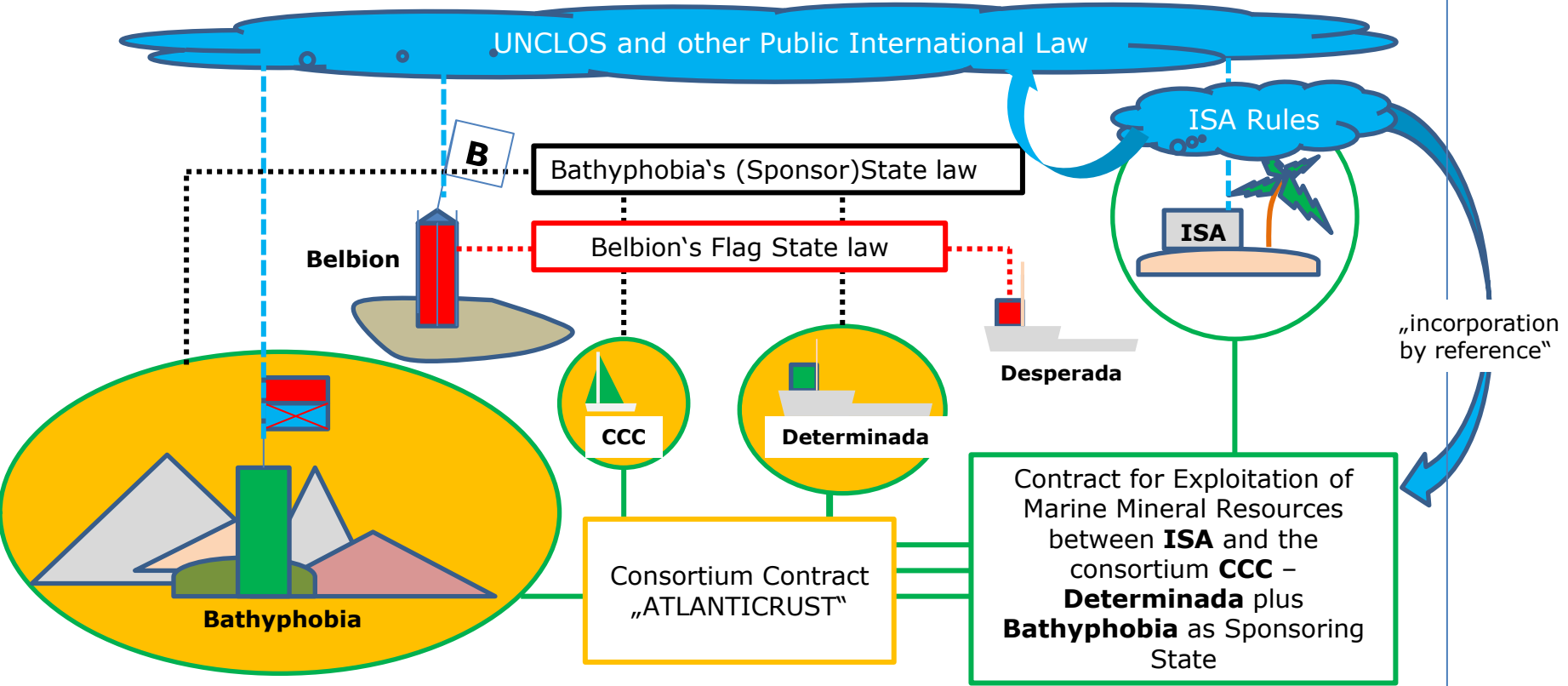
Singapore, December 5, 2019

ANDREAS KAEDE, ATTORNEY-AT-LAW

Sustainability Aspect in Deep Sea Mining Contracts



Sustainability Aspect in Deep Sea Mining Contracts



Singapore, December 5, 2019

ANDREAS KAEDE, ATTORNEY-AT-LAW

Sustainability Aspect in Deep Sea Mining Contracts

Types of rules – The „hierarchy“

(viewpoint: company under German law; EU legal acts not considered)

- constitution of the state
- mandatory international law
- mandatory national law
- contractual obligations
- non mandatory applicable law

If you want to raise a claim for performance or damage, check contractual claims first

Some other important principles

(viewpoint: same)

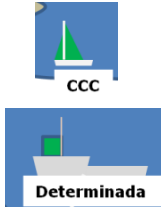
- as a rule (with exceptions) international law (conventions, treaties) obligates states, not individuals. The treaties may obligate states to cause their subjects to comply (cf Art. 139 Sect. 2 UNCLOS)
- treaties need to be ratified to become national law
- a contract provision conflicting with mandatory law is void
- the more specialized rule prevails over the more general one on same subject, unless the previous button applies

Reg. 43 III current ISA Draft Rules:

1. Nothing in an exploitation contract shall relieve a Contractor from its lawful obligations under any national law to which it is subject, including the laws of a sponsoring State and flag State.

Sustainability Aspect in Deep Sea Mining Contracts

RULES



Contract for Exploitation of Marine Mineral Resources between **ISA** and the consortium **CCC** – **Determinada** plus **Bathypobia** as Sponsoring State






Exploitation Contract between **ISA** and „ATLANTICRUST“-Consortium

- Contract will be modelled upon **ISA draft Rules** (ISBA/25/C/WP.1) – hereafter „Draft“.
- A breach of the contract can be brought by anyone to the **Secretary General** of ISA; Secretary General if convinced would issue a „compliance notice“ to the infringer (Draft regulation 103).
- A dispute would go to the **Seabed Chamber of ITLOS** (cf Draft regulation 106, i.c.w. Art 187 lit c UNCLOS).
- The **applicable law** will be the contract terms, other ISA Rules, and any international law in keeping with UNCLOS (...) (Section 17 of the Standard Terms, cf. Draft, Annex X)

Sustainability Aspect in Deep Sea Mining Contracts

Selected **Exploitation Contract** obligations „**Determinada**“ may have breached



- Compliance with **own Mining/Environmental Management Plan** (Draft, Annex X **Section 3**)
- Compliance with „**all ISA rules and regulations**“ (**ibid**, general reference). →
 - Draft, **regulation 49**: **prevent** pollution or **other hazards** in Area 
 - Draft, **regulation 50**: **avoid dumping** of mining refuse 
- Obligation to keep **subcontractor** compliant, and to not devolve responsibility on him (Draft, Annex X, **Section 6**) 
- Obligation to **prevent and report the Incident**, to immediately discontinue work if „Incident“ becomes foreseeable, and to take emergency measures once it happened (Draft, **regulation 33**; „Incidents“ are defined at the end of the Draft)

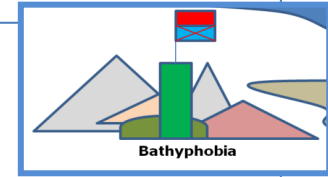
Selected **Exploitation Contract** obligations „**CCC**“ may have breached



- CCC is the **coordinator** in the ATLANTICRUST Consortium. It might be expected that a coordinator has a certain role of supervision of what is going on in the project. If so, ISA might want to claim that CCC neglected this supervision role as regards Determinada's conduct.
- In **Draft regulation 5, No. 5**, the Rules demand that wherever there is a consortium applying for an approval of a Plan of Work, there should be a **Lead member** specified in the application.
- However unfortunately, there are **no hints** anywhere in the Rules about **what such a Lead member's responsibilities should be**.
- → hence, there is **no basis for a claim against CCC out of this contract**.
- → yet, this **does not hurt** as the **Sponsoring State's** role and responsibility w/regard to its „sponsorees“ (see below) usually will **overshadow** the coordinator's responsibility.

Sustainability Aspect in Deep Sea Mining Contracts

RULES



Selected **Exploitation Contract** obligations of **Bathypobia**

- Bathypobia is the **Sponsoring State** of the ATLANTICRUST Consortium.
- A Sponsoring State pursuant to **Draft regulation 105** (also reflected in UNCLOS Annex III, Sect. 4 (4)) shall **ensure, within its legal system**, that a Contractor it sponsors shall adhere to its contract, the ISA Rules, and UNCLOS.
- ISA may therefore claim that, with regulation 105 (as well as the UNCLOS rules) being incorporated by reference into the Exploitation Contract, Bathypobia has **breached** the Exploitation Contract **by not having ensured Determinada's adherence** to the contract & rules.

Sustainability Aspect in Deep Sea Mining Contracts

RULES

Consortium Contract „Atlantitrust“

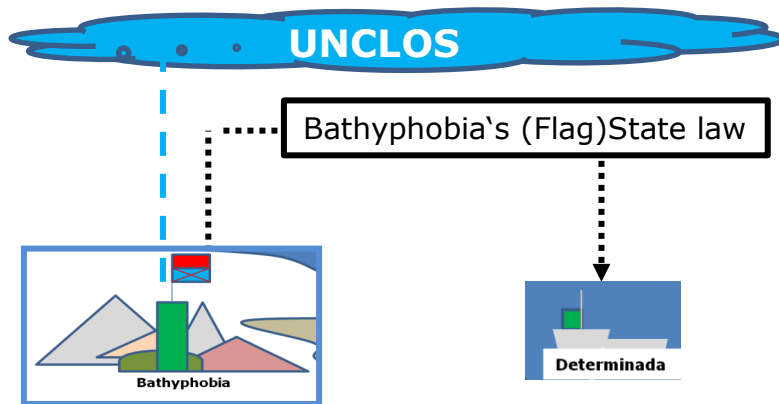


- Usually, consortia dealing with a common partner such as public institution, will have a contract additional to the one with the institution, to regulate some matters *inter se*. Example from other area: publicly funded R&D.
- „Atlantitrust“ **text is not known to us**. However we can assume that such a contract would
 - mirror and re-state the obligations from the Exploitation Contract as **claimable by one consortium member vis-a-vis the other**;
 - **enable** the **Sponsoring State** to exercise its obligation **to ensure compliance** of the consortium members sponsored by it;
 - allow member **a** to take **redress** from member **b** which alone caused a damage for which member **a** is held cumulatively or subsidiarily responsible.

Sustainability Aspect in Deep Sea Mining Contracts

RULES

State Law of Bathypobia to be invoked against Determinada?



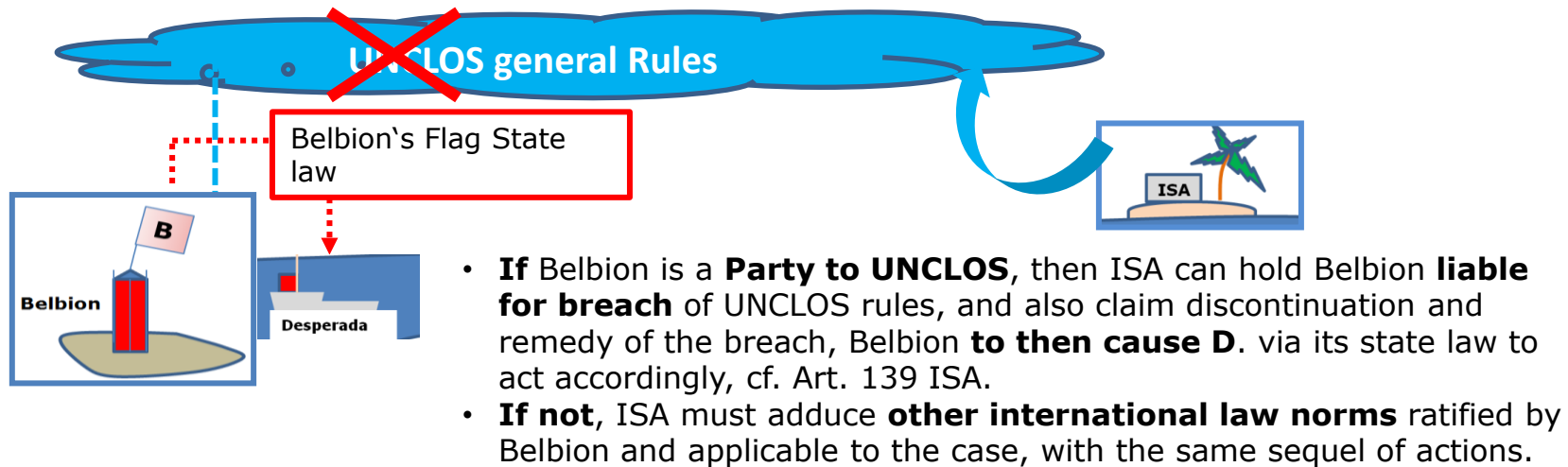
- rules from ratified **UNCLOS** via Art 139 (2) , example: Art 150, ruling i.a. that activities in the Area are to be conducted with a view to ensure ... the avoidance of unnecessary waste.
- mandatory state law on environmental matters
- **Sponsor State relationship** – recommended to craft as an **administrative act** (= „ensure compliance“)
- → advantage lies with **enforcement**: Bathypobia can directly exact penalties of its citizen Determinada, and access D.'s assets in case of payment default

Sustainability Aspect in Deep Sea Mining Contracts

RULES

Claims of ISA or Bathyphobia against **Desperada/Belbion?**

- **Belbion** is **Flag State to Desperada**, however, both have
 - no Exploitation Contract with ISA,
 - no Consortium Contract with the „Atlanticrust“ group.
- hence, the **specific contractual obligations do not apply** to them.



Sustainability Aspect in Deep Sea Mining Contracts

DEFENSES

Defenses

Exploitation Contract – Determinada



Contract for Exploitation of
Marine Mineral Resources
ISA - CCC – Determinada
- Bathypobia



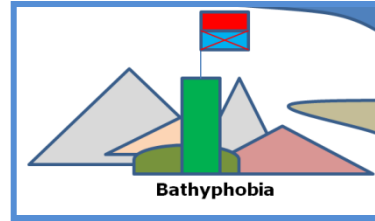
- **not adhering to own Mining Plan:** discussion of plan, interpretation of „Follow good industry practice“.
- **Creation of Hazards:** discuss EM Plan and „applicable standards & guidelines“
- **Dumping:** discuss „safety of vessel or installation“.
- **Subcontractor:** if not denying having subcontracted Desperada altogether, discuss „having ensured quality of supervision“. However, Determinada would not escape remaining responsible for Desperada’s acts (Draft **regulation 6.3**).
- **„Incident “: (Draft regulation 32):**
- **„lawful national law to take precedence over Ex. Contract (Draft regulation 43 III)**

A Contractor shall reduce the risk of Incidents as much as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction, taking into account the relevant Guidelines. The reasonable practicability of risk reduction measures shall be kept

Sustainability Aspect in Deep Sea Mining Contracts

DEFENSES

Defenses (2)



Contract for Exploitation of
Marine Mineral Resources
**ISA - CCC – Determinada
- Bathophobia**

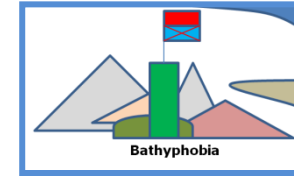


Exploitation Contract – Bathophobia

- role of Sponsor State – **additional resp. auxiliary** responsibility. → as long as „sponsoree“ complies or remedies, Sponsor State remains in the back
- **if breach by „sponsoree“ - defense** for Sponsor State that it has „*taken all necessary and appropriate measures to secure effective compliance*“ by the sponsored state (Art. 139 (2) as well as Art 4 (4) UNCLOS).

Sustainability Aspect in Deep Sea Mining Contracts

Defenses (3)



Consortium Contract – all Parties

Expectable defenses allowed in the consortium contract would be:

- for Determinada (against Bathypobia), **same as available** in the Exploitation Contract;
- dto „**act of God**“

Additionally vs Bathypobia: counterclaim of **lack of support** from Sponsor State while in financial need and not capable of procuring suitable equipment.

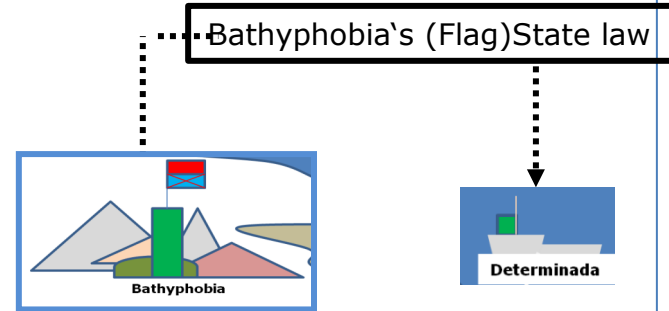
In any event: **careful crafting of Consortium Contract necessary to properly distribute risks and liabilities!**

Sustainability Aspect in Deep Sea Mining Contracts

DEFENSES

Defenses (4)

State Law – Bathypobia vs Determinada



- **ratified UNCLOS provisions:** defense that Bathypobia's invocation would be subsidiary only to the contractual claims, and to ISA's actionable position as Authority.
- **original Bathypobian state law on environmental matters: (1)** defense of lack of jurisdiction B.on the High Seas ; (2) depending on B.'s national law.
- **administrative act** of the Bathypobian authorities to implement **Sponsor State role:** (1) same argument on jurisdiction as re. environmental law; (2) inappropriateness to demand discontinuation of whole operation if lesser means available (e.g. repair of equipment/exchange of ground vehicle).

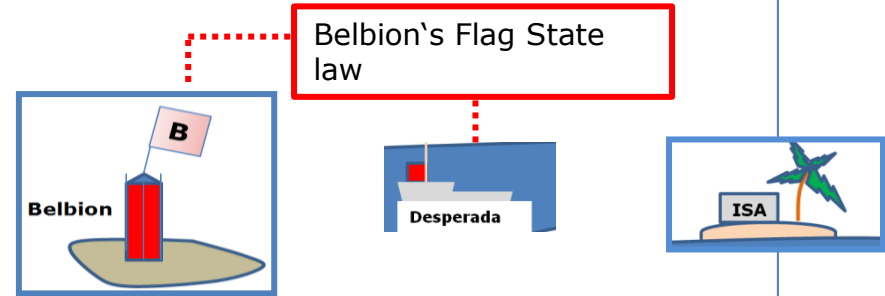
Sustainability Aspect in Deep Sea Mining Contracts

DEFENSES

Defenses (5)

„State Law“ – ISA vs Belbion, Belbion vs Desperada

- **defenses of Desperada** against immediate **claims from ISA** may be that there is no direct linkage between claimant and respondent. Claims must go via Flag State.
- **defenses of Desperada** against **Belbion's** claims under state law depend on how Belbion has implemented the international law into its law. If e.g. Art. 150 UNCLOS is ratified without further detailing, defense may be that the provision is too broad „unnecessary waste“.
- Any existing purely national **Belbian environment law** would need to be checked.



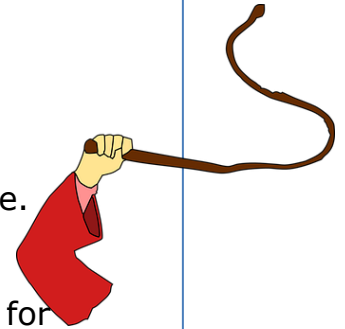
Sustainability Aspect in Deep Sea Mining Contracts

ENFORCEMENT

Enforcement

General:

- In the ideal world, the **sanction** for a wrongdoing is to be felt by the perpetrator, i.e. **should be more onerous than undoing/repairing** the wrong.
- One purpose of enforcement is the **actual ending of the illicit act** (and deterrent for the perpetrator to repeat it).
- The other is to **deter any other potential wrongdoer** from following suit.
- Enforcement can be **preventive** (such as monitoring) and **repressive** (i.e. sanction attached to the commission of the wrong)



Sustainability Aspect in Deep Sea Mining Contracts

ENFORCEMENT

Enforcement (2)

Exploitation Contract

Contract for Exploitation of
Marine Mineral Resources
**ISA - CCC – Determinada
- Bathyphobia**

Prevention and Early Response

- Elaborate **Application System (Draft, Part II)** forcing Contractor to name risks and their containment already as condition for obtaining the contract (EIA, Mining Workplan, Emergency Response Plan, EMMP)
- **Inspection System** as advance protection (Draft **regulations 69** et seq.), carried out by „inspectors“ during project operations
- **Incident Reporting System** (Draft **regulation 33**)
- **Environmental Compensation Fund** (Draft **regulations 54** et seq) also covering environmental damage repair cost not recoverable from a Contractor

Sustainability Aspect in Deep Sea Mining Contracts

Enforcement (3)

Exploitation Contract

Repression (Draft regulation 103)

- **Compliance notice** by **Secretary General** (*ibid.*, No.1) giving room for returning to compliance & to defend itself
- In case of persistent violation, **Council** may either terminate the contract or impose **penalties „proportionate to the seriousness of the violation“** on contractor (*ibid*, Nos. 5., 6)
- **Council** may also initiate emergency interim measures to avoid further harm to environment (UNCLOS, Art. 162(2) lit w)
- **LTC**, in considering further applications for contracts, shall consider „previous operating record of responsibility of applicant“ (Draft, **regulation 12 No. 4 (c)**)

Contract for Exploitation of
Marine Mineral Resources
ISA - CCC – Determinada
- Bathophobia

Enforcement (4)

Other Bases of Enforcement

- **State Law** (also including national environmental law): Enforcement under the respective national legal rules.
 - Usually most effective, due to the power the state has over its subjects.
 - However, questionable if the Flag State is a mere „flag of convenience“;
 - → in some cases, harbour state enforcement is alternatively considered (cf. MARPOL)
- **UNCLOS general rules** (outside contract): Enforcement of environmental rules is delegated to the States Parties (cf. UNCLOS Part XII, Section 6), thus the aforesaid on „state law“ applies.
- **Consortium Contracts**: again, worthwhile crafting meticulously. One option is the choice of applicable law and the form of dispute resolution, both of which may result either in an efficient enforcement régime or a perennial stall.

Conclusions

- A mining company will face claims and sizeable consequences if in breach of environmental rules of the modern DSM régime;
- the Contract – especially the Exploitation Contract – offers the most elaborate and efficient means to ensure compliance;
- even „outsiders“ i.e. companies operating in the Area without a Contract may in principle be sanctioned when in breach of UNCLOS rules;
- However, defenses are available in all stages and constellations, suitable at least to protract proceedings;
- enforcement – in a world without „world police“ is strongest when directly coming as a contractual consequence. Flag State enforcement comes second, however largely depending on the quality of the applicable State law (cf. „convenience flag“).

Sustainability Aspect in Deep Sea Mining Contracts

Thus when considering a compliance case, let us avoid a too narrow perspective....



...but give **her a chance to eventually prevail!**



Thank you for your patience!!

Sustainability Aspect in Deep Sea Mining Contracts



Backup

Sustainability Aspect in Deep Sea Mining Contracts

Sponsoring State provisions

Regulation 105 ISA Rules C25

Regulation 105 Sponsoring States

Without prejudice to regulations 6 and 21, and to the generality of their obligations under articles 139 (2) and 153 (4) of the Convention and article 4 (4) of annex III to the Convention, States sponsoring Contractors shall, in particular, take all necessary and appropriate measures to secure effective compliance by Contractors whom they have sponsored in accordance with Part XI of the Convention, the Agreement, the rules, regulations and procedures of the Authority and the terms and conditions of the exploitation contract.

Art 139 (2) UNCLOS

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. **A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.**

Art. 4(4) UNCLOS Annex III

4. The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

Sustainability Aspect in Deep Sea Mining Contracts



General Pollution Provisions , e.g.

Art. 150 UNCLOS

Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring:

- (a) the development of the resources of the Area;
- (b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, **the avoidance of unnecessary waste**;
- (c) the expansion of opportunities for participation in such activities consistent with articles 144 and 148;
- (d) participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention;

.....etc-.....

Article 211. Pollution from vessels

1.

States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

MARPOL e.g. does not specifically mention plumes

Section 3 Enforcement and penalties

Regulation 103 Compliance notice and termination of exploitation contract

1. At any time, if it appears to the Secretary-General on reasonable grounds that a Contractor is in breach of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice.
2. A compliance notice shall:
 - (a) Describe the alleged breach and the factual basis for it; and
 - (b) Require the Contractor to take remedial action or other such steps as the Secretary-General considers appropriate to ensure compliance within a specified time period.
3. For the purposes of article 18 of annex III to the Convention, a compliance notice issued under this regulation constitutes a warning by the Authority.
4. The Contractor shall be given a reasonable opportunity to make representations in writing to the Secretary-General concerning any aspect of the compliance notice. Having considered the representations, the Secretary-General may confirm, modify or withdraw the compliance notice.
5. If a Contractor, in spite of warnings by the Authority, fails to implement the measures set out in a compliance notice and continues its activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI of the Convention and the rules, regulations and procedures of the Authority, the Council may suspend or terminate the exploitation contract by providing written notice of suspension or termination to the Contractor in accordance with the terms of the exploitation contract.
6. In the case of any violation of an exploitation contract, or in lieu of suspension or termination under paragraph 5 above, the Council may impose upon a Contractor monetary penalties proportionate to the seriousness of the violation.
7. Save for emergency orders under article 162 (2) (w) of the Convention, the Council may not execute a decision involving monetary penalties, suspension or termination until the Contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to it pursuant to section 5 of Part XI to the Convention.