THE BRAZILIAN LEGAL FRAMEWORK ON DEEP-SEABED MINING

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OVERVIEW

- UNCLOS relevant provisions
- International responsibility of States
- ITLOS Case No. 17
- ISA relevant regulations
- Brazilian legal framework
- Conclusion

INTRODUCTION

- Do Brazilian law comply with ISA standards of environmental protection?
- There is no specific regulation on deep-seabed mining in most of Latin America countries
- MERCOSUR does not have exclusive competence to issue laws and regulations on the protection and the preservation of the marine environment

UNCLOS RELEVANT PROVISIONS

- Article 145: Protection of the marine environment

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area **to ensure effective protection for the marine environment** from harmful effects which may arise from such activities. **To this end the Authority shall adopt appropriate rules, regulations and procedures** for inter alia:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

UNCLOS RELEVANT PROVISIONS

- *Article 192: General obligation*

States have the obligation to protect and preserve the marine environment.

- *Article 139: Responsibility to ensure compliance and liability for damage*

1. **States Parties shall have the responsibility to ensure that activities in the Area**, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, **shall be carried out in conformity with this Part**. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. **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, paragraph 2(b), **if the State Party has taken all necessary and appropriate measures to secure effective compliance** under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

3. **States Parties** that are members of international organizations **shall take appropriate measures to ensure the implementation of this article** with respect to such organizations.

UNCLOS RELEVANT PROVISIONS

- *Article 153: System of exploration and exploitation*

4. The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. **States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139**.

INTERNATIONAL RESPONSIBILITY OF STATES

- Spanish Zone of Morocco Case, PCJ (1925), England v. Spain: all international rights results in international responsibility, being that international liability results in the obligation to repair damages caused by non-compliance with the violated obligation.
- The Rainbow Warrior Case, 1986, New Zeland v. France: any breach by a State of any international obligation shall give rise to international liability of the State and consequent duty of repair
- An act or omission carried out by the legislative body may give rise to the State's international responsibility
- Article 235 of UNCLOS established the possibility of applying the rules of international responsibility of States in cases where there was failure to fulfill the duty of protection and preservation of the marine environment

ITLOS ADVISORY OPINION OF 1 FEBRUARY 2011

- Council of the Authority decision ISBA/16/C/13 adopted on May 6, 2010.
- 3 questions:
- (I) in accordance with the Convention, in particular Part XI and the Agreement of 1994, what are the legal responsibilities and obligations of the States Parties to the Convention in relation to the sponsorship of activities in the Area;
- (ii) what would be the extent of the State Party's liability for any failure by a company sponsored under Article 153 (2) (b) of the Convention to comply with the provisions of the Convention, in particular with Part XI and the Agreement of 1994; and
- (iii) what are the necessary and appropriate measures that the sponsoring State must take to fulfill its responsibilities under the Convention, in particular with Article 13, Annex III and the Agreement of 1994.

ITLOS ADVISORY OPINION OF 1 FEBRUARY 2011

- The Seabed Disputes Chamber delivered its final opinion in February 2011.
- (i) The Chamber emphasized that the obligation of the Sponsoring State is to ensure that the activities conducted by the contractor in the Area are carried out in compliance with the rules to which they are subjected
- It is not an obligation of result, but an obligation of due diligence
- The Chamber stated that the States also have direct obligations, e.g. the obligation to assist the Authority in the exercise of control of the activities carried out in the Area; and the obligation to apply precautionary approaches

ITLOS ADVISORY OPINION OF 1 FEBRUARY 2011

- It is not possible to differ developing from developed States for the purpose of applying the Convention
- The Chamber pointed out that the Sponsoring State is clearly responsible for its failures to comply with its own obligations but is not responsible for the failures of the sponsored contractor to fulfill its obligations
- (ii) the Chamber emphasized that it is expected that the Authority will deal with the question of liability in future regulations on exploration and that it is not for the Tribunal to establish rules on the subject matter

ITLOS ADVISORY OPINION OF 1 FEBRUARY 2011

- The Chamber recognized that §2 of Article 139 of the Convention established two conditions for the emergence of international responsibility of States: the failure of the sponsoring State to fulfill its obligations (resulting from action or omission) and the occurrence of damage
- Liability cannot be imputed when the State has taken all necessary and appropriate measures to ensure effective compliance with the international rules of deep seabed mining
- (iii) the Convention requires the Sponsoring State to adopt, within its legal system, laws and regulations, as well as take administrative measures to ensure compliance by the contractor with its obligations

ITLOS ADVISORY OPINION OF 1 FEBRUARY 2011

- The measures must meet the quality standard observed from the rules issued by the Authority
- After the case, it has become necessary for most States to introduce new laws in their legal system in order to establish the rules, provisions and procedures required

INTERNATIONAL SEABED AUTHORITY REGULATIONS

- ISA regulations currently in force deal exclusively with prospecting and exploration activities
- The rules only came into force in 2000, being revised in 2013 after the release of Nauru Case decision
- ISA Mining Code has a predominance of precautionary application
- The precautionary principle is composed of the threat of environmental damage, the uncertainty and the action surrounding it, and in this sense the implementation of that principle includes an institutional dimension (what precautionary measure will be taken?).

INTERNATIONAL SEABED AUTHORITY REGULATIONS

- Application for approval of exploration: requires among the documents a certificate from the Sponsoring State stating that the contractor is under its effective control and taking the responsibilities established by UNCLOS
- The State can stop sponsoring the contractor.
- The regulation also provides for the duty of Sponsoring States to cooperate with the Authority to establish and implement programs for monitoring and assessing the impact of mining on the marine environment

INTERNATIONAL SEABED AUTHORITY REGULATIONS

- The contractor must, before starting his activities in the Area, provides the Council with some guarantee that he has the financial and technical capacity to comply promptly with the emergency orders or to guarantee that the Council may take the necessary measures.
- If the contractor fails to provide such a guarantee to the Council, the Sponsoring State will have to take measures to ensure that the contractor provides such guarantee or to take measures to ensure that the necessary assistance is given to the Authority

BRAZILIAN LEGAL FRAMEWORK

- There is no specific Brazilian law on international deep-seabed mining
- The natural and mineral resources of the continental shelf and of the exclusive economic zone are public goods of the State (Article 20, V and IX, Brazilian Constitution)
- State has exclusive competence to legislate on mineral resources (Article 20, XII, Brazilian Constitution)
- Brazilian Mining Code of 1940: activities related to the mining, trade and industrialization of mineral raw materials are subject to the National Department of Mineral Production supervision
- Brazilian Navy has competence to ensure compliance with laws and regulations at sea

BRAZILIAN LEGAL FRAMEWORK

- Brazilian Navy Regulation ("Normam") No. 11 establishes what information should be provided to the Port Authority before starting mining activities within the continental shelf
- It has limited application to Brazilian jurisdictional waters and continental shelf. it is not applicable to the activities carried out in the Area, nor does it mention such activities
- Article 225 of Brazilian Constitution establishes the right to the ecologically balanced environment and imposes on the public power and the community the duty to defend and preserve it

BRAZILIAN LEGAL FRAMEWORK

- Paragraph 2 of article 225 of the Constitution established the principle of eco-efficient mining, which guides the land-based mining law
- There are three types of environmental license in Brazil. The Previous License, due in the preliminary planning phase; the Installation License, which authorizes the start of the deployment; and the Operation License, which aims to enable the operation of the activity.
- There is no requirement to present a previous environmental impact study for any mining activity

BRAZILIAN LEGAL FRAMEWORK

- National Policy for the Resources of the Sea: minerals within Brazilian territory must be exploited in the view of sustainable development.
- There is no definition of sustainable development – Commission for the Resources of the Sea
- The IX Sectorial Plan for the Resources of the Sea: it expresses the Brazilian interest in the Area and mentions the need to observe the importance of the rules, regulations and procedures issued by the Authority to ensure the effective protection of the marine environment.

CONCLUSION

- International rules require a more strict application of the precautionary principle than Brazilian mining law
- Brazilian Government acknowledged that there is no law on international deep-seabed mining and only mentions the need to observe the Authority regulations

THANK YOU!

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