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Dimensions of the Contractor's Activities in the "Area" based on Seabed Disputes Chamber's Jurisprudence and the United Nations Convention on the Law of the Sea's Provisions

Javad Salehi[1]

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Abstract

Exploitation, Exploration and Extraction of the Area resources are subject to the provisions of the United Nations Convention on the Law of the Sea. States Parties to the United Nations Convention on the Law of the Sea are bound by its provisions to develop the Area economic activities. All states have a duty to prevent harm to the environment including the marine environment. The United Nations Convention on the Law of the Sea has general and ambiguous rules for the support of member states for the operation of sponsored contractors in Area. States are worried that they would be liable by sponsoring contractors from their Area's actions. Eliminating the ambiguity of this concern is issue of Advisory Opinion that has been requested from the Seabed Disputes Chamber of the International Tribunal Law of the Sea to interpret the provisions of the United Nations Convention on the Law of the Sea. The main question is what are the obligations of the Sponsoring State in supporting the activities of the contractor in the Area based on Seabed Disputes Chamber of the International Tribunal Law of the Sea's Advisory Opinion? Research findings show that Judges interpret the main concepts outlined in Part XI and XII of the United Nations Convention on the Law of the Sea, including due diligence, obligation to ensure, and obligation to achieve, argued that the Sponsoring State's obligations to the Sponsored Contractor's activities are obligation to ensure. The Sponsoring State advocates for the contractor to comply with the provisions of the United Nations Convention on the Law of the Sea and the contracting parties, use appropriate instruments and endeavor to

[1] Associate Professor of Payam-e-Noor University, Tehran, Iran, Email: Javadsalehi@pnu.ac.ir.

achieve maximum results and achieve these goals. Under these conditions, the responsibility for the damage by Sponsored Contractor to the Area environment is not borne to the Sponsoring State.

Keywords: Contractor, Seabed Disputes Chamber's, UNCLS Jurisprudence.

Introduction

The deep seabed beyond national jurisdiction covers approximately half of our planet, yet it is the most inaccessible and least explored area on earth (Dingwall. 2020, 139). The history of exploiting the deep sea as a common heritage of humanity goes back to the statements of the Ambassador of the Government of Malta to the United Nations in 1967 (Nandan, 2010, 76-7). The expression "ocean commons" refers most immediately to a spatial domain and, in particular, to marine areas beyond national jurisdiction (ABNJ), whose general legal framework is set out in the United Nations Convention on the Law of the Sea (UNCLOS) (Lucia, 2019, 47). The coastal State may exercise sovereign rights over exploration, exploitation, conservation, and management of natural resources and other economic activities within the Exclusive Economic Zone (EEZ) in accordance with the provisions of Articles 56(1) and 77 of the United Nations Convention on the Law of the Sea and its restrictions (Salehi, 2017, 22). Continental Shelf is comprised of the seabed and subsoil of the submarine areas that extend beyond Territorial Sea throughout the natural prolongation of land territory to the outer edge of the continental margin, or to a distance of 200 nm from baselines where the outer edge of the continental margin does not extend up to that distance. In any case, the outer limit of the continental shelf shall not stretch beyond 350 nautical miles. Coastal states have the right of exploration and exploitation of the seabed and the natural resources that lie on or beneath it in the Continental Shelf. The ocean surface and the water column beyond the EEZ are referred to as the High Seas. Seabed beyond a coastal State's EEZs and Continental Shelf claims is known as the Area. The International Seabed Authority (ISA) was created to organize, control, and carry out exploration exploitation activities in the Area. The requirements for the exploitation of resources located in the Area are set out in the Part XI and XII of the United Nations Convention on the Law of the Sea in detail. No State has sovereignty or sovereign rights to the Area, and the Area's minerals can only be extracted according to Part XI in the United Nations Convention on the Law of the Sea under supervision of the International Seabed Authority. The general provisions of Part XI and XII of the United

Nations Convention on the Law of the Sea provide for the main obligations of the UNCLOS's State Party to operate the Area activities.

But the UNCLOS's State Parties do not steer the economic activities in the Area, but are sponsor active contractors in this economic operation in the Area. The material management of the Area economic activities is the responsibility of the contractor, but the obligation to prevent related violations is the international responsibility of the Sponsoring State that is the UNCLOS's State Party. Actions of private entities attributable to the state, where they perform public or state functions or are allowed to operate extraterritorially under their control. As every State has a responsibility for activities attributed to it (Crawford, 2013, 395). The international responsibility of the state due to the violation of its obligation in international law has a strong position in practice and theory (Zamani, 2016, 17). States have "… the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[2]. However, the idea of the need for states to resort to legal requirements to control a certain level of behavior of their subjects is not limited to international environmental law. As previously referred to by the International Court of Justice in the Corfu case (International Court of Justice, 1949, 22). Irrespective of the fact that Article 21 of the Stockholm Declaration also confirms the principle of appropriate action, which is documented in the International Court of Justice's advisory opinion on the legitimacy of the use of nuclear weapons (International Court of Justice, 1996, 241-2). The exercise of the jurisdiction of the Sponsoring State over the contractor arises from the element of citizenship or its effective contractual control over the activities of the contractor. Therefore, the contractor's activities in the exploration and extraction of the Area resources are carried out with the international responsibility of the Sponsoring State. This approach means that the contractor prior to the start of the exploitation, exploration and extraction of the Area resources, which requires harmful effects on the marine environment, it must seek the support of the Sponsoring State, which is accepted its responsibility to eliminating the negative consequences of its activities on human society and sea environment.

Under general international law, the principle is that the conduct of a company is not attributable to its state. However, this situation is somewhat different in relation to state agencies either affiliated with or

[2] Declaration of the United Nations Conference on the Human Environment (Stockholm), 1972, art. 21.

supported by the state. The behavior of non-governmental entities can also be attributed to the state, when the power to exercise part of the authority of the state is delegated to them by state institutions. Accordingly, the Sponsoring State is responsible to ensuring that the Contractor complies with the provisions of the United Nations Convention on the Law of the Sea to the extent that any breach of the Contractor's compliance with the provisions would result in breach of the Sponsor State's obligation to compensate the Contractor for the Area environment. But what are the nature and specific standards of the Sponsoring State' Responsibility? The responsibility to "Ensure" provided for in Article 139(1) of the United Nations Convention on the Law of the Sea has given rise to ambiguities in the nature of this responsibility, which is a matter of concern to the Sponsoring State of contractors.

The role of non-governmental organizations in resolving international disputes and issuing advisory opinions on the obligations and responsibilities of governments in the areas of investment and commercialization of activities in maritime areas is undeniable. Accordingly, the main question of the research is what are the obligations of the Sponsoring State in supporting the activities of the contractor in the Area based on Seabed Disputes Chamber of the International Tribunal Law of the Sea's Advisory Opinion? Explain, implement and critique the legal achievements of the contractor in the Area and the obligations of the Sponsoring State in this regard in accordance with an Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal Law of the Sea in response to a question from the International Seabed Authority is subject of this article, which has been done by descriptive-analytical method while examining the principles of International Environmental Law and the International Responsibility of States.

1. Sponsoring State's Responsibility in the UNCLOS

The United Nations Convention on the Law of the Sea places responsibility on the Sponsoring State of the company applying for exploration and exploitation in the Area to ensure compliance with the applicable parts of the United Nations Convention on the Law of the Sea, a breach of which places liability on the Sponsoring State to ensure compensation of environmental damage (Svendsen, 2020, 595). The Sponsor State's international obligations and application of the relevant international law shall be enforced when it is ensured that they are in conformity with the provisions of Part XI of the United Nations

Convention on the Law of the Sea (Seabed Disputes Chamber of ITLOS, 2011, 106). The contractor operates in the Area under supervision and the State Party undertakes to control and comply with its conduct in accordance with the provisions of Part XI of the United Nations Convention on the Law of the Sea. These obligations and international law shall be construed in favor of the responsibilities set forth in Part XI as well as the obligations set forth in Part XII of the United Nations Convention on the Law of the Sea.

These obligations are characterized as “Direct Obligations” (Seabed Disputes Chamber of ITLOS, 2011: 44). The main direct obligations incumbent on the Sponsoring States are the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; 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; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. Although the activity in the Area is carried out under the supervision of the contractor, if the Sponsor State is considered its guarantor, all the consequences and in the first place the compensation for the damages resulting from the contractor's activity will be borne by the Sponsor State. However, by using the term “ensure”, the Seabed Disputes Chamber of the International Tribunal Law of the Sea seeks to relieve the Sponsor State of these obligations.

The word “Ensure” has less meaning than “Guarantee” or “Warranty”. The guarantee or warranty of a behavior is the absolute acceptance of all the expected and unexpected consequences of that behavior, so that no claim of nullification of the stewardship in that behavior is accepted by the Sponsor State. This is also in line with the doctrines of privatization of liability for environmental damage. It seems that some believe that limiting international liability for environmental damage to governments has caused many damages to remain unresolved, although others believe that liability insurance coverage for mining contractor performance monitoring contracts in the Area is still an option for governments to advance, it has not been well-received due to its unknown nature. At the same time, Article 139(1) of the Convention on the Law of the Sea shall be read in the light of the provisions of Article 139(2) of that Convention, which confirms the liability of the Sponsor State for ensuring it ought to take from the Contractor in accordance with Part XI and XII of the

United Nations Convention on the Law of the Sea. Because according to Article 139(2) of the United Nations Convention on the Law of the Sea "A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153(2)(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153(4), and Annex III, article 4(4)". This conformity indicates that the Sponsoring State is not obligated to obtain any specific result, whether contractor's legality or breach of law, so that failure to do so is the sole responsibility for compensating the contractor performance. Accordingly, the mere fact that the Sponsoring State proves that it has fulfilled its obligations is no longer its responsibility, even if the contractor still inflicts damage on the Area's environment by complying with these requirements.

It is expected that states have the necessary control over their respective individuals and international institutions monitor the activities of these individuals and their respective governments by granting permission to exploit common resources and exercise international jurisdiction (Ismaili and Rahimi, 2018, 119). Accordingly, the term "ensure" means the Sponsoring State's efforts to Contractor comply with the provisions of the United Nations Convention on the Law of the Sea. The Sponsoring State merely seeks to ensure that the Contractor complies with the provisions of Part XI and XII of the United Nations Convention on the Law of the Sea. As soon as these obligations are fulfilled, it must be acknowledged that Sponsoring State has taken care of the Contractor's comply. If this interpretation is in accordance with the will of the drafters of the United Nations Convention on the Law of the Sea, the Sponsoring State is "committed to action". Contradicting this interpretation implies that the Sponsoring State is not "Committed to Result", even if its observance of the contractor's lawfulness to operate in the Area still causes damage to the Area's environment. Damages are not the responsibility of the Sponsor State according to the Seabed Disputes Chamber of the International Tribunal Law of the Sea's opinion.

Of course, the facts must also be taken into account in confirming this view. The Sponsoring State and the Sponsored Contractor are two different entities. It does not make sense for the Sponsoring State to be absolute guarantor of the Sponsored Contractor' results in the Area. The provisions of Part XI and XII of the United Nations Convention on the Law of the Sea have a similar approach, without mentioning the Sponsoring State absolute responsibility. The technology that can be used

in the Contractor's activities on the Area in any case has harmful effects. The spatial distance of the Area from the territory or representative of the Sponsoring State makes it more difficult to comprehensively monitor the Contractor's activities. Hence, there is no doubt that the notion of "commitment to result" faces practical drawbacks. However, this procedure is in accordance with the opinion of the judges of the Seabed Disputes Chamber of the International Tribunal Law of the Sea, although in any case it does not comply with the requirements of customary international law in the field of the sea environment. Although from one point of view, in the Convention on the law of the sea provisions is no hinder to extend the international customary law obligations on the States parties to the Convention, but branches of International Tribunal for the Law of the Sea are reluctant to extend to the law of the sea (Salehi, 2019, 195).

2. Sponsoring State's Responsibility in the Seabed Disputes Chamber's Jurisprudence

Optimal use of deep-sea resources is directly related to the teachings of sustainable development. In this regard, international regulations are formulated and implemented in line with the teachings of sustainable development in other areas of exploitation of deep-sea resources. Sponsoring State concerned that the potential liabilities or costs arising from its sponsorship of a mining entity might exceed its financial capacities as a developing country (Handl, 2011, 209). Article 139 of the United Nations Convention on the Law of the Sea creates a special responsibility and obligation for States Parties to the activities of applicant companies under the auspices of a State Party in the Area. As major commitments on the sustainable use of natural resources are determined and implemented as appropriate. Nevertheless, the generalities of these commitments have been foreseen and specified in various international instruments based on the past experiences of the international community (Boyle and Redgwell, 2021, 200-1). The provisions of Article 139 of the United Nations Convention on the Law of the Sea without prejudice to the rules of the international law emphasize that: first of all, States Parties shall monitor to ensure that activities in the Area are conducted in accordance with the provisions of the United Nations Convention on the Law of the Sea by States Parties, Governmental entities, natural and legal persons, nationals of the Member State or under their control or nationals. And second, without prejudice to the provisions of the international law, damages resulting

from the failure of States Parties or international organizations to fulfill their obligations shall be compensated.

This obligation is in the form of a responsibility to "Ensure", the limits and framework of which are not clear, regardless of the fact that this obligation may apply in other cases before the International Court of the Law of the Sea. This ambiguity is the subject of a legal question by the Government of Nauru at the 2010 Meeting of the States Parties to which the Seabed Disputes Chamber of the International Tribunal Law of the Sea has been asked to respond. This demand has been proposed in the form of an Advisory Opinion to the Seabed Disputes Chamber of the International Tribunal Law of the Sea to explain the obligations of the Sponsoring State in the field of the Contractors' Seabed Activities. For the first time, the International Seabed Authority has asked the Seabed Disputes Chamber of the International Tribunal Law of the Sea for an Advisory Opinion. The International Seabed Authority has made a request for an answer to a question concerning the obligations of States Parties to sponsor the contractor for its Area activities under the provisions of Part XI of the United Nations Convention on the Law of the Sea and its Executive Agreement, which is important to review and analyze.

The sponsoring State's liability for failure to meet its direct obligations is governed exclusively by the first sentence of article 139(2) of the United Nations Convention on the Law of the Sea, while a sponsoring State's liability for a failure to meet its obligations in relation to damage caused by a sponsored contractor is covered by both the first and second sentences of article 139 of the United Nations Convention on the Law of the Sea (Seabed Disputes Chamber of ITLOS, 2011, 58). The nature of these obligations obviously does define and determine the scope of liability. "Necessary and Appropriate Measures" in article 139(2) of the United Nations Convention on the Law of the Sea and article 4(4) of Convention Annex are part of the Sponsoring State's obligations to ensure for the Contractor to operate in the Area and a manifestation of the Standard of the "Due Diligence" by the Sponsoring State. But in the structure of responsibilities and obligations of the Sponsoring State, the "necessary and appropriate measures" mentioned in the United Nations Convention on the Law of the Sea have two different and at the same time interrelated functions.

It has the function of ensuring the contractor's legality of the obligations of the United Nations Convention on the Law of the Sea and the related instruments in the relevant contract on the one hand, and these measures

have the function of excluding the Sponsoring State from liability for damages caused by the contractor on the other hand. Therefore, in these circumstances, mere fulfillment of the Sponsoring State obligations to relieve the responsibility of compensating the damages caused by the contractor's activity in the Area is sufficient. Because it is assumed that with the Sponsoring State' care, the Area environment should not be harmed by the contractor. However, the situation is not always the same. Notwithstanding the fulfillment of the Sponsoring State obligations to the Contractor under the protection of the laws and regulations of Part XI and XII of the United Nations Convention on the Law of the Sea, damage to the marine environment may still occur. However, this situation has far fewer negative effects on the environment of the Area. It is on this basis that in the international arena today, the mechanisms of exploitation of private individuals generally pass through the channels of governments and with their support and responsibility. For this reason, the mechanisms of exploitation of private individuals generally pass through the channels of states and with their support and responsibility in the international arena.

Therefore, it is necessary for the Sponsoring State to have instantaneous access to information on the contractor's activities in the Area, as the sponsoring government's actions before the start of the contractor's activities may be considered appropriate and sufficient, but these actions lose their effectiveness during the contractor's activities (French, 2011, 534). It is in this context that moment-to-moment information from the beginning to the end of the contractor's activities can give the sponsoring government better maneuverability to take appropriate action based on new information. Regardless of the quality and quantity of appropriate actions depending on the type of activity, area of activity, equipment used, capabilities and experiences of the contractor and the supporting government, which cannot be decided before the start of contractor activities in the Area. The various stages of the contractor's activities also have such an issue that gives rise to a wide range of appropriate actions. It is natural that the exploration activities of the contractor cause far less damage to the environment of the Area. These potential damages increase in the extraction stage. It is in this context that it is not possible to wrap a single version for the Sponsoring State in resorting to the same appropriate action at different stages of exploration and extraction. Moreover, the extraction process faces difficulties that are not the same at the beginning, middle and end, and it must be decided according to the circumstances of the incident in the Area. This situation is further

complicated by the extraction of different resources in different parts of the Area.

Conclusion

The Seabed Disputes Chamber of the International Tribunal Law of the Sea believes that the Sponsoring State is obliged to control the compliance of the contractor with the regime set out in the UNCLOS. This mechanism is accompanied by legal principles in domestic law and aims to influence the activities of the contractor. Responsibility to Ensure from the point of view of the Seabed Disputes Chamber of the International Tribunal Law of the Sea based on the principle of non-responsibility of the government for the behavior of its citizens is not convincing, while the absolute responsibility of the Sponsoring State for any breach of obligation by its contractor is not a fair approach. Accordingly, the judges of the Seabed Disputes Chamber of the International Tribunal Law of the Sea choose an intermediate approach that neither leads to absolute commitment nor absolute responsibility. This approach demonstrates the use of appropriate tools and the maximum possible effort to achieve the best results. However, this is an obligation to the act and not an obligation to the result, which is legal language is referred to as an obligation to take appropriate action.

Judges of the Seabed Disputes Chamber of the International Tribunal Law of the Sea shall invoke similar provisions of Article 194 (2) of the Convention on the Law of the Sea, without reference to the procedure of the International Court of Justice or the Stockholm Declaration. They reach the same conclusion as the International Court of Justice with such an approach, but the judges of the Seabed Disputes Chamber of the International Tribunal Law of the Sea, by establishing a link between the concepts of commitment to trust and appropriate action, create a perspective far beyond the interpretations of International Court of Justice judges. The International Court of Justice's practice is committed to enacting appropriate laws and regulations and enforcement mechanisms to oversee activities, while the Seabed Disputes Chamber of the International Tribunal Law of the Sea's Judges refer to a higher standard, with the expectation that the Sponsoring State will support all stages of contractor activity in the Area, to be lawful and under their control.

The final approach of the Seabed Disputes Chamber of the International Tribunal Law of the Sea is to provide a clear picture of the Sponsoring State's obligations to the contractor under the auspices of tying the concept of commitment to "Due Diligence" to the "Direct Obligations"

enshrined in the Convention on the Law of the Sea and its related Agreements. The direct obligations outlined in the UNCLOS and its related Agreements to the Sponsoring State are independent of the contractor's compliance or disobedience. Commitment to the precautionary principle, environmental assessment, the best environmental practices, and compliance with the general and specific regulations of the International Seabed Authority are among the direct commitments of the Sponsoring State. The Sponsoring State is obliged to fulfill these obligations regardless of the contractor's approach. It is its responsibility to disregard the Sponsoring State. Because these direct commitments are part of the appropriate actions expected of the Sponsoring State. Fulfillment of direct obligations by the Sponsoring State means taking the necessary steps to ensure that the contractor's activities are safe. Examining the Contractor's environmental assessments before the Sponsoring State submits an application for activity in the Area to the International Seabed Authority is a manifestation of the appropriate action of the Sponsoring State.

Continuous environmental monitoring during the contractor's activities in the "Area" is part of the direct obligations of the Sponsoring State, that before to the issuance of a mining permit for the contractor, appropriate action shall be taken to review the environmental assessments of his future activities. According to the interpretation of the judges of the Seabed Disputes Chamber of the International Tribunal Law of the Sea, if the Sponsoring State proves that the contractor's observance of the law is enshrined in the provisions of the Convention on the Law of the Sea, the contractor and the State party are no longer jointly or severally liable. Because the illegal action leads to damage to the environment of the Area as a result of the contractor's operation and it is his responsibility to compensate. If the contractor pays the damages, there is no place to compensate the member state. Therefore, the contractor is initially responsible for paying damages. If the Contractor fails to pay the full damages, the Sponsoring State shall be liable to pay only if it has failed to fulfill its obligations under the UNCLOS to supervise the Contractor's activities in the Area.

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