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Disputes between Deep Seabed Miners and their Sponsoring State: The Role of International Law

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Various Pacific Island states have become involved in deep seabed mining ("DSM") in order to reap the allegedly significant benefits to be obtained from extractive activities in the international seabed ("the Area"). According to the government of Nauru, such gains include "employment; training; capacity building; technology transfer; foreign investment; increased tax revenue; and national self-determination". Realistically, for many of these states a key mode of participating in deep seabed mining is to attract foreign investment by partnering with private sector enterprises. Such partnership has occurred through the sponsorship granted by a state to a local subsidiary incorporated by a foreign investor. However, concerns over DSM's environmental impact may lead states to backtrack on their support.

On 14 April 2022, Tuvalu announced that it was rescinding its sponsorship of Circular Metals Ltd. (which was alleged to be a subsidiary of the Canadian the Metals Company) for the exploration of polymetallic nodules in the Area. State sponsorship is required to obtain an exploration contract from the International Seabed Authority ("ISA"). Tuvalu's Foreign Minister stated that sponsorship had been reversed after "concerns by the government as well as within particularly the foreign ministry". He also explained that "the part that we can play is to ensure that we set very high standards or the environmental issues that are involved in requirements, which could then hopefully discourage companies from pursuing it, because it'll be very costly."

Hence, the question arises as to whether a sponsoring state could face any legal consequences from such change of policy. Starting off by briefly articulating the role of sponsoring states under international law, this post will discuss the possible legal claims that may arise from deep seabed mining statutes and sponsorship agreements.

What is the Role of Sponsoring States?

Under Part XI of the UN Convention on the Law of the Sea ("UNCLOS"), a corporation wishing to extract metals from the international seabed may do so only based on a contract concluded with the ISA. However, no private corporation may apply for the right to explore or exploit resources in the Area until it is sponsored by a state party to UNCLOS. Sponsoring states have the duty of ensuring that the contractor complies with the terms of its contract with the ISA. This duty of *due diligence* may require to unilaterally modify state laws "as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge" (para 117).

UNCLOS and associated instruments do not specify particular consequences for the termination or the variation of sponsorship, except that "termination of sponsorship shall take effect six months after the date of receipt of the notification [done by the state] by the Secretary-General" and that in such event the contractor shall obtain another sponsor within those six months (ISA polymetallic nodules regulations, regulation 29). Neither UNCLOS nor the ISA regulations appear to qualify the state's power to end or modify its sponsorship if it deems it desirable. But this does not mean that everything goes. According to the Seabed Disputes Chamber's 2011 Advisory Opinion "reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring state" (para 230).

More precise language on the termination, suspension, or variation of sponsorship could be found in the national legal instruments relating to activities in the Area. Under national laws, the legal document embodying this partnership is the "certificate of sponsorship" (see sections 88 – 90). A certificate of sponsorship may be complemented by an investment contract – or sponsorship agreement – setting additional legal and financial conditions (see here, at section 92). In addition, UNCLOS requires sponsoring states to adopt general laws to regulate activities in the Area (see here, at para 233). In this regard, both DSM laws and sponsorship agreements restrict the state's discretion to unilaterally variate, suspend or terminate a sponsorship agreement. In doing so, they often confer a crucial role to international law.

Possible Legal Claims Arising from Deep Seabed Mining Statutes

Legislation developed by five Pacific island states, namely, Fiji, Kiribati, Nauru, Tonga and Tuvalu, contain numerous provisions protecting the stability of the legal relationship between the state and the sponsored entity. For instance, section 97 of Tuvalu's Seabed Minerals Act 2014 states:

> "The Authority *may vary, suspend or revoke any Sponsorship Certificate*— where the variation or revocation is in the *reasonable opinion* of the Authority *necessary* to: (i) prevent serious risk to—(a) the safety, health or welfare of any persons; or (b) the Marine Environment; or (ii) avoid a conflict with any obligation of Tuvalu arising out of any international agreement or instrument in force for Tuvalu…" [emphasis added]

Similar language is present *inter alia* in section 39 of Nauru's International Seabed Minerals Act 2015 and in section 88 of Tonga's Seabed Minerals Act 2014.

Moreover, section 94 of Tuvalu's law binds state authorities "to not impose unnecessary, disproportionate, or duplicate regulatory burden on Sponsored Parties." Obligations of proportionality are also evoked in section 13, which mentions "the principles under which regulatory activities should be *proportionate*, accountable, consistent, transparent and targeted only at cases in which action is needed" [emphasis added]. Importantly, identical language is present in the other legislations across the Pacific region (for instance, see Nauru's law at sections 10(d) and 30(d).

Proportionality is a principle of public law in many countries and is also applied in the practice of international tribunals. International legal norms of proportionality are very much relevant to legislation which requires state action to be "consistent with existing requirements imposed by the

UN Convention on the Law of the Sea, the Rules of the ISA and other applicable standards of international law" (see Tuvalu's law, section 94 or Nauru's law, section 30(d)). Law of the sea tribunals have affirmed that the exercise of state power is limited by criteria of reasonableness, proportionality and necessity. Thus, the tribunal in *Duzgit Integrity (Malta v. Sao Tomé and Principe)* argued that:

> "The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality" (para 209)

Also investment tribunals have affirmed that "there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it" (*AES v. Hungary*, para 10.3.9). Accordingly, state authorities must be able to point to a legitimate objective and there must be some "evidential basis for a measure, if it is not to be considered as arbitrary or disproportionate" (see Harrison, at p. 498). In *Crystallex v. Venezuela*, for example, the denial of a mining permit was held to violate international law because it was based upon reasons that had not been raised before by the state, whilst ignoring the scientific evidence that had been submitted by the mining company (see paras 591 – 597). Additionally, in *Infinito Gold v. Costa Rica*, the tribunal held a mining ban to be disproportionate because it retroactively prohibited a gold mining project which national courts had considered to be environmentally sound (para 561 – 563).

Possible Legal Claims Arising from Sponsorship Agreements

Sponsorship agreements seek to preserve the economic bargain struck between the parties. One example is the 5 June 2017 Sponsorship Agreement between Nauru Ocean Resources Inc. (a subsidiary of the Metals Company) and the Republic of Nauru. Clause 10 of this contract sets out a detailed investment protection regime for the private party. Thus, "any Nauruan laws and regulations brought into effect after the commencement date will not interfere with or diminish NORI's rights… except to the extent the Republic has an obligation at international law to enact such laws in order to fulfil [its] sponsorship obligations". Even in that case, the parties are obliged to preserve NORI's level of financial burden as to contract's date of execution.

In addition, clause 10 refers to several rules of international investment law. Pursuant to its fifth paragraph:

> "In enacting and implementing Nauruan Laws and regulations the Republic shall at all times accord NORI *fair and equitable treatment* and will provide *a stable and predictable legal framework* and make decisions consistently and transparently and in accordance with the *legitimate expectations* of NORI and the NORI Group." [emphasis added].

Such language is equivalent to the fair and equitable treatment (or FET) clauses contained in many investment treaties. Section 10 of the contract also refers to Nauru's duty not to expropriate NORI's assets. Finally, this sponsorship agreement selects arbitration in accordance with the

UNCITRAL Arbitration Rules for the settlement of disputes.

An arbitral tribunal may turn to international law to interpret the equivalent language contained in the NORI sponsorship agreement, as has already happened in the context of investment arbitration. In *Lahoud v. DRC*, the tribunal interpreted a FET clause within a national legislation "in light of the principles drawn by the international jurisprudence on this subject, including the awards and decisions of ICSID tribunals" (para 438). Similarly, in *Caratube v. Kazakhstan* the investment contract at issue referred to Kazakhstan's former investment law (which in turn prohibited uncompensated expropriation). It was held that substantive protections provided under that law entered the contractual relationship between the claimant and Kazakhstan "in the capacity of supplementary contractual provisions" (para 295). As the parties had not presented any evidence relating to expropriation under Kazakhstani law, the tribunal applied rules of international law relating to expropriation.

Overall, this analysis demonstrates that there are risks for sponsoring states which alter, too abruptly, their policies on DSM. Based on DSM laws or contracts, investor claims against sponsoring states are possible. In this regard, both sponsorship agreements and DSM statutes have important linkages with international law.

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