

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

Pradeep Arjan Singh

Member, *INTERCOAST International Research Training Group*,
Center for Marine Environmental Sciences (MARUM), Bremen.
PhD Candidate, *University of Bremen.*

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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)
 - Ad. Op. (para. 119) refers to UNCLOS Annex III, article 4(4):

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

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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.

SECTION 4. MONITORING AND ENVIRONMENTAL ASSESSMENT

Article 204

Monitoring of the risks or effects of pollution

1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.

2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Article 205

Publication of reports

States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

Article 206

Assessment of potential effects of activities

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 marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

- 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

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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.

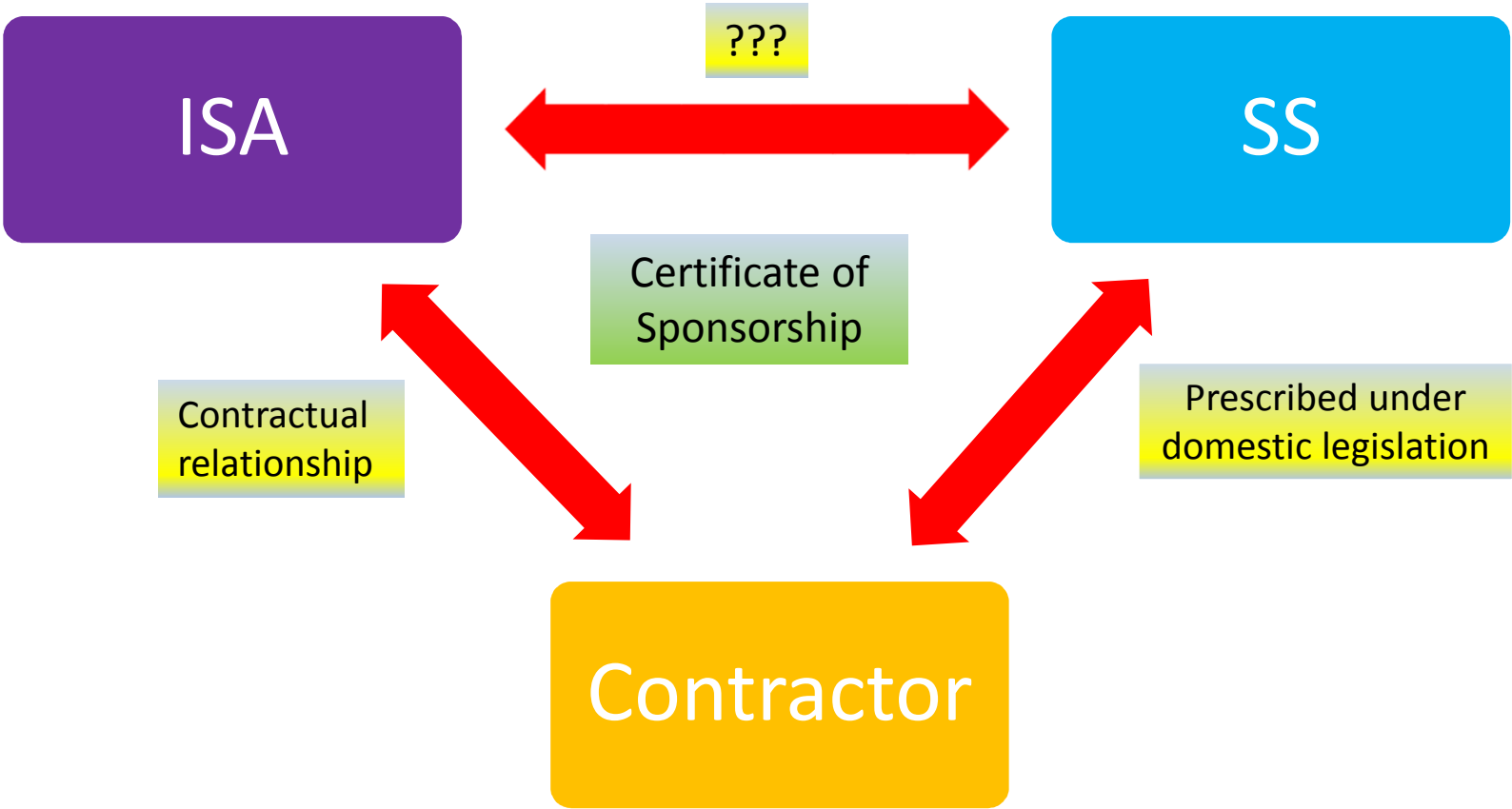
- Compels sponsoring states to ensure conformity with Part XI.
- Measures taken by ISA (Art. 145) “binds” sponsoring states.

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).
 - Support and participation in preparation of **Plan of Work** for exploitation: **EIA and Environmental Management System** (setting of objectives, targets, IRZ/PRZ, strategy; includes: Environmental Management and Monitoring Plan, Emergency Response and Contingency Plan, Closure Plan).
 - **Not just carried out, but in accordance** with 'good industry practice' , 'internationally recognised standards', 'best available scientific evidence', 'best environmental practices', 'best available technology' and the like.
 - **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



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.¹¹

- Multiple references in Draft Environmental Regulations, i.e.:

Draft Regulation 11

Co-operation

Applicants, Contractors, Sponsoring States and other Interested Persons shall cooperate with the Authority in the establishment and implementation of programmes to observe, measure, evaluate and analyze the impacts of Exploitation Activities on the Marine Environment and to share the findings and results of such programmes with the Authority for wider dissemination, and that such co-operation and collaboration extends to the implementation and further development of Best Environmental Practices in connection with activities in the Area.

Draft Regulation 71

General

The [Authority] shall, in co-operation with Sponsoring States, monitor, evaluate and supervise, including a right to inspect under regulation 54 of the Exploitation Regulations, the Exploitation Activities under an Exploitation Contract on a continuous basis and shall develop and implement such monitoring⁶² and supervision programmes, approved by the Council, to ensure the effective protection of the Marine Environment and the prevention, reduction and control of Pollution from such activities.

Draft Regulation 72

Power of Authority to direct Contractor to take action to prevent or minimize Environmental Impacts

Where, in the opinion of the Authority in consultation with a Sponsoring State, a Contractor is conducting Exploitation Activities in a way that results, or is likely to result in the breach of an Environmental Target under the Contractor's Environmental Management and Monitoring Plan, the Authority may, by way of a compliance notice under regulation 55 of the Exploitation Regulations, direct that the Contractor take such action as is necessary to comply with the specified requirements of the notice to prevent or minimize damage to the Marine Environment. Such notice issued may impose any reasonable requirement on a Contractor which may include, as the circumstances dictate:

- a) a requirement to cease or not commence a specified activity for a specified period or until such time and date as the Authority and Contractor agree.
- b) a requirement to undertake a specified activity in a specified way, and within a specified period or at specified times or in specified circumstances.
- c) a requirement to take necessary measures to prevent or minimize any damage to the Marine Environment.
- d) a requirement to undertake specific tests or monitoring and to furnish the Authority with the results or report of such tests or monitoring.

Draft Regulation 73

Necessary measures to secure compliance

1. The Authority, in co-operation with a Sponsoring State, shall take necessary measures to secure Contractor compliance with the Rules of the Authority where specified actions or outcomes, identified by the reporting and Monitoring measures, on inspection by the Authority or Sponsoring State or by verifiable information from a third-party, are assessed as providing evidence of non-compliance, including, but not limited to:

Draft Regulation 78

Avoidance of duplication in procedures

The Authority and Sponsoring States shall co-operate toward the avoidance of unnecessary duplication of procedures and compliance requirements under their respective rules, regulations and procedures.

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*”

(<https://www.isa.org.jm/news/organizational-changes-secretariat>)

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

4.6 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 contactor 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!

Contact:

Pradeep Arjan Singh

Email: pradeep@uni-bremen.de

