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Deep Sea Mining, Arbitration and Environmental Rules: What Role for Standards?

Marc-Antoine Carreira da Cruz · Saturday, October 27th, 2018

Deep sea mining regulation is an extremely young field of international law. Recently, there have been some important evolutions in the debate around the contractual and environmental rules that will organize the exploitation of mineral resources in the areas of the seabed beyond the continental shelf – hereafter referred to as "the Area". Nevertheless, few people know that arbitration can be the stage for the settlement of some specific disputes in this field, with important impacts on the interpretation of environmental duties for the contractors.

The International Seabed Authority (ISA) is in charge of regulating and administrating deep sea economic exploitation according to articles 151 and 153 of the United Nations Convention on the Law of the Sea (UNCLOS).

The dispute settlement around deep sea mining is organized under a complex scheme, with various options and exceptions. Basically, article 187 of the UNCLOS confers a wide jurisdiction upon the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea over disputes arising from activities in the Area. But there are exceptions under articles 188 and 189 of the Convention. Amongst these exceptions, one opens the door to commercial arbitration. Indeed, article 188 (2) (a) of the Convention states that disputes between parties to a contract concerning the interpretation or application of a contract or work plan under article 187(c) (i) shall be submitted, at the request of any party to the dispute, to binding commercial arbitration unless the parties otherwise agree, and unless it concerns the interpretation of UNCLOS.

On the arbitration procedure – and by extension the applicable law and rules – the UNCLOS gives a short indication in its article 188 (2) (c): In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the ISA, unless the parties to the dispute otherwise agree.

For years, this provision has led to an unknown scenario mainly because the ISA is still working on the main legal framework for deep sea mining, the Exploitation Regulations, the standard contract clauses and its annexes. Therefore, there could have been some uncertainty around some important points, notably the way environmental duties would have been defined in ISA regulations, contracts, and work plans and how they can be interpreted in cases of commercial arbitration.

There have been debates on this issue with stakeholders since the decision and first regulation by

the ISA in 2011 and 2012 on the Environmental Management Plan for the Clarion Clipperton Zone, notably with the workshop in collaboration with the ISA dedicated to Environmental Assessment and Management for Exploitation in the Minerals in the Area, in May 2016.

Eventually, in April 2018, the ISA Legal and Technical Commission issued the revised draft regulations on the exploitation of mineral resources in the Area for consideration and adoption. What does it tell us?

Firstly, draft regulation 104 reaffirms the regime of dispute settlement set by the UNCLOS and thereby reaffirms the regime of arbitration set by article 187(c) (i) of the Convention.

Secondly, when looking at the Annex X of the document, section 3.2 the standard clauses for exploitation contract specify that the contractor shall implement the work plan in particular which includes the environmental and monitoring plan. At the same time, the document includes schedules that are integrated to the contract and Schedule 1 is dedicated to the use of terms and scope of the contract. This schedule includes several key terms related to environmental duties such as “best environmental practices”, “environmental effect”, “serious harm”, “mitigation”. But, interestingly, it is mentioned that the content and the terms defined are indicative at this stage and that definitions will evolve as regulations content evolves and a common approach towards terms based on internationally accepted definitions is established.

This leads to a rather open situation in the case of arbitration. And in this context, what seems interesting is to think about the way some tools could be used to make the debate around the interpretation of terms regarding environmental duties easier. In this view, there is one interesting option in the toolbox of international law instruments: standards.

Standards – or more precisely ISO technical and management standards, are a key soft law instrument with powerful legal implications as deeply analyzed by various works, notably in various contributions by the Perelman Center for Legal Philosophy. They can have significant advantages as applicable rules or tools for interpretation in international commercial law and in arbitration especially when it comes to complex technical matters.

Has the ISA considered this option during the drafting process and consultation of stakeholders? There is no answer on the specific issue of arbitration and interpretation. Nevertheless, the ISA and its stakeholders are aware of the subtle but crucial importance of standards to consolidate and make the environmental rules of deep sea mining operational in the contract and work plan framework.

Indeed, standards were already scrutinized in the Discussion Paper of January 2017 published by the ISA on the development and drafting of Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters). The way standards such as ISO: 14001 (environment management) and ISO 31000 (risk management) could be appropriate was mentioned, even if it was not in a discussion on rules of interpretation in the arbitration procedure. This tentative working draft contained a commentary inside section 3, stating that the regulation sets the benchmark for an Environmental Management System equivalent to the principles of ISO 14001:2015. In this proposed option, the provision 3 of the Draft regulation 28 stated that where an applicant possesses or proposes to implement an Environmental Management System which is not equivalent to the principles of ISO 14001:2015, the Authority would have the option – without obligation – to consider the alternative Environmental Management System. This would imply a *de facto* kind of conformity presumption.

Actually, this has been already pushed for and brought up in contractual obligations by the ISA in its Environmental Management Plan for the Clarion Clipperton Zone of 2011 that stated in the management objectives (contract areas- B.41) that the management objectives for the contract include that the contractors will apply the principles of ISO 1400133 to the development of their site-specific environmental management plans.

But what about the revised draft regulations of April 2018? It does not actually contain the same explicit mention. Nevertheless, there are some important indications on the consideration of standards related to the environment, with interesting consequences on interpretation in arbitration cases. Regulation 1 – on the use of terms and scope, indicates that the regulations shall be supplemented by standards in particular on the protection and preservation of the Marine Environment. At the same time, Annex X related to Standard Clauses for exploitation contract specifies in provision 3.2 that the Contractor shall in particular implement the work plan which integrates the Environmental Management and Monitoring Plan, in accordance with Good Industry Practice. One can remark on several interesting points here.

Firstly, the definition of "good industry practice" in Schedule 1 notably says that the requirements under applicable standards adopted by the ISA are one implementation of the skills and diligence reasonably expected to be applied as good industry practice. As the ISA may adopt ISO standards in its guidelines, it will shape this definition in the light of standards on risk assessment, environmental management, environmental assessment and deep sea mining industrial processes.

Secondly, the Environmental Management and Monitoring Plan, ruled by Annex VII, also introduce standards in the process, as it must include a description of relevant environmental performance standards, indicators and details of the quality control and management standards.

Thirdly, the Environmental Management and Monitoring Plan must be read in parallel with Part IV of the Regulations related to the Protection and Preservation of the Marine Environment which have also opened the door to the standards – directly and indirectly. Directly, with some provisions such as Regulation 47 which states that the Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the Marine Environment as far as reasonably practicable, and in accordance with the applicable standards. And indirectly, with Regulation 46 stating that contractors shall integrate Best Available Scientific Evidence in environmental decision-making, including all risk assessments and management undertaken in connection with the management measures taken under or in accordance with Good Industry Practice.

Thus, all in all, the situation is the following: one must be careful and wait for the results around the draft regulations of ISA, notably the draft of Schedule 1 on the terms of the standard clauses for exploitation contracts. But it can observed that the door is potentially open to the use of standards in helping to interpret environmental terms and obligations if an arbitration takes place under the specific case set by art. 188 (2) (a) of the UNCLOS.

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