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Sponsoring States in the Area: Obligations, liability and the role of developing States

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ABSTRACT

Private entities can engage in mining activities in the Area provided *inter alia* that they are sponsored by a State Party to the United Nations Convention on the Law of the Sea (UNCLOS). Sponsorship is the medium through which the sponsoring State exercises control over the contractor, by requiring it to comply with the provisions of UNCLOS. In light of the particular requirement for sponsorship, a number of questions arose during discussions at the International Seabed Authority (ISA or the Authority) concerning the obligations of the sponsoring State and the extent of its liability for any failure to comply with the provisions of UNCLOS. These questions were put to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea by the Council of the Authority in the form of a Request for an advisory opinion and replies were provided by the Chamber in its Advisory Opinion of 1 February 2011. This case, which was prompted by the applications submitted to the Authority by two companies sponsored by two Small Island Developing States (Nauru and Tonga), also triggered a debate concerning the participation of developing States in activities in the Area and whether preferential treatment should be accorded to sponsoring States that are developing States. This article deals with these matters.

1. Introduction

The general rule in international law is that acts of private entities are not attributable to the State [1]. There are however exceptions to the rule of attribution, for instance where a private entity is empowered to exercise elements of governmental authority or is acting on the instructions or under the direction or control of the State [2]. Exceptions may also be stipulated by treaty [3], as within the legal framework of outer space where article VI of the Outer Space Treaty "automatically attribute[s] all private activities to the national State" [4].

While a State is in general not responsible for the activities of private persons [5], it may nonetheless be held responsible for these activities in cases where it acts as guarantor for a certain conduct [6]. Such is the special case of a State sponsoring entities engaged in deep seabed mining, where the State is required to ensure the implementation by the contractor of the obligations established by the United Nations Convention on the Law of the Sea (UNCLOS) [7]. This special system diverges from the general rule in two ways. First, the responsibility of the State for activities of a sponsored entity may arise, even if this specific regime does not provide for the attribution of the activities of the entity to the sponsoring State [8]. Second, the liability of the sponsoring State for failure to carry out its obligations may arise only if there is damage [9].

As will be seen below, private entities can engage in mining activities in the Area [10] provided *inter alia* that they are sponsored by a State Party to UNCLOS. Sponsorship is the medium through which the sponsoring State exercises control over the contractor, by requiring it to comply with the provisions of UNCLOS. In light of the particular requirement for sponsorship, a number of questions arose during discussions at the International Seabed Authority (ISA or the Authority)) concerning the obligations of the sponsoring State and the extent of its liability for any failure to comply with the provisions of the Convention. These questions were put to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) by the Council of the Authority in the form of a Request for an advisory opinion and replies were provided by the Chamber in its Advisory Opinion of 1 February 2011 (the Advisory Opinion) [11]. This case, which was prompted by the applications submitted to the Authority by two companies sponsored by two small Small Island Developing States (Nauru and Tonga), also triggered a debate concerning the participation of developing States in activities in the Area and whether preferential treatment should be accorded to sponsoring States that are developing States. This article deals with these matters.

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2. Activities in the Area

The status of the Area and its resources as the "common heritage of mankind" is the main principle underlying the Area regime contained in Part XI of UNCLOS [12]. With the aim of providing "mankind" with the capability to act, UNCLOS created the ISA as the organization through which States can organize and control activities in the Area [13]. In other words, the ISA acts as a trustee for administering a common good, which has been vested on mankind as a whole [14].

The Area regime contained in Part XI of UNCLOS follows a functional approach as it is largely applicable to resource-related activities [15]. It governs the "resources of the Area", namely, the mineral resources to be found in the Area *in situ*, either in solid, liquid or gaseous form [16]. Such mineral resources include polymetallic nodules, polymetallic sulphides and ferromanganese crusts, for the prospection and exploration of which the ISA has established three sets of Regulations [17]. This regime applies specifically to the "activities in the Area" which are confined to the "exploration for and exploitation of the resources of the Area [18]. In the Advisory Opinion, the scope of the "activities in the Area", in relation to both exploration and exploitation, is defined as the recovery of minerals from the seabed and their lifting to the water surface and includes activities directly connected with that [19].

UNCLOS created a system of exploration and exploitation of the resources of the Area, in which the Enterprise [20], and, in association with the ISA, States Parties, state enterprises and natural or juridical persons can participate [21]. In order to access the system, any prospective contractor, including the Enterprise, is required to submit an application for approval of a plan of work for activities in the Area [22]. Once approved by the ISA, the plan of work will be in the form of a contract between the Authority and the applicant, except for applications made by the Enterprise [23].

Pursuant to the Nodules Regulations, any application for exploration for polymetallic nodules by a developed State must cover an area "sufficiently large and of sufficient estimated commercial value to allow two mining operations", and indicate how this area is to be divided into two parts [24]. On this basis, the Authority is in a position to designate which of the two segments should constitute a "reserved area". Once a "reserved area" has been established, any developing State or entity sponsored by it and effectively controlled by it may notify the Authority that it wishes to present a plan of work for exploration with respect to a "reserved area". This notification is forwarded to the Enterprise, for it to inform the Authority whether or not it intends to carry out activities in the "reserved area" [25]. Following this decision, an application for approval of a plan of work for that area may then be submitted by the developing State or, as the case may be, the Enterprise. Unlike the Nodules Regulations, the Sulphides and Cobalt-Rich Ferromanganese Crusts Regulations gives the applicant the choice of contributing a "reserved area" or offering an equity interest in a joint venture arrangement [26].

As the Enterprise has not been established yet, only developing States or private entities sponsored by them have been granted contracts in relation to exploitation activities in "reserved areas". So far, the ISA has entered into 23 contracts for exploration [27]. Five of these contracts cover sectors in areas reserved for the Authority situated in the Clarion-Clipperton Zone of the Pacific Ocean [28], and relate to activities of exploration for polymetallic nodules. Of those five contracts, two concern exploration to be conducted by a state enterprise, for which the State concerned (China and Kiribati) provided documents of sponsorship. China sponsored China Minmetals Corporation [29], and Kiribati sponsored Marawa Research and Exploration Ltd., both of which are state enterprises [30]. The other three contracts concern applications made by companies, private entities, sponsored respectively by Nauru, Tonga and Singapore.

In 2008, Nauru sponsored an application made by Nauru Ocean Resources Inc. (NORI), covering a surface located in areas reserved for the ISA. The applicant indicated that NORI "is a registered national of Nauru" and "is incorporated within the jurisdiction and under the effective control" of that State [31]. Once a subsidiary of Nautilus Minerals Inc., which subsequently relinquished its ownership and interest therein, the applicant stated that since 2008 NORI is "no longer affiliated with Nautilus Minerals Inc., or with any other entity or person outside the jurisdiction of the sponsoring State" [32]. The same year, Tonga sponsored an application made by Tonga Offshore Mining Ltd. (TOML) for a surface located in areas reserved for the Authority [33]. According to the applicant, TOML is a registered national of Tonga, incorporated within Tonga's jurisdiction and under its effective control. TOML is "a Tongan incorporated subsidiary of Nautilus Minerals Incorporated, which holds 100 per cent of the shares of TOML through another wholly owned subsidiary, United Nickel Ltd., incorporated in Canada" . In 2013, Singapore sponsored an application made by Ocean Mineral Singapore Pte. Ltd. (OMS), a subsidiary of Keppel Corporation Limited (Keppel). OMS is a corporation incorporated and registered under the laws of Singapore, and, "as such, is a national of Singapore and is subject to the effective control of Singapore" [34]. As the area under application was a designated reserved area, the applicant indicated that Singapore had been classified as a Small Island Developing State [35].

These three applications involve private entities sponsored by developing States which are engaged in exploration activities in areas of the deep seabed that have been reserved for the ISA. Since these applications have been submitted by private entities and sponsored by a State, the applicants have endeavoured to establish their respective links of nationality and effective control with each sponsoring State.

3. Sponsorship

It would be mistaken to assert that sponsorship was established by UNCLOS as a tool to facilitate participation by developing States in activities in the Area through private entities, since otherwise they would be deprived from doing so due to lack of sufficient financial or technical capabilities. Actually, some developed States have also chosen to sponsor applications made by companies, *e.g.* the United Kingdom with respect to UK Seabed Resources Ltd., and Belgium with respect to G-Tec Sea Mineral Resources NV (GSR) [36]. As will be seen below, the Seabed Disputes Chamber clarified that the provisions of UNCLOS concerning responsibilities and liability of the sponsoring State "apply equally to all sponsoring States, whether developing or developed" [37].

The act of sponsorship is broadly speaking evidence of an undertaking assumed by an entity on behalf of another. With regard to Part XI of UNCLOS, it constitutes an essential prerequisite for private entities to engage in activities in the Area. Pursuant to article 153 (2)(b) of UNCLOS, in order to conduct activities in the Area, natural or juridical persons (as well as state enterprises) must satisfy two requirements, namely, (i) either to possess the nationality of a State Party or to be effectively controlled by it or its nationals; and (ii) to be sponsored by such States [38]. In the Advisory Opinion, this provision is read as requiring a twofold connection between a State Party and domestic law entities, namely, that of nationality and of effective control [39]. This leads the Seabed Disputes Chamber to conclude that, in the event that the applicant has more than one nationality, all States concerned must sponsor the application [40]. Furthermore, if the applicant is effectively controlled by another State or its nationals, the sponsorship of that State is also necessary [41].

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