

March 9, 2011

Volume 15, Issue 7

Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on “Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area”

By David Freestone



Introduction

On February 1, 2011, the Seabed Disputes Chamber unanimously adopted a historic opinion, the Advisory Opinion on the “Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area.” This is the first time that the advisory jurisdiction of the International

Tribunal for the Law of the Sea (“ITLOS”) has been invoked and the first time that the Seabed Disputes Chamber has been called upon. It is also the first time that the Tribunal—whose jurisprudence has to date been marked by a multiplicity of dissenting and separate opinions—has reached a completely unanimous ruling in a case referred to it.^[1]

Background

The 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) declares the seabed area beyond national jurisdiction (“The Area”) the “common heritage of mankind.”^[2] Exploration and exploitation of minerals in the Area are governed by the International Seabed Authority (“ISA”). All prospective exploration and exploitation activities are required to be sponsored by a State Party to the 1982 Convention. In applying for an exploration or exploitation license, an entity submits two broadly similar areas for consideration. If a license is granted, the ISA determines which area will be allotted to the applicant; the second area is reserved for activities by the ISA through the Enterprise or “in association with developing states.” However, the Enterprise—the international body that was originally designed to carry out such activities for the benefit of mankind—was effectively shelved by the 1994 Implementation Agreement that brought the Convention into force.^[3] The remaining option therefore is for these reserved sites to be exploited by the ISA “in association with developing states.”

Pursuant to this option, in April 2008, Nauru and Tonga—two small Pacific Island developing states—each put forward a proposal for activities in reserved areas. Nauru is a country with a land area of twenty-one square kilometers, a population of less than 10,000, and a GDP of \$34 million.^[4] Tonga is an archipelagic state with a land area of 747 square kilometers, a population of just over 100,000, and a GDP of \$320 million.^[5] Each of these

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states was sponsoring a commercial entity to undertake these activities: Nauru Ocean Resources Inc. and Tonga Offshore Mining Ltd.

After the ISA's consideration of these proposals began, both states asked that their applications be deferred. In March 2010, Nauru requested the ISA Secretary-General to seek an advisory opinion from the ITLOS Seabed Disputes Chamber regarding the extent of the liabilities of a state sponsoring "seafloor mining in international waters." In particular, it stressed that its sponsorship had originally been based on the assumption that it could mitigate its potential liabilities. If this was not the case, it continued, developing countries would effectively be precluded from taking part in such activities, despite the fact that their participation was a basic precept of the Convention.^[6]

The Council of the ISA decided to reformulate the Nauru proposal into three more general but concise questions.^[7] After these were received by the ITLOS Registrar, the Seabed Disputes Chamber President invited States Parties to UNCLOS, the ISA, and intergovernmental organizations with observer status at the ISA to make written statements.^[8]

The Advisory Opinion

Having found that it had jurisdiction under UNCLOS Article 191 to render an advisory opinion and that the request was admissible,^[9] the Chamber moved to the first of the three questions posed by the ISA.

Question 1: What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

The Chamber first found that the phrase "activities in the Area" did not include every activity associated with seabed exploration and mining. Relying on the wording of the Convention, rather than the Nodule and Sulphides Regulations concluded by the ISA, it found that the phrase included "drilling, dredging, coring, and excavation; disposal, dumping and discharge . . . of sediment, wastes or other effluents; and construction operation or maintenance of installations, pipelines and other devices related to such activities." It did not include transportation and processing (although these are covered by the Regulations). The significance of this somewhat esoteric distinction should not be underestimated for it does limit the applicability of the ruling and also some of the limitations of liability discussed below. Simply put, the liability regime—the limitations of which may be disappointing to some—does not cover all the potentially threatening activities associated with mining.

On the primary question of legal responsibilities and obligations of a state sponsoring such activities, the Convention text is also relatively clear. Article 139(1) reads:

States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part.

States Parties have an obligation to assist the Authority in this regard,^[10] and, under the Convention Annex III, Article 4, paragraph 4, State sponsors shall also, "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

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and its obligations under this Convention.”[\[11\]](#)

Having recognized that this provision contains an “obligation to ensure,” the Chamber, in what is from an environmental law perspective possibly the strongest part of the opinion, itemized the constituent elements of this obligation, pointing out that this is an obligation of conduct rather than of result, i.e., it is not an obligation that requires the contractor’s compliance in every case. It is analogous to the obligation of due diligence and conduct that the International Court of Justice found in the recent *Pulp Mills Case*.[\[12\]](#)

International environmental lawyers will most welcome elements of the requirements of “due diligence.” Recognizing that “due diligence” may impose more rigorous requirements for riskier activities, the Chamber first identified what it termed the “legal obligation” to apply the precautionary approach as found in Principle 15 of the Rio Declaration. [\[13\]](#) Precaution is recognized by the ISA Nodules and Sulphides Regulations, but the Chamber went further, seeing this as “an integral part of the due diligence of sponsoring states which is applicable even outside the scope of the regulations,” requiring actions where scientific evidence is insufficient but “there are plausible indications of potential risk.” Perhaps most significantly, the Chamber recognized “a trend towards making this approach part of customary international law,” which it sees in the *Pulp Mills Case* and which this opinion of course further supports.[\[14\]](#)

Other due diligence elements include “best environmental practices,” which are required by the ISA regulations and the Standard Clauses for exploration contracts. Technical and financial guarantees by a contractor, as well as the availability of financial recourse for prompt and effective compensation in the event of damage caused by marine pollution, are also included, as are requirements for Environmental Impact Assessment (“EIA”), which the Chamber found extended beyond the scope of the ISA Regulations.

On the wider and controversial question of the treatment of developing states, the Chamber unequivocally endorsed the principle of equality, recognizing that the spread of sponsoring states “of convenience” (similar to flags of convenience for ships) would jeopardize the application of the highest standards of protection.

Question 2: What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?

Arguably, this question formed the basis for the most important part of the opinion, but is also the one for which the 1982 Convention provides the clearest answer. Article 139(2) specifies that “without prejudice to rules of international law . . . damage caused by the failure of a state party . . . to carry out its responsibilities under this Part shall involve liability.” However, it goes on to say that a “State Party is not liable for damage caused by a failure to comply . . . by a person whom it has sponsored . . . if the State Party has taken all necessary and appropriate measures to secure effective compliance” These measures are elaborated as the requirements that the “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.”

[\[15\]](#)

The Chamber ruled that this was a high standard of due diligence for sponsoring states. However, given the explicit text of the Convention, it was not a strict liability regime, despite arguments to the contrary. But if damage occurred, and the sponsoring state had failed to take “all necessary and appropriate measures to ensure compliance” by its contractor, then the state would be liable. Moreover, the Chamber pointed out that nothing would prevent such liability from being introduced in the future through the mining regulations or the

establishment of a trust fund to cover damage not covered by the Convention.

Question 3: What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

As discussed above, the Chamber had effectively answered this question already. Laws, regulations, and administrative measures must be in force at all times that the contract with the Authority is in force. These measures cannot simply be contractual arrangements with the sponsored entity. They must be at least as stringent as those adopted by the Authority and certainly no less effective than international rules.

Final Thoughts

From an international environmental law point of view, this is also a historic ruling. The Chamber's unanimous opinion sets the highest standards of due diligence and endorses a legal obligation to apply precaution, best environmental practices, and EIA. Some commentators will be disappointed that the Chamber did not take the view that sponsoring states are strictly liable for the actions of their sponsored entities. However, the wording of the Convention itself weighs heavily against this conclusion. Moreover, the Chamber does suggest that a strict liability regime could be introduced via the ISA Mining Regulations and suggests the use of a trust fund to address residual liability issues. Crucially, it also rules that developing countries have the same obligations regarding environmental protection as developed countries. It not only warns of the risk that differentiated lower standards might result in the emergence of the equivalent of flags of convenience—so called “sponsoring states of convenience”—but also goes a long way in preventing that from happening.

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Endnotes:

[1] This reflects great credit on Chamber President Tullio Treves whose task it would have been to forge consensus.

[2] United Nations Convention on the Law of the Sea art. 137, *opened for signature* Dec. 10, 1982, 1833 *U.N.T.S.* 396, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS].

[3] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, G.A. Res. 48/263, U.N. Doc. A/RES/48/263 (Aug. 17, 1994).

[4] *Background Note: Nauru*, U.S. Dep't of State (Jan. 26, 2011), <http://www.state.gov/r/pa/ei/bgn/16447.htm>.

[5] *Background Note: Tonga*, U.S. Dep't of State (Dec. 23, 2010), <http://www.state.gov/r/pa/ei/bgn/16092.htm>.

[6] See UNCLOS, *supra* note 2, arts. 148, 150, 152.2.

[7] See Int'l Seabed Authority Counsel, Apr. 26-May 7, 2010, Kingston, Jamaica, *Decision of the Council of the International Seabed Authority Requesting an Advisory Opinion Pursuant to Article 191 of the United Nations Convention on the Law of the Sea*, Decision ISBA/16/C/13 (May 6, 2010), *available at* <http://www.isa.org.jm/files/documents/EN/16Sess/Council/ISBA-16C-13.pdf>. “As indicated by the Authority in its written statement and at the hearing, this decision was taken “without a vote’ and ‘without objection.” Seabed Disputes Chamber of the Int’l Trib. for the Law of

the Sea, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Feb. 1, 2011), *available at* http://www.itlos.org/adv_op_010211.pdf (citing Written Statement of the Authority, ¶ 2.4, ITLOS/PV.2010/1/Rev.1).

[8] Within the time limits, statements were received from Australia, Chile, China, Germany, the Republic of Korea, Mexico, Nauru, the Netherlands, the Philippines, Romania, the Russian Federation, and the United Kingdom. The Authority, the Interoceanmetal Joint Organization, and the International Union for Conservation of Nature and Natural Resources also submitted statements. Beginning on September 14, 2010, oral proceedings were held, giving an opportunity to all those who had sent statements, as well as the UNESCO Intergovernmental Oceanographic Commission (“IOC”), to speak.

[9] The Chamber declined to comment on whether the difference in wording between the Statute of the International Court of Justice and Article 191 of the 1982 Convention meant that, whereas the ICJ has discretion under its own statute to render an advisory opinion, this same discretion did not exist for the Chamber. *Compare* UNCLOS, *supra* note 2, art. 191 (stating that the Chamber “shall give” advisory opinions), *with* Statute of the International Court of Justice art. 65(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (stating that the Court “may give” an advisory opinion).

[10] UNCLOS, *supra* note 2, art. 153(4).

[11] This paragraph however continues in a way that severely restricts possible answers to the second question: “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.”

[12] *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶ 187 (Apr. 20, 2010), *available at* www.icj-cij.org. Indeed the Chamber cites Article 194(2) of the Convention as another example of a similar obligation: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment” Although not cited, this wording is recognized from Principle 2 of the Rio Declaration or Principle 21 of Stockholm. It supports the fact that this represents customary law.

[13] Note the equivocal wording of Principle 15, requiring states only to introduce “cost effective measures” “according to their capabilities.” This wording was introduced, it is reported, by the United States at the 1992 Rio Conference.

[14] This is a long-standing interest of the author. *See, e.g.*, David Freestone & Ellen Hey, *The Precautionary Principle and International Law: The Challenge of Implementation* (1996).

[15] UNCLOS, *supra* note 2, Annex III, art. 4(4).