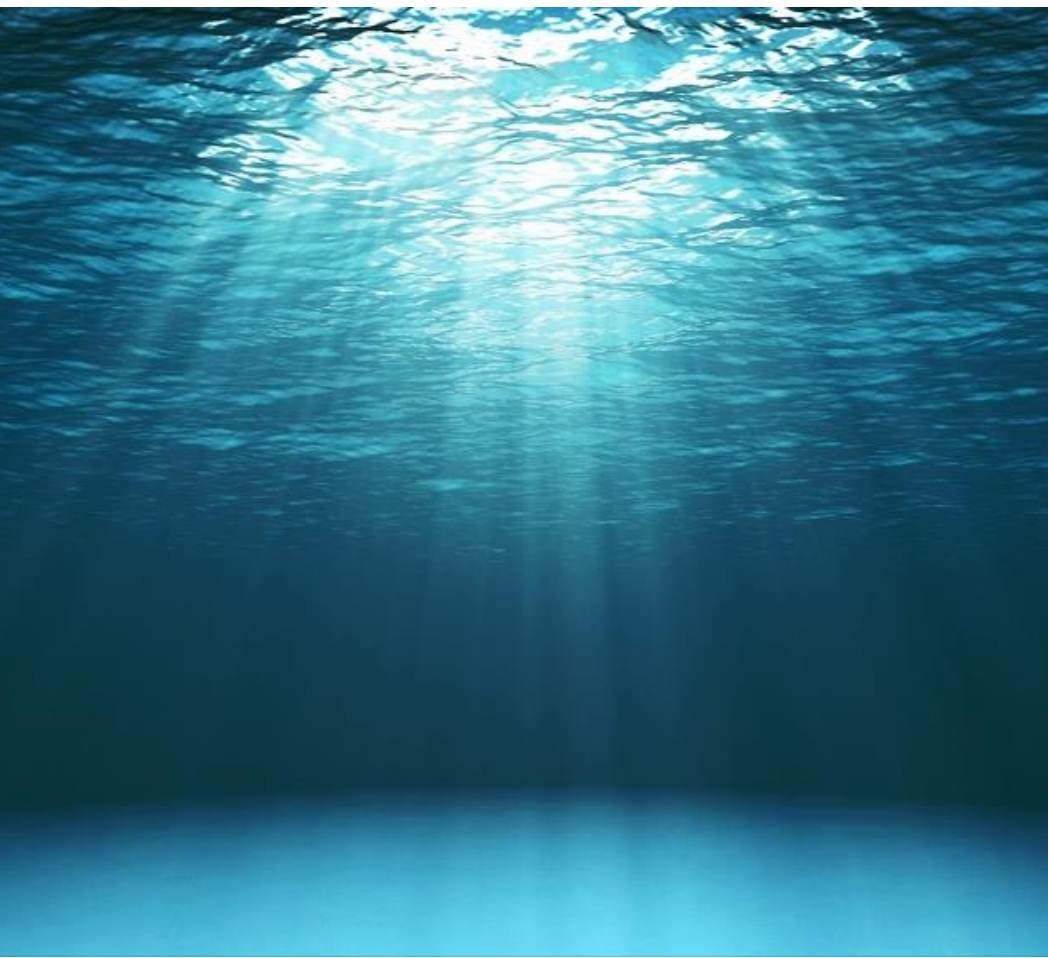




**British Institute of
International and
Comparative Law**

Deep Seabed Mining & International Law: Is a Precautionary Pause Required?





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Comparative Law**

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Vision

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Summary

On May 31, 2023, the British Institute of International and Comparative Law (BIICL) organized a [webinar](#) titled 'Deep Seabed Mining & International Law: Is a Precautionary Pause Required?'.

Deep-sea mining in the world's global commons has become a topic of intense international debate, with a growing call for a moratorium or a precautionary pause until the environmental risks are better understood. Governments, NGOs, and companies are all weighing in on this issue, which has significant potential implications for the future of our planet. Some argue that a [precautionary pause is needed](#) until the gaps in scientific knowledge are filled and the International Seabed Authority's institutional capacity is addressed. Others believe that timely exploitation of metals such as copper, cobalt, nickel, manganese, and rare earths for electric cables and lithium-ion batteries can help facilitate [low-carbon energy transition](#).

Despite the International Seabed Authority granting licenses for companies and states to explore the deep seabed in accordance with Part XI of UNCLOS, full-scale mining has not yet started. There is significant opposition amongst ISA Council States to DSM beginning soon, thus the Council will likely seek to prevent approval of an application before RRP's are ready. The Pacific small island nation of Nauru has already triggered the "[two-year rule](#)", which requires the International Seabed Authority to complete the adoption of its rules, regulations, and procedures for mineral exploitation by July 2023. Meanwhile, other island nations like Samoa, Fiji, and Palau, alongside Chile, France, Germany, New Zealand and others, are advocating for a moratorium on deep-sea mining.

This event discussed the legal, environmental and social implications of deep-sea mining in areas beyond national jurisdiction. Should states and companies prioritise precautionary measures before engaging in commercial exploitation of the deep seabed? What specific precautionary measures should be implemented in this regard? If a precautionary pause is deemed necessary, what additional collaborative measures should member states take, in accordance with UNCLOS, to enhance scientific knowledge and establish a robust framework for responsible exploitation of deep-sea resources?

The event was convened by [Dr Constantinos Yiallourides](#), Research Leader in the Law of the Sea, BIICL; [Ingrid Gubbay](#), Visiting Research Fellow, BIICL; and [Dr Jean-Pierre Gauçi](#), Arthur Watts Senior Fellow in Public International Law, BIICL.

This report summarises the conversation and consolidates some key points covered in the webinar held on 31 May 2023. The panel discussion was chaired by Ingrid Gubbay, European Head of Human Rights and Environmental Law at Hausfeld, Visiting Research Fellow, BIICL. The panel speakers were [Toby Fisher](#), Barrister Matrix Chambers, Former Deputy Director, International Law at New Zealand Ministry of Foreign Affairs & Trade; [Associate Prof. Dr Aline Jaeckel](#), Australian National Centre for Ocean Resources & Security, University of Wollongong; and [Monica Fering-Tinta](#), Barrister, Twenty Essex.

BIICL extends its gratitude to all the panellists for their outstanding contributions to the discussion and to all attendees for their support of the event.

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

Suggested Citation:

British Institute of International and Comparative Law, 'Deep Seabed Mining & International Law: Is a Precautionary Pause Required?' (31 May 2023).

Toby Fisher: Deep Sea Mining Moratorium

1. Toby Fisher's presentation focused on the legal opinion he co-authored for Pew Trusts with Professor Zachary Douglas KC, former Samoa Attorney-General Brenda Heather-Latu and Jessica Jones. That advice concluded that – whatever name you give to it (precautionary pause, moratorium or something else) – a legal measure to defer deep-sea mining (DSM) is not only consistent with international law, it is in fact required by it. The full opinion is available at: <https://www.pewtrusts.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf>

2. Mr. Fisher discussed one interpretation of the 'two-year rule' that maintains that in July 2023, plans of work should be provisionally approved and allowed to proceed. If this interpretation were correct, Mr. Fisher highlighted three serious problems. First, the rules, regulations, and procedures for exploitation will not be complete by July 2023, and thus there will not be clear rules or thresholds for environmental impact assessment or environmental monitoring and management. Nor will there be mechanisms to ensure economic benefits are shared and the work is carried out for the benefit of humankind. Second, huge knowledge gaps around the deep seabed mean we cannot know the impact of DSM on the ecosystems. Third, the ISA is under-resourced and ill-equipped to enforce conditions, and self-reporting is not an ideal monitoring model.

3. Mr. Fisher argued that the interpretation of the "two-year rule" as set out above is wrong. Treaty provisions are not to be read in isolation and the two-year rule needs to be interpreted and applied consistently with other provisions in UNCLOS and the 1994 Agreement, including the need to protect and preserve the marine environment. In the absence of a robust regulatory regime, and in the absence of better scientific knowledge, a deferral of exploitation is legally required by UNCLOS if states and the ISA are to meet their obligations to ensure protection of the marine environment from deep-sea activities. ISA obligations must be discharged consistent with the precautionary principle and be based on the best available scientific evidence. Confidence that DSM could proceed without significant harm is currently low.

4. With respect to the balancing between detrimental impact allowed and economic benefits incurred, Mr. Fisher explained:

This is a matter for states through negotiation. And it's an entirely separate issue from whether states can simply permit deep sea mining to proceed, where it risks harmful effects or serious harm on the grounds that the economic benefits outweigh that harm. Plainly, that is not permissible. ... [D]isagreement on the question of international law can't be a mere policy choice. It must be grounded in the rules of international law and, in particular, the rules for the interpretation of treaties. And so far I've not seen a coherent counter argument grounded in the rules of treaty interpretation that supports the view that deep sea mining should be able to proceed in the absence of adequate scientific knowledge and the absence of a robust and completed regulatory framework.

Dr Aline Jaeckel: Implementing Precaution

5. Dr Jaeckel's presentation focused on additional measures that states and the ISA must implement to fulfil their obligations under the precautionary principle. She analysed the three dimensions relevant to implementing precaution, which are the procedural dimension, the institutional dimension, and the substantive dimension, or protective measures that directly protect the environment.

6. The procedural dimension encompasses steps the ISA or states must take to implement precaution. Aside from the need to ensure robust environmental baselines, a key step is to set clear environmental goals and objectives to determine what level of harm is considered acceptable. This is a political question that needs to be addressed by the ISA Council or Assembly, as scientists do not currently have political guidance on acceptable levels of harm, needed for them to develop measurable environmental thresholds. Overly broad statements, such as environmental protection from harmful effects of mining, lack the specificity of a more productive goal such as 'sustaining marine ecosystem integrity, which scientists can then break down into objectives relating to biodiversity loss, maintaining ecosystem functions, and so on.'

7. Institutional measures 'relate to the institutional capacity that an organization needs to have in order to take those procedural steps.' For example, the ISA would need 'sufficient expertise to determine the quality of environmental baselines.' The ISA may require more expertise in environmental management and EIAs, as well as marine biology more broadly. There also needs to be the capacity to ensure robust monitoring and compliance assurance.

8. Protective measures ensure that no environmental harm occurs. They must be effective in reaching an environmental objective and be proportionate. Since we do not currently have environmental objectives, this is challenging to meet. A precautionary pause may be proportionate because we do not have a good understanding of environmental baseline conditions. Establishing those baselines should be a key focus for the ISA.

Monica Feria-Tinta: The Role of ITLOS

9. Feria-Tinta focused on procedural aspects of a precautionary pause and highlighted what Gjerde has called the disconnection between science and law. Feria-Tinta discussed potential avenues to bring the issue to the International Tribunal for the Law of the Sea (ITLOS).

10. First, the ISA could resort to ITLOS for an advisory opinion and clarification of the legal issues at stake. The advice requested could cover both interpretation and application of the relevant legal provision, resolving the uncertainties surrounding the implications and consequences arising out of the invocation of section 1(15) and guide the Council (the executive branch of the ISA) as it moves forward, as suggested by Singh. But a potential advisory opinion could also be addressed (i) to clarify notions such as the meaning of 'serious harm' (as differentiated from 'harmful effects') in the context of DSM (including what are the key factors or parameters to measure, to inform the decision about whether an impact constitutes serious harm or not); (ii) what is required to meet the notion of 'effective protection' under UNCLOS; or (iii) what amounts to national 'effective control' of an entity. An ISA state member could also trigger the request for an Advisory Opinion by the ISA as was the case with Nauru in March 2010, when it requested the ISA Secretary-General to seek an advisory opinion from the ITLOS Seabed Disputes Chamber in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion ('*Responsibilities and Obligations of Sponsoring States*'), 1 February 2011, ITLOS Reports 2011.

11. Alternatively, State Parties to UNCLOS could file a case against the ISA, given that the Secretary General of the ISA stated that the environmental impacts from DSM are 'predictable and manageable'. Additionally, states could argue that there was an omission of the Authority in not complying with obligations to protect the marine environment. Finally, states could argue an act of Authority to be in excess of jurisdiction or misuse of power.

12. Feria-Tinta also noted challenges with harmonization of different regimes for seabed mining in different areas, as well as potential risks of methane hydrate mining. Scientists warn that such mining could destabilize the ocean floor, generate submarine landslides, and create powerful tsunamis. These events are untraceable, an important note for cross-jurisdictional claims. Compensation would also differ across regimes; while strict liability is not contemplated by some, under international law it can ensure the polluter pays to ensure the victim is adequately compensated.

Q & A

13. Constantinos Yiallourides (BIICL) asked:

When can we expect the issuance of the first exploitation licenses by the ISA, and who is likely to take the lead in obtaining those licenses? Should we anticipate the possibility of international litigation seeking to cease deep-sea mining?

14. Feria-Tinta noted that, in the most extreme scenario, the ISA could issue licenses for exploitation as early as July 2023. The ISA, or Member States, could request an advisory opinion from ITLOS. Fisher noted that states appear not to be planning to submit a plan of work until specific rules are adopted.¹ If there were a plan, the Legal and Technical Commission will first review before the Council decides whether to approve or reject the plan or delay a decision. The LTC does not have to issue recommendations on the application, however. Germany and the Netherlands have suggested that ISA should direct the Legal and Technical Commission to not pass judgement until the rules are passed. Fisher also noted that international litigation by private actors will unlikely be successful, though there could be domestic litigation against sponsoring states brought by a commercial entity.

15. In response to a question about whether a precautionary pause contradicts the purpose of the two-year rule, which is to allow provisional acceptance of exploitation should the rules not yet be ready, Dr Jaeckel answered that the two-year rule was intended to address a situation where the rules were essentially ready, but their adoption was blocked, which is not the case here. Fisher added that we should take a more contextual approach to interpretation and look at other obligations from UNCLOS and the 1994 Implementation Agreement.

16. Dr Jaeckel argued that the acceptable level of environmental harm is an inherently political, rather than legal, issue. What value we place on the deep ocean and minerals we can extract from it should be addressed by the ISA Council and Assembly. Feria-Tinta disagreed, arguing that the question is a legal one considering the impact on climate, and a question that can be addressed by a court or tribunal. Fisher suggested that there may be a middle way to look at this, arguing that this is a question for political negotiation, but that negotiation is constrained by the need to have regard to best available science.

17. In response to a question about breaches of a moratorium, Fisher noted that the response would differ based on who is acting in breach; a commercial entity could be sanctioned by its home state, whereas a state in breach could face various countermeasures. Dr Jaeckel added that few actors are pushing for DSM in the near future, and any breach would witness significant diplomatic backlash or reduce a contractor's ability to get similar contracts in the future. Gubbay added that companies seeking to breach the moratorium would struggle to get insurance, and gathering evidence of a breach may be challenging. Dr Jaeckel highlighted the need for a transparent monitoring scheme. On the insurance point, Fisher added that contracts granted under the two-year rule would be provisional, and thus give rise to the risk that the approval will be revoked. This will also create insurance problems.

18. The panellists discussed the proportionality aspect of the precautionary principle. Dr Jaeckel noted that the precautionary principle is intended to prevent environmental harm, and it thus applies to DSM given the risk of environmental harm. Feria-Tinta added a cautionary note about continuing to exhaust minerals in various areas (land and now rushing to the sea) and the impact of never-ending mining on the planet.

¹ Fisher subsequently clarified that he meant that States had agreed that they did not want to see mining before RRP are agreed. That does not mean states won't submit plans of work.

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