



Legal obligations of the sponsoring State

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***Responsibilities and obligations of States sponsoring persons and entities
with respect to activities in the Area
(Request for Advisory Opinion submitted to the Seabed Disputes Chamber)***

- Request transmitted by the Council of the International Seabed Authority on 14 May 2010
- Written Statements submitted by 12 States Parties, the Authority and 2 intergovernmental organizations
- Oral proceedings took place from 14 to 16 September 2010 with participation of 9 States Parties, the Authority and 2 intergovernmental organizations
- Advisory Opinion delivered on 1 February 2011



« Sponsoring State »

75. The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems. This result is obtained through the provisions of the Authority's Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments.

UNCLOS, Annex III, article 4, para. 3

Each applicant shall be sponsored by the State Party of which it is a national unless the applicant has more than one nationality, as in the case of a partnership or consortium of entities from several States, in which event all States Parties involved shall sponsor the application, or unless the applicant is effectively controlled by another State Party or its nationals, in which event both States Parties shall sponsor the application. The criteria and procedures for implementation of the sponsorship requirements shall be set forth in the rules, regulations and procedures of the Authority.

“Activities in the Area”

“activities in the Area” not only covers “the recovery of minerals from the seabed and their lifting to the water surface” but also activities directly connected therewith (“the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea”). On the other hand, “processing” is excluded as well as transportation activities “to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates”, while “transportation within that part of the high seas, when directly connected with extraction and lifting” is included in the definition.

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?

« Obligation to ensure »

110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".

112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law

Direct obligations

122. Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments...

Precautionary approach

126. Principle 15 of the 1992 Rio Declaration on Environment and Development (hereinafter “the Rio Declaration”) reads: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.

Precautionary approach (2)

135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the “standard clause” contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that “a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but “any relevant rules of international law applicable in the relations between the parties”.

UNCLOS, art. 206

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the responsibilities and obligations of states with respect to marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

[Article 205 refers to an obligation to publish reports.]

Obligation to conduct an EIA

149. It must, however, be observed that, in the view of the ICJ, general international law does not “specify the scope and content of an environmental impact assessment” (paragraph 205 of the Judgment in Pulp Mills on the River Uruguay). While article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area. 150. In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.

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?”

UNCLOS, art. 139 (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."

- Strict liability?
- Who can claim reparation?
- Damage?
- Exemption?

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

228. What is expected with regard to the responsibility of the sponsoring State in terms of Annex III, article 4, paragraph 4, of the Convention is made clear in the second sentence of the same paragraph. It requires the sponsoring State 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. The standard for determining what is appropriate is not open-ended. The measures taken must be “reasonably appropriate”. The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.

Measures (2)

234. The sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under the Convention. These provisions may concern, inter alia, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

235: Implementation of SBDC's decisions in accordance with Tribunal's Statute (see art. 39)

Measures (3)

236. Other indications may be found in the provisions that establish direct obligations of the sponsoring States (see paragraph 121). These include: the obligations to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. It is important to stress that these obligations are mentioned only as examples.

237. In this context, the Chamber takes note of the Deep Seabed Mining Law adopted by Germany and of similar legislation adopted by the Czech Republic.

Measures (4)

See para. 231 : UNCLOS, Annex III, art.21, para 3:
No State Party may impose conditions on a contractor that are inconsistent with Part XI.
However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI.

Follow-up

- Annual report on legislation; database on national legislation on ISA's website; model legislation
- 2013: Amendments to the Nodules Regulations (2000), in order to bring them into line with the Sulphides Regulations (2010).
- Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area