Activities in the Area and the role of sponsoring states: An institutional perspective

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Overview

I. Setting the scene
   • The concept of state sponsorship
     ✷ Topic of liability will not be covered

II. Sponsoring states and marine environmental protection
   • Types of obligations
   • Part XI and the role of sponsoring states

III. Institutional arrangements
   • Existing realities and shortcomings
   • The good news: Recent initiatives and near outlook

IV. Points for discussion
I. Setting the scene

• What are sponsoring states:
  
  – UNCLOS, Part XI: mandatory for contractors.
  
  – 3 key provisions: Art. 139; Art. 153; Annex III Art. 4(4).
  
  – Criteria: Nationality or effective control.
  
  – May be more than one sponsoring state for a single entity.
II. Sponsoring states and protection of the marine environment

• 2011 Advisory Opinion: Two categories of obligations:

1. Sponsoring states’ responsibility to ensure:
   • compliance by the sponsored contractor
   • due diligence (conduct, not result)

   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.
2. Direct obligations of sponsoring states:
   • exist independently from ‘responsibility to ensure’ obligations (i.e. stand alone), but largely intertwined.
   • clarified in Ad. Op. (para. 122) to include the following:
     i. the obligation to assist the Authority in the exercise of control over activities in the Area;
     ii. the obligation to apply a precautionary approach;
     iii. the obligation to apply best environmental practices;
     iv. 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;
     v. the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and
     vi. the obligation to conduct environmental impact assessments.
Part XI and sponsoring states

• Protection of the marine environment in Part XI: Art 145

> Article 145
Protection of the marine environment

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

• No reference to sponsoring state.
• Question: Whether general duties of UNCLOS member states under Part XII (Protection and Preservation of the Marine Environment) can be applied to Part XI?
• Emphasis on key provisions: Arts. 204-206.
• Answer: Yes, they are applicable! Confirmed in Ad. Op. (see paras. 141-150).

• Most crucial: EIA and monitoring. According to the SDC:

142. Regulation 31, paragraph 6, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations establish a direct obligation of the sponsoring State concerning environmental impact assessment, which can also be read as a relevant factor for meeting the sponsoring State’s due diligence obligation. This obligation is linked to the direct obligation of assisting the Authority considered at paragraph 124.

• Importantly,

143. Contractors and sponsoring States must cooperate with the Authority in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment, particularly through the creation of “impact reference zones” and “preservation reference zones” (regulation 31, paragraphs 6 and 7, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations). A comparison between environmental conditions in the “impact reference zone” and in the “preservation reference zone” makes it possible to assess the impact of activities in the Area.
• Rule of thumb: fall back to Art. 139 and Art. 153

  **Article 139**
  Responsibility to ensure compliance and liability for damage

  1. 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. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

  **Article 153**
  System of exploration and exploitation

  4. The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

• Compels sponsoring states to ensure conformity with Part XI.

• Measures taken by ISA (Art. 145) “binds” sponsoring states.
Protection of the marine environment: Who does what?

• ISA as manager/steward and in main position – develop Mining Code, and environmental strategy for the Area, etc.

• Contractors play the most important role (‘day-to-day’, ‘hands-on’).

• But, sponsoring state provides the critical function (check & balance):
  ▪ From the beginning: domestic legislation & administrative procedures in place.
  ▪ Involvement at preliminary stage (exploration).
  ▪ Continuous monitoring and reporting.

• Ultimately all 3 must work together – in order to do that, first need to know what to expect from each other

Therefore: Lines of duties needs to be clarified from an institutional standpoint
III. Institutional arrangement

ISA

Contractual relationship

Certificate of Sponsorship

Contractor

SS

Prescribed under domestic legislation

???
Existing realities and shortcomings

• Clear: Direct obligation to cooperate with ISA with respect to environmental protection.
  – Especially impact assessment and monitoring.
• No proper mechanism currently in place.
• Fact: ISA lacks capacity, expertise, financial means.
• Status of unclear institutional arrangement is acknowledged in Draft Environmental Regulations (25.1.2017), i.e.:

6.3 However, the definitive process(es) for environmental assessment (baseline delivery to the production of an impact statement) have yet to be outlined by the Authority and the extent and nature of the Authority’s involvement in the assessment process from cradle to grave. Indeed, what is also unclear, is the role of Sponsoring States in the environmental assessment process and subsequent monitoring / addressing non-compliance.\textsuperscript{11}
• Multiple references in Draft Environmental Regulations, i.e.:
The good news

- Heading in the right direction – asking right questions.

- Steps are being taken at the ISA to identify and facilitate the role of sponsoring states:
  
  i. Building up the Mining Code (law-making):
     - E.g. Environmental Regulations; Seabed Mining Directorate Regulations?
     - But also recommendations and guidelines, e.g. LTC’s Recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration, 12 July 2013 (ISBA/19/LTC/14).
ii. Institutional reform in Secretariat:
   • Recent announcement in January 2017 by ISA Secretary-General on the “creation of a new Contract Management Unit (...) to act as the central administrative point of contact between contractors, sponsoring States and the Secretariat”  

iii. Need to prescribe ‘Lines of duty’ has been acknowledged (Draft Environmental Regulations) – to be ‘workshopped’.

   • References are made to Sponsoring States in the working draft but the lines of duty and responsibility (jurisdictional competence) between the Authority and sponsoring States (together with that of flag States, States Parties and non-Parties to the Convention and relevant international organizations, including the International Maritime Organization) are not entirely clear and will need to be “workshopped” in due course.

   • But, still some way to go ...
IV. Discussion points

1. How to ‘formalize’ the relationship? Should it be binding (e.g. regulations and legal undertaking); or non-binding (e.g. guidelines and memorandum of understanding)?

2. What is the scope/content to be included and how should it be defined? Prescriptive standards or just comply with checklist? E.g. what is the threshold of serious harm? Monitoring and reporting frequency? Costs?

3. Are lower levels of expectations justifiable for developing states due to their lack of capacity to monitor? Must they demonstrate ability as pre-requisite? Indication from ITLOS. Arrangement between contractor and sponsoring state for latter to meet obligations under international law? Crucial: no exclusion to participation - CHM should prevail.

4. How much room is available for independent scientific research agencies to participate in collaboration with sponsoring states and contractors (esp. monitoring)?

5. What if a mining entity has more than one sponsoring states? Division of obligations?

6. Should sponsoring states feature in an inspectorate, or is there a conflict of interest?

7. Is there a need to submit request for a follow-up Advisory Opinion? Pros and Cons?
Thank You!

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