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Analysis

Seabed Disputes Chamber of the
International Tribunal for the
Law of the Sea

Responsibilities and obligations of states
sponsoring persons and entities with
respect to activities in the area
ADVISORY OPINION

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Abstract

The present Case Analysis seeks to discuss the main points of the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the area. The Opinion addresses a number of important issues that range from the analysis of the environmental obligations of states under the United Nations Convention on the Law of the Sea to the analysis of the due diligence criterion in the context of the activities in the Area. All of these significant issues are discussed in the analysis. The Advisory Opinion is important in the sense that the Seabed Disputes Chamber did indeed answer in great detail all of the questions the Council of the International Seabed Authority posed. The result will certainly help to develop a better understanding of the sponsoring states obligations with respect to the Area.

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1. Background to the Case and Preliminary Considerations

On 1 March 2010, the Republic of Nauru transmitted to the Secretary-General of the International Seabed Authority a proposal¹ to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS Chamber). The reason why Nauru sought an advisory opinion was clearly set out in the first paragraphs of its proposal. In 2008, Nauru had sponsored an application by Nauru Ocean Resources Inc in order to explore for polymetallic nodules in the Area.² The problem that Nauru faced was the following: there was the possibility that the costs that could arise from its responsibilities and liability under the pertinent articles of the UN Convention on the Law of the Sea³ (hereinafter LOSC) could exceed its financial capabilities. Therefore, it sought to clarify the content of these obligations by seeking an advisory opinion on the matter by the ITLOS Chamber. The Chamber is constituted under article 186 of the LOSC. The Chamber is open to States Parties, the Authority, State enterprises and natural or juridical persons that are sponsored by a State.⁴ The Council of the International Seabed Authority (the Council) did not adopt the questions as posed by Nauru in its proposal, but it formulated a set of three questions and subsequently submitted them to the ITLOS Chamber.⁵ On 1 February 2011, the ITLOS Chamber delivered its Advisory Opinion in the case of *'Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area'*.⁶

The three questions posed by the Council to the ITLOS Chamber were the following:

- (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?
- (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?

1 Doc ISBA/16/C/6 available at <<http://www.isa.org.jm/files/documents/EN/16Sess/Council/ISBA-16C-6.pdf>> accessed 23 September 2011.

2 ibid 1.

3 United Nations Convention on the Law of the Sea, 1833 UNTS 3.

4 See LOSC arts 153(2)(b), 187, 191 and Annex VI of arts 14 and 34.

5 Doc ISBA/16/C/13 available at <<http://www.isa.org.jm/files/documents/EN/16Sess/Council/ISBA-16C-13.pdf>> accessed 23 September 2011.

6 Available at <<http://www.itlos.org/fileadmin/itlos/documents/cases/case.no.17/adv.op.010211.pdf>> accessed 23 September. (hereinafter ITLOS Chamber, Advisory Opinion).

- (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?

Before the Chamber set out to address these questions it made a number of preliminary remarks regarding terminology. First, it sought to define the term 'sponsorship'. According to the Chamber, sponsorship is fulfilled under two main conditions: the sponsored person or entity is a national of a State Party or it is controlled by it or its nationals and they must be sponsored by such States.⁷ Thus, a 2-fold criterion emerges containing both nationality and effective control. The Chamber moved on to define what the phrase 'activities in the Area' means. It held that activities in the Area include recovery of minerals and lifting them to the surface, the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest.⁸ In contrast, transportation to points on land from the high seas is not considered as an activity in the Area,⁹ whereas transportation that takes place within the parts of the high seas and is directly connected with extraction and lifting from the seabed falls within the ambit of the term 'activity in the Area'.

The third terminological clarification attempted by the ITLOS Chamber concerned the use of the terms 'responsibilities' and 'liability'. The different use of the term 'responsibilities' in different articles or paragraphs of the same article of the Convention on the Law of the Sea forced the Chamber to clarify the issue. It held that the term 'responsibilities' as it appears in articles 139, 235 and article 4 of Annex III of the LOSC means 'obligation' in the sense of a primary obligation in international law.¹⁰ The term as it is employed in article 235(3) and article 22 of Annex III of the LOSC means 'responsibility' in the sense of a secondary obligation in international law.¹¹ The term 'liability' denotes the consequences of the breach of a primary obligation and is in fact a synonym of the term 'responsibilities' in the second sense of the term.

2. Responsibilities of the Sponsoring States

The structure of the advisory opinion follows the order of the three questions. This analysis, in order to render the content of the opinion clearer, does not follow the Opinion's structure. Since the first and the third questions both refer to the manner in which States must discharge their obligations set out by the LOSC and the 1994 Agreement, these will be treated together. On the other hand, the second question deals with issues of state responsibility and,

7 ITLOS Chamber, Advisory Opinion, para 77.

8 *ibid* paras 94–5.

9 *ibid* para 96.

10 *ibid* para 65.

11 *ibid* para 67.

accordingly, will be treated separately. The other reason, besides clarity, that dictates such an approach, is that many obligations analysed by the ITLOS Chamber are of a complex nature and they emerge in various parts of the Opinion. Connecting the first and third questions will, therefore, contribute to the cohesion of the presentation and analysis.

2.1. Due Diligence Obligations

The ITLOS Chamber's main goal was to identify the exact content of primary obligations of the sponsoring States concerning activities in the Area. It began its task by inquiring into the meaning of the key phrase in LOSC article 139(1) 'responsibility to ensure' that activities in the Area shall be carried out in conformity with Part XI of the Convention. It concluded that 'responsibility to ensure' reflects the obligation of the sponsoring State to ensure compliance by the sponsored contractor.¹² This effectively means that the liability of the sponsoring State is limited in the instances where it fails to ensure compliance. This obligation to ensure, according to the ITLOS Chamber, is not an obligation of result but one of conduct.¹³ The distinction between obligations of result and obligations of conduct in international law is crucial since it provides for the necessary criteria by which the existence or not of a breach are to be identified.¹⁴ The Chamber took the next step and connected the obligation to ensure to the notion of a due diligence obligation,¹⁵ citing in support of its statement the decision of the International Court of Justice in the *Pulp Mills* case.¹⁶ Nevertheless, the Chamber admitted that '[t]he content of "due diligence" obligations may not be easily described in precise terms'.¹⁷ Despite its statement on the difficulties of identifying the exact content of the due diligence obligation, the Chamber managed to draw some broad lines in its effort to provide, at least, for a general framework. It first stated that the obligation

12 *ibid* para 109.

13 *ibid* para 110.

14 The distinction can be traced back to Roberto Ago's term as a Special Rapporteur of the International Law Commission, on the topic of State Responsibility, see Sixth Report on State Responsibility by Mr Ago, Special Rapporteur, *Yearbook of the International Law Commission* (vol II, Part One 1967) 4–20. Two excellent accounts of the difference can be found in Jean Combacau, 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse' in *Mélanges offerts à Paul Reuter, Le droit international: unité et diversité* (Pedone 1981) 181 and Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 EJIL 371.

15 While it is true that usually the obligations of conduct are due diligence obligations, this is not always the case, see René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (Kluwer Law International 1997), 82.

16 ITLOS Chamber, Advisory Opinion, para 111. For the *Pulp Mills* decision see *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, available at <<http://www.icj-cij.org/docket/files/135/15877.pdf>> accessed 23 September 2011, Judgment of 20 April 2010.

17 *ibid* para 117.

becomes stricter or more lenient depending on the risk of the activity in question.¹⁸ The risk can be identified both in the nature of the activity and in its object.¹⁹

According to the Chamber, the LOSC provides that States must adopt, in their legal systems, necessary measures so as to discharge their 'obligation to ensure'.²⁰ Then the Chamber noted that an indication of the content of these laws and regulations can be found in the LOSC itself (in article 139(2) and Annex III of article 4(4)).²¹ This is the point at which the connection between the first and the third questions lies. In its reply to the third question, the Chamber sought to establish the content of the measures, laws and regulations that the States must adopt.

The purpose of the measures that a sponsoring State must adopt is, according to the Chamber, 2-fold: to ensure compliance by the contractor; and to exempt the sponsoring State from liability.²² The Chamber went on to reiterate that laws and regulations and administrative measures are necessary for the State to comply with its due diligence obligation²³ and it clarified that the adoption of such measures cannot be substituted by a contract between the sponsoring State and the contractor.²⁴ What seems to be the main theme of the Chamber's reaction to the issue of due diligence re-emerges in paragraph 227 of the Opinion where it stresses that 'it is not called upon to render specific advice as to the necessary and appropriate measures' a sponsoring State should take. It goes on, nevertheless, to hand out some general advice. It lists as possible examples of measures: criteria on the financial viability of the project; the technical capacity of the contractor;²⁵ or measures that establish enforcement mechanisms.²⁶ The main indication, though, as to the content of the due diligence obligation of States, according to the Chamber, can be found in the direct obligations of sponsoring States. This statement is very important because it sheds more light on the relationship between due diligence and direct obligations, a relationship that features often in the Advisory Opinion.

2.2. Direct Obligations of Sponsoring States

The first direct obligation discussed by the Chamber is that of the sponsoring State's assistance to the Authority. The obligation, as stressed in the Opinion,

18 *ibid.*

19 *ibid.*

20 *ibid* para 118.

21 *ibid* para 119.

22 *ibid* para 217.

23 *ibid* para 218.

24 *ibid* para 224.

25 *ibid* para 234.

26 *ibid* para 218.

is to be met through the exercise of due diligence by the States.²⁷ The second direct obligation is the application of the precautionary approach. The precautionary approach can be found in both the Sulphides²⁸ and the Nodules Regulations.²⁹ The Chamber took a bold view on the precautionary approach given its debatable status in international law.³⁰ It held that the Regulations have turned the non-binding Principle 15 of the Rio Declaration³¹ into a binding obligation.³² This means that the sponsoring States will have to apply the precautionary approach not as a policy tool, but rather as a binding legal norm. The discussion around the precautionary principle also brings out the issue of common but differentiated responsibilities. The Chamber held that the LOSC does not provide for the existence of common but differentiated responsibilities,³³ and, moreover, such an approach could lead to 'sponsoring States of convenience'.³⁴ Nevertheless the precautionary principle, as embodied in the Rio Declaration, does indeed provide for common but differentiated responsibilities. Therefore, these are to be taken into account when the precautionary element is assessed in the due diligence sponsoring States exercise for an activity in the Area.³⁵

The third direct obligation identified by the Chamber is that of applying the best environmental practices. Without elaborating much on its content, the Chamber noted that the obligation is enshrined in the general due diligence obligation.³⁶ The Chamber identified two more direct obligations, though with no serious degree of elaboration as to their content: the obligation to provide for guarantees in a case of emergency;³⁷ and to provide for recourse to compensation.³⁸

When the issue of Environmental Impact Assessment (EIA) was discussed, the Chamber delved into it with more verve. First, it stated that, according to

27 *ibid* para 124.

28 Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA/16/A/12/Rev1 (7 May 2010) art 33(2).

29 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18 (4 October 2000) art 31(2).

30 See Jonathan B Wiener, 'Precaution' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007), 598 and Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 JEL 221.

31 Rio Declaration on Environment and Development, UN Doc A/Conf151/5/Rev1 (1992).

32 ITLOS Chamber Advisory Opinion, para 127.

33 *ibid* para 158.

34 *ibid* para 159. The Chamber, though, noted the LOSC art 148 and Annex III of art 9(4) accord preferential *treatment* to developing States when they engage in mining in areas of the seabed by the LOSC, see paras 157, 163.

35 *ibid* para 167.

36 *ibid* para 136.

37 *ibid* para 138.

38 *ibid* para 139.

Section 1(7) of the Annex to the 1994 Agreement, the sponsoring States are under a due diligence obligation to ensure that an EIA is undertaken.³⁹ Once more it becomes evident that the Chamber views the direct obligations of sponsoring States as falling under the wider due diligence duty, while maintaining their autonomy. It followed the same approach when it assessed the EIA obligations as found in the Sulphides and Nodules Regulations. It held that the EIA obligation of sponsoring States '[...] can be also read as a relevant factor for meeting the sponsoring State's due diligence obligation'.⁴⁰ What is more, the obligation to conduct an EIA is also a general obligation under customary law.⁴¹ It is also of importance that the Chamber held that the sponsoring States and the contractors should establish monitoring programmes in co-operation with the Authority.⁴² The obligation to continuously monitor the activities in the Area is in keeping with the dictum of the ICJ in the *Gabčíkovo/Nagymaros* case, where it held that, given the nature of environmental law, as new standards and rules emerge, these must be taken into account not only when States design new activities but also when they continue existing operations instigated at an earlier date.⁴³

The two most significant pronouncements of the Chamber concerning the conduct of an EIA are to be found in the last paragraphs of the relevant section of the Advisory Opinion. The first one effectively broadens the dictum of the ICJ in the *Pulp Mills* case, rendering the conduct of an EIA applicable to areas beyond national jurisdiction.⁴⁴ This statement, if taken outside the confines of the present Opinion, brings the obligation to conduct an EIA into a global context that defies its narrow transboundary or local application.

The second statement made by the Chamber in relation to an EIA was that the content of the EIA itself should be determined by the relevant Regulations and Recommendations issued by the Authority.⁴⁵ Again, the Chamber departed from the reasoning of the ICJ in the *Pulp Mills* case where it held that the content of the EIA is defined by the national laws of the States.⁴⁶ This approach possibly leads the way to a wider understanding of the content of the EIA; an understanding that looks towards international bodies for the definition of the content of the EIA, thus working towards a global and not a narrow localised approach.

39 *ibid* para 141.

40 *ibid* para 142.

41 *ibid* para 145.

42 *ibid* para 143.

43 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Order of 5 February 1997, ICJ Rep 1997, 7, para 140.

44 ITLOS Chamber Advisory Opinion, para 148.

45 *ibid* para 149.

46 See *Pulp Mills* case (n 16) para 205.

3. The Extent of Liability of Sponsoring States

The second question that the Chamber was called upon to answer was the extent of liability of sponsoring States in cases of breach of their responsibilities delineated in the first and third questions.

The Chamber began its analysis by identifying the applicable provisions as LOSC Articles 139 (2), 235 and 304 and Annex II Articles 4(4) and 22. Then it continued with the obvious statement that the sponsoring States will incur liability if they fail to carry out their responsibilities as spelled out in the LOSC as analysed in the Opinion.⁴⁷

The next step then would be to identify what failure to carry out their responsibilities means. The Chamber held that the breach by a sponsoring State of its due diligence and direct obligations coupled with damage to the Area constitutes a failure to carry out its responsibilities.⁴⁸ Note here the requirement that damage is necessary in order to establish liability. According to the Chamber, the requirement of damage is an exception to the rules of State Responsibility, yet its existence can be inferred from the first sentence of article 139(2) of the LOSC.⁴⁹

The possible claimants include coastal States, entities engaged in seabed mining, other users of the sea and the Authority. The Chamber read into article 137(2) the possibility that the Authority itself can be a claimant in cases in which damage occurs.⁵⁰ This seems to be a correct reading of the article since it stipulates that the Authority may act on behalf of mankind. In the same vein any State party may be a claimant in the light of the *erga omnes* obligation to preserve the environment in the high seas and in the Area.⁵¹ Despite the debate around the *erga omnes* character of the obligation to preserve the environment⁵² and the problems surrounding the practical

47 ITLOS Chamber Advisory Opinion, para 172.

48 *ibid* para 177.

49 *ibid* para 178. The statement of the Chamber that the requirement of damage is an exception to the customary rules of liability might be an exaggeration. The Chamber offers as evidence the Arbitral Award in the Rainbow Warrior case and the International Law Commission's Commentary on the Articles on Responsibility of States for Wrongful Acts. An alternative reading of the case and the commentary would suggest that whether or not damage is a constitutive element of responsibility or liability is decided by the primary rule in question. This reading means that the customary rule is that damage is not required but it is also not excluded if the primary rule dictates differently.

50 *ibid* para 179.

51 *ibid*.

52 There are varying views in the literature as to the normative character of the obligation to preserve the environment. For the view that it is an *erga omnes* obligation, see Alan Boyle, 'Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches' in Peter Wetterstein (ed), *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (OUP 1997) 83, 87, Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 65, see contra Mahnouch H Arsajani and Michael W Reisman, 'The Quest for an International Liability Regime for the Protection of the Global Commons' in Karel Wellens (ed), *International Law Theory and Practice, Essays in Honour of Eric Suy* (Kluwer 1998) 469, 485.

application of such an approach, the Chamber made a reasonable, if bold, inference from the text of the LOSC.

The Chamber then moved on to add that there must also be a causal link between the failure of the sponsoring State to fulfil its responsibilities and the damage caused to the Area.⁵³ The Chamber also held that there can be no presumption about the causal link but its existence must be proven.⁵⁴

This leads to a consideration of possible exemption from liability. The Chamber found that according to article 139(2) and Annex II of article 4(4), when the sponsored contractor breaches his obligations, whether these emanate from the Convention, the Regulations or the contract, and damage occurs, then the sponsoring State is not liable.⁵⁵ At the same time the Chamber noted that the LOSC does not provide for joint and several liability: rather, the liability of the contractor and the liability of the State exist in parallel in cases in which damage is caused because both have breached their obligations.⁵⁶

In determining the nature and the extent of liability of sponsoring States, the most difficult issue that the Chamber faced was the scenario in which the State has fulfilled its responsibilities and yet damage in the Area still occurs. According to the Chamber, in this case, article 139(2) does not provide for the liability of the sponsoring State even if the contractor has failed to meet his obligations.⁵⁷ This effectively means that there is a 'gap' in the liability regime provided for by the LOSC. This is so because international law, apart from a few civil liability regimes, has not developed appropriate rules for allocation of liability when there is no breach of the primary obligations of a State.⁵⁸ The liability regime that is fully functional, yet not without problems, is the one developed by States in order to address the problem of oil pollution at sea. The Convention on Civil Liability for Oil Pollution⁵⁹ provides for strict but limited liability for the ship-owner. Exactly because the liability is limited, States and ship owners have developed a fund whose purpose is to secure

53 ITLOS Chamber Advisory Opinion, para 181.

54 *ibid* para 182.

55 *ibid* para 186.

56 *ibid* para 201.

57 *ibid* para 209.

58 *ibid*.

59 International Convention on Civil Liability for Oil Pollution Damage (1969) 973 UNTS 3 as amended by the Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, LEG/CONF9/15 of 2 December 1992. The limits of liability were amended in 2000 by an IMO Resolution, see Limitation amounts in the Protocol of 1992 to amend the international convention on civil liability for oil pollution damage, IMO Resolution LEG1 (82) 6 November 2000.

compensation for the victims of pollution.⁶⁰ Nuclear energy liability regimes follow a similar approach.⁶¹

The solution proposed by the Chamber is for the Authority to set up a fund to cover for the damages, much like the funds that exist in the oil pollution and nuclear energy regimes.⁶² It must be submitted at this point that the issue of liability when no primary rules have been breached is a rather complex one and could not possibly be resolved by the Chamber, even within the confines of the Area regime.

Finally, the Chamber held that when damage occurs there is a duty for the payment of full compensation or *restitutio in integrum*.⁶³ Nevertheless, as is often the case in environmental law, the form of reparation will also depend on the technical feasibility of restoring the situation to its previous status.⁶⁴

4. Conclusion

The Advisory Opinion of the ITLOS Chamber clarifies and illustrates most of the obscure issues that might arise with regard to activities in the Area. It reaffirmed the customary nature of the obligation to conduct and EIA and it went on to define, at least to a small extent, its content. The Chamber also sought to give as concrete a meaning as possible to the elusive concept of due diligence. It laid out the particular obligations of States concerning the protection of the Area and it linked them with the general obligation to apply due diligence in the activities they develop. It moreover directed States towards the particular administrative measures they will have to take so as to give effect to the due diligence obligation. Another important aspect of the opinion is

60 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971) 1110 UNTS 57 as amended by Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Oil Pollution Damage (1971) IMO, LEG/CONF/16 of 2 December 1992. A supplementary fund was established with the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992) IMO Doc 92 FUNA/A.8/4.

61 Vienna Convention on Civil Liability for Nuclear Damage (1963) 1063 UNTS 265 and Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, 956 UNTS 251 as amended by the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, 12 September 1997, 36 ILM 1454, 1462 (1997) and Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July as Amended by the additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (Brussels Supplementary Convention) 1041 UNTS 358. The Brussels Supplementary Convention was amended by the Protocol to amend the Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July as Amended by the additional Protocol of 16 November 1982, 1650 UNTS 451. There is also the Convention on Supplementary Compensation for Nuclear Damage, 12 September 1997, 36 ILM 1454, 1473 (1997) which creates a supplementary fund.

62 ITLOS Chamber Advisory Opinion, para 209.

63 *ibid* para 194.

64 *ibid* para 197.

the fact that it directed the attention of states to the 'gap' in the liability regime in the case where a State has indeed fulfilled its obligations under the LOSC, yet the activities in the area still have a harmful effect. Overall it is an opinion that is bold and forward thinking in most instances, as with the Chamber's stance concerning *erga omnes* obligations. At the same time, it is a rather balanced opinion that does not seek to resolve all issues when it is clearly not in a place to do so. It remains to be seen how the Opinion will play out in the unfortunate case where damage in the Area does occur and how the States will react to it in their subsequent practice.