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Contractual Disputes between the International Seabed Authority and Deep Seabed Mining Contractors: an International Investment Law of the Sea?

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To a large extent, the UN Convention on the Law of the Sea ("UNCLOS") shields the contractual rights of deep seabed miners from the regulatory powers yielded by the International Seabed Authority ("ISA"). Exploration and exploitation contracts concluded between the ISA and deep seabed mining operators are afforded security of tenure: their unilateral suspension or termination is allowed only in very limited circumstances. Furthermore, rules of uniform treatment, reasonableness, and proportionality constrain the ISA's powers.

This blog post will assess the interplay between the ISA's regulatory powers and the private rights held by deep seabed miners, considering the precedents set by previous investment arbitrations. Just like various investment treaties, Part XI of UNCLOS combines the protection of private rights with the recognition that regulatory action is required to achieve certain public purposes. Because analogous norms have already been applied to onshore mining disputes as part of international investment law, it may be useful to look at those precedents when interpreting and applying the rights of deep seabed mining operators under UNCLOS.

The ISA and Security of Tenure

UNCLOS and its 1994 Implementing Agreement designate the Area and its resources as the common heritage of mankind ("CHM"). Having prohibited the unilateral appropriation of the Area and its resources, the CHM principle tasks the ISA with ensuring the equitable sharing of benefits and with managing natural resources in a sustainable way (see UNCLOS, articles 137, 140, and 145). To achieve these different goals, the ISA is granted extensive regulatory powers. In addition of adopting binding regulations on the exploration and exploitation of deep seabed minerals, it has the power to enforce these regulations directly against contractors (see Jaeckel, p. 147).

In fact, the exploration and exploitation of mineral deposits in the international seabed ("the Area") require approval by the ISA. Such approval takes the form of a contract between the ISA and the deep seabed mining operator. However, pursuant to article 153(6) of UNCLOS, contracts enjoy security of tenure. Therefore, they cannot be revised, suspended, or terminated except in accordance with articles 18 and 19 of Annex III. Under the latter provision, the renegotiation of a contract is always possible when either party considers that there are circumstances which "would render the contract inequitable or make it impracticable or impossible to achieve the objectives [therein]." As there is no obligation for the parties to consent to such changes, the result is that

various versions of the ISA regulations may be applicable to different contracts.

The ISA's practice confirms that the contractor's acquired rights are not affected by the approval of new rules. In 2011, the ISA modified substantially the location of a proposed network of marine protected areas to avoid conflicts with existing contracts. In 2013, after deciding to create an overhead charge to cover its costs of administration and supervision of contracts, the ISA initiated the renegotiation of existing contracts in line with the changes it had approved. It even considered that it was necessary to obtain the consent of applicants who had applied for a contract prior to the entry in force of the amended regulations.

Suspension and Termination of Contracts

Under article 18 of Annex III, suspension or termination of contracts is only possible in case of "serious, persistent and willful violations" by the contractor of the "fundamental terms" of the "applicable international legal framework." Neither "serious, persistent and willful" nor "fundamental terms" are defined in Annex III of UNCLOS. In fact, very few provisions specify whether they constitute fundamental terms; for example, regulation 36(3) of the draft exploitation regulations stipulates that "the obligation under an exploitation contract to maintain insurance as specified in the Guidelines is a fundamental term of the contract."

For all other provisions, an enquiry must be made based on their wording, context, and place within the CHM principle. For instance, a fundamental restatement of the CHM principle can be found in article 137 UNCLOS – titled "Legal status of the Area and its resources" – which bans exploration and exploitation activities not authorized by the ISA. National mining laws generally hold that the conduct of unauthorized mining activities is a ground for suspension or termination of mining rights. It may also be expedient to inquire on which terms are regarded by national mining laws as being "fundamental", interpreting the relevant UNCLOS provisions in light of national practice. A cursory look at national mining laws confirms that conducting extractive activities in zones or for resources other than those indicated in a mining title are considered grounds for unilateral suspension or termination (e.g. Mexico's Mining Law, article 55(IX-XI); France's Nouveau Code Minier, article L. 173-5, 3° and 4°; and Kazakhstan's Code on Subsoil Use, article 221(3)).

Equally, as only persons authorized by the ISA may carry out activities in the Area, the transfer of mining rights from the contractor to other persons without authorization by the ISA would constitute a serious violation of a fundamental term. Indeed, section 22 of the "Standard clauses for exploration contract" (see here at Annex IV) requires ISA consent for any transfer of rights and obligations under the exploration contract. Here too, the UNCLOS provisions on unilateral suspension and termination should be interpreted in light of national practice whereby the transfer of mining titles without prior authorization constitutes a ground for unilateral suspension or termination (e.g. Senegal's Loi n° 2016-32 portant Code Minier, article 22; Kazakhstan's Code on Subsoil Use, article 221(3)(1)).

The "fundamental" nature of environmental disciplines in the ISA's exploration regulations and recommendations – for instance the duty to gather accurate environmental baseline data during exploration – is less clear. Arguably, for the contractor, environmental monitoring is a crucial obligation which undergirds the full environmental impact assessment required before commencing exploitation activities (see draft exploitation regulations 7, 47). Hence, such duty is inherent to the object of exploration contracts and may be considered as a fundamental term.

Outside those limited cases, the ISA does not have the power to suspend, terminate, or alter the contracts it granted to deep seabed mining operators. Rather, to bypass the rigours of security of tenure, exploration and exploitation contracts may be drafted so to authorize the evolution of rules applicable to individual contractors. Exploration contracts already require contractors to "observe, as far as reasonably practical" the recommendations issued "from time-to-time" by the ISA (see standard clauses section 13.2(b). ISA recommendations play an important role because they give a greater level of detail (see for example here) to contractors' obligations pursuant to the ISA regulations. Secondly, section 3.3(a) of the current draft exploitation contract standard clauses binds contractors to "comply with the regulations, as well as other Rules of the Authority, as amended from time to time…" If approved, such formulation would enable the automatic incorporation of new ISA rules into the contractual framework.

Reasonableness, and Non-Arbitrariness: An International Investment Law of the Sea?

Evolving contract terms may very well limit the reach of security of tenure, but this would not entail a boundless discretion for the ISA. Aside from security of tenure, there are other rules governing the ISA's powers. For instance, article 18 of Annex III authorizes the imposition of "proportionate" monetary penalties to sanction contractors' breaches. More generally, article 145 of UNCLOS speaks of "necessary" measures to ensure effective protection for the marine environment. In addition, article 154 requires the ISA to "avoid discrimination in the exercise of its powers and functions", and article 17 of Annex III obliges it to "adopt and uniformly apply" its regulations, rules, and procedures. All these terms introduce a level of constraint on the exercise of regulatory powers. Furthermore, the Seabed Disputes Chamber stated in its 2011 Advisory Opinion that "reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring state [of deep seabed mining in the Area]" (para 230).

Interestingly, there are striking similarities between such law of the sea rules and norms of international investment law: standards of reasonableness, and non-arbitrariness have been applied as part of treaty standards on fair and equitable treatment and expropriation. A comparison with rules of international investment law could be apt, because mining disputes have been frequent in investment arbitration and because international investment law also protect private rights *vis-à-vis* regulatory action (see Dingwall's exhaustive analysis).

The ISA's obligation to "uniformly apply" its rules has been compared to the doctrine of legitimate expectations under international investment law, which seeks to hold authorities to their word and prevent "arbitrary changes in policy or practice" (see Harrison, p. 161). Arbitral jurisprudence has already held that the inconsistent application of existing mining rules may constitute an international wrong. For instance, in *Eco Oro v. Colombia*, the tribunal chastised the inconsistent behaviour of state authorities, which took twenty years to delimit the areas concerned by a mining ban while continuing to award exploration rights for those same areas (see *Eco Oro v. Colombia*, para 803). In *Bilcon v. Canada*, the tribunal held that the denial of mining rights violated the international minimum standard of treatment because state authorities had departed from existing interpretations of the legally accepted level of environmental harm (see *Bilcon v. Canada*, para 531).

Equally, there is a certain similarity between reasonableness in the law of the sea and in international investment law. Investment tribunals have recognized that states are bound to principles of reasonableness and proportionality "requiring an appropriate correlation between the state's public policy objective and the measure adopted" (*AES v. Hungary*, para 10.3.9). A relevant

example is that of *Infinito Gold v. Costa Rica*: the tribunal ruled that a ban on open pit mining which retroactively affected a project had "no reasonable correlation" with the aim it sought because "the only project caught by its provisions was the [investor's] project" and "the Constitutional Chamber had already ruled that the Project was environmentally sound" (*Infinito Gold v. Costa Rica*, para 562). Such precedents touch on the interplay between the investor's acquired rights and the state's regulatory powers and provide us with some guidance on which kind of action by the ISA may be considered arbitrary and thus violative of UNCLOS.

Some Conclusions

Security of tenure provides strong protections for contractual rights held by deep seabed mining operators. Arguably, the ISA is allowed to unilaterally suspend or terminate contracts only in certain limited cases: for example, when the contractor transfers its title to a third person without prior authorization, or where it does not gather accurate environmental baseline data during exploration. In practice, the rigours of security of tenure may be stemmed if contracts are drafted in sufficiently flexible terms. In such case, the ISA would still be bound by rules of reasonableness, non-arbitrariness, and proportionality. Analogous norms have already been interpreted and applied as part of international investment law: the arbitral case law shows that arbitrary changes in mining policy or practice may constitute an international wrong.

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