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28 February 2013

This opinion addresses International Seabed Mineral Management Decree 2013 draft 13 February 2013. It only addresses the text of the draft decree on its face and does not attempt a 'root and branch' analysis of the draft decree. For instance, it does not analyse the extent to which the draft decree should govern the conduct of environmental impact assessments, the implementation of marine protected areas, measures and response to events and impacts, details of recovery of costs, compensation and redress in the case of environmental damage, public participation and regulatory mechanisms.

Note: Section 4(e) is missing the word 'State'.

14. High Court Jurisdiction

It is critical that Fiji retains jurisdiction over any disputes. Article 235 of the UN Law of the Sea Convention (UNCLOS) provides that:

> Article 235
> Responsibility and liability
>
> 1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
>
> 2. **States shall ensure that recourse is available in accordance with their legal systems** for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
>
> 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.
>
> (emphasis added)

It is without doubt that this requires Fiji to establish procedures and substantive rules governing claims for damages - before its own domestic courts. The International Tribunal for the Law of the Sea said precisely this, and explained why:

> "140. This provision applies to the sponsoring State as the State with jurisdiction over the persons that caused the damage. By requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for

> damages **before its domestic courts**, this provision serves the purpose of ensuring that the sponsored contractor meets its obligation under Annex Ill, article 22, of the Convention to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area.

Section 14, as drafted, is inadequate to address article 235. It currently only provides that that the High Court 'may' conduct... (b) proceedings to establish liability and to provide recourse for compensation from a Sponsored Party in the event of unlawful damage caused by Seabed Mineral Activities, in accordance with Article 235(2) of the UN Convention on the Law of the Sea."

Instead, Fiji must establish procedures and substantive rules governing claims before its domestic courts, to ensure that the sponsored contractor meets its obligations to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area. This includes financial provisions to ensure that the contractor has the resources to meet any possible liability.

Content of a Sponsorship Application

Proposed section 19(2)(e) would require "(e) A financing plan and evidence of actual or intended ownership or lease of vessels and equipment required for the operation of the Seabed Mineral Activities."

This provision is essential to ensure that the contractor has the resources to conduct its activities. ITLOS in its Advisory Opinion found that:

> 234. The sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under the Convention. These provisions may concern, inter alia, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

Likewise, proposed section 192(2)(f) would require:

"(h) Evidence of insurance or contingency funding adequate to cover damage that may be caused by the Seabed Mineral Activities or the costs of responding to an Incident"

Again, it is critical, for the reasons described above, that a contractor has the resources to meet any claim. Without this, Fiji would still be liable for damage under Articles 139(2) and Annex Ill, article 4, paragraph 4 of UNCLOS.

Qualification Criteria

The proposed section 20(1) would provide that "The FISSA may recommend the issue of a Sponsorship Certificate if it is satisfied that the undertakings required by section 19 have been given and the Qualification Criteria are met."

This is appropriate, and under no circumstances should 'may' be replaced with 'shall', since the FISSA (and Fiji) must retain discretion over whether to issue a Sponsorship Certificate. As ITLOS observed at paragraph 78 of its Advisory Opinion, " 78. No provision of the Convention imposes an obligation on a State Party to sponsor an entity that holds its nationality or is controlled by it or by its nationals."

Indeed, proposed section 21 appropriately provides that:

> "21. The FISSA must make a recommendation to the Cabinet whether to issue the Sponsorship Applicant with a Sponsorship Certificate or deny the Sponsorship Applicant a Sponsorship Certificate."

Proposed section 20(2)(c) would provide that as a criterion " (c) Compatibility of the proposed Seabed Mineral Activities with applicable national and international laws, including those relating to safety at sea;"

To this should be added "and the protection and preservation of the marine environment", since Fiji under Article 192 of UNCLOS has the obligation to protect and preserve the marine environment (as noted by ITLOS in the Advisory Opinion at paragraph 97.

Paragraph (c) should thus read:

(c) Compatibility of the proposed Seabed Mineral Activities with applicable national and international laws, including those relating to safety at sea and the protection and preservation of the marine environment"

Similarly, to paragraph (d) should be added:

"(iii) the marine environment"

Paragraph (e) would read:

(e) That the Seabed Mineral Activities will not result in irreparable harm to any community, cultural practice or industry in Fiji, and would be generally in the public interest of the country, taking into account the potential for capacity-building and/or local employment and the long-term economic benefit to Fiji."

to this should be added "and environmental" so it reads"

(e) That the Seabed Mineral Activities will not result in irreparable harm to any community, cultural practice or industry in Fiji, and would be generally in the public interest of the country, taking into account the potential for capacity-building and/or local employment and the long-term economic and environmental benefit to Fiji."

Application by Sponsored Party to ISA

Proposed section 24 would read in part:

"(3) The costs of presenting that application to the ISA, including any costs incurred by Fiji in supporting the application before the ISA, will be met by the Sponsored Party"

This is entirely appropriate. A contractor should indemnify Fiji for any costs incurred on its behalf.

Duties pertaining to Seabed Mineral Activities

This is a particularly important provision. Article 139(2) of UNCLOS require "all necessary and appropriate measures to secure effective compliance". ITLOS found that " The sponsoring State is absolved from liability if it has taken "all necessary and appropriate measures to secure effective compliance" by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure of the sponsoring State to carry out its direct obligations." Therefore, when section 25(4) requires people to " (4) Apply the Precautionary Approach, and employ best environmental practice in accordance with prevailing international standards in order to avoid, mitigate, or remedy the adverse effects of Seabed Mineral Activities on the Marine Environment;" it is important that all adverse effects are caught.

Section 25(1) would require people to:

" (10) Not proceed or continue with the Seabed Mineral Activities without obtaining prior written consent from the ISA to proceed, if evidence arises that to proceed is likely to cause significant adverse impact to:

(a) the Marine Environment that was not anticipated in any environmental impact assessment previously conducted,

(b) the safety, health or welfare of any person, or

(c) other existing or planned legitimate sea uses including but not limited to Marine Scientific Research, navigation, submarine cables, fisheries or conservation activities."

This is an important requirement, and some changes are necessary. First, any prior written consent must be specifically given, to avoid an argument that some other pre-existing consent suffices. Secondly, no significant adverse impact to the Marine Environment should be permitted, so the reference to "that was not anticipated in any environmental impact assessment previously conducted" should be deleted. This is obvious, since there is no such exemption proposed for (b) or (c).

So section 25(10) should read:

" (10) Not proceed or continue with the Seabed Mineral Activities without obtaining *specific* prior written consent from the ISA to proceed, if evidence arises that to proceed is likely to cause significant adverse impact to:

(a) the Marine Environment,

(b) the safety, health or welfare of any person, or

(c) other existing or planned legitimate sea uses including but not limited to Marine Scientific Research, navigation, submarine cables, fisheries or conservation activities."

Duties as Sponsoring State

Section 27(4) reads:

" (4) avoid imposing unnecessary, disproportionate, or duplicate regulatory burden on Sponsored Parties;

The use of the words 'avoid imposing', rather than 'not impose', is appropriate, since this retains discretion to impose the relevant burden on Sponsored Parties. If the discretion was removed, Fiji would be in danger of attracting liability.

Subsection (4) reads:

" (5) not impose requirements upon a Sponsored Party under this Decree or Regulations to be made under this Decree except insofar as these are consistent with, and take into account 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;"

This should be deleted, since Fiji may need to impose requirements independent of UNCLOS and international law, for instance, due to Fijian law. At the very least, "and take into account" should be deleted, although this would still impose a burden to ensure that all Fijian law requirements are consistent with UNCLOS etc.

Monitoring Powers

Proposed section 28 would read:

"28. The FISSA reserves the power to make such examinations, inspections and enquiries of Sponsored Parties and the conduct of Seabed Mineral Activities as are necessary to meet its responsibilities under international law as a Sponsoring State, which may include the sending of an

observer to the site of the Seabed Mineral Activities and vessel or premises of the Sponsored Party from time to time, upon giving reasonable notice to the Sponsored Party."

Observers must be independent. They should not be required to, for instance, comply with any directions of the contractor. An additional sentence is required stating that " Sponsored Parties shall take all necessary steps to facilitate the activities of any such examinations, inspections, enquiries and observers and not hinder or direct their activities in any way. All necessary documentation and access will be provided b y the Sponsored Parties at all times."/

So section 28 should read;

"28. The FISSA reserves the power to make such examinations, inspections and enquiries of Sponsored Parties and the conduct of Seabed Mineral Activities as are necessary to meet its responsibilities under international law as a Sponsoring State, which may include the sending of an observer to the site of the Seabed Mineral Activities and vessel or premises of the Sponsored Party from time to time, upon giving reasonable notice to the Sponsored Party. *Sponsored Parties shall take all necessary steps to facilitate the activities of any such examinations, inspections, enquiries and observers and not hinder or direct their activities in any way. All necessary documentation and access will be provided b y the Sponsored Parties at all times.,"*

Administrative Action

Section 29 as drafted would read

> " (1) In the event of the FISSA determining that a Sponsored Party has materially breached, or is at serious risk of materially breaching, the Rules of the ISA, or this Decree, the FISSA may:
>
> (a) issue written warnings, including warnings in relation to possible action the FISSA may take in the event of future breaches;
>
> (b) enter into a written agreement providing for the Sponsored Party to undertake a programme of remedial action and to mitigate the risk of re-occurrence;
>
> (c) issue a written notice requiring the Sponsored Party to take specified action, or not take specified action, aimed to stop, remedy or mitigate the risk of occurrence or re-occurrence of breach;
>
> (d) in the case of actual breach..."
>
> (2) Action taken under subsection 29(1) of this Decree must be commensurate with the gravity, frequency and other circumstances of the breach or anticipated, including the Sponsored Party's previous conduct under Fiji's Sponsorship.

It is important to retain this provision, including the "at serious risk", since section 29 should not be limited to actual breaches, but should address future possible or apprehended breaches. Additionally, the words 'material' and 'serious' should be deleted, since the FISSA should not be hampered in its ability to issue warnings etc. Also, the word 'breach' appears to be missing after 'anticipated'.

So section 29 should read:

> " (1) In the event of the FISSA determining that a Sponsored Party has breached, or is at risk of breaching, the Rules of the ISA, or this Decree, the FISSA may:

(a) issue written warnings, including warnings in relation to possible action the FISSA may take in the event of future breaches;

(b) enter into a written agreement providing for the Sponsored Party to undertake a programme of remedial action and to mitigate the risk of re-occurrence;

(c) issue a written notice requiring the Sponsored Party to take specified action, or not take specified action, aimed to stop, remedy or mitigate the risk of occurrence or re-occurrence of breach;

(d) in the case of actual breach..."

(2) Action taken under subsection 29(1) of this Decree must be commensurate with the gravity, frequency and other circumstances of the breach *or anticipated breach* , including the Sponsored Party's previous conduct under Fiji's Sponsorship.

Records

Section 30(2) at present reads:

" The FISSA shall ensure that all such records shall be held with appropriate confidentiality, and will not disclose commercially sensitive information unless agreed otherwise with the Sponsoring Party."

This unduly restricts FISSA. It should retain the discretion to disclose information when necessary, such as when a Court requires it.

So Section 30(2) should read:

" The FISSA shall ensure that all such records shall be held with appropriate confidentiality, and will not disclose commercially sensitive information *unless necessary or* agreed otherwise with the Sponsoring Party."

Termination

Section 32 reads:

32. A Sponsorship Certificate terminates if, pursuant to this Decree –

(a) It is made for a specified term and that term expires without renewal.

This is appropriate, and no reference should be made to section 36, as this would unnecessarily restrict the scope of section 32, and introduce uncertainty.

Revocation of Sponsorship

Section 34 reads:

" 34. The FISSA may revoke its Sponsorship Certificate under this section—

(1) in any case, with the consent of the Sponsored Party;

(2) upon consultation with the Sponsored Party, where the Sponsored Party is prevented for a continuous period exceeding two years from the date of signing the contract with the ISA from undertaking the Seabed Mineral Activities despite taking all reasonable measures to do so, because of events outside of the Sponsored Party's control;

> (3) where no material efforts have been made by the Sponsored Party to undertake the Seabed Mineral Activities for a period exceeding five years from the date of signing the contract with the ISA;"

Subsection 2 is appropriate, since otherwise Fiji could suffer consequences for the inaction of the Sponsored Party, such as through financial incapacity or other reasons. Fiji must be able to terminate the sponsorship under these circumstances.

Subsection 3 is too long - this should match the two year period. Again, otherwise Fiji may suffer adverse consequences due to the delay of the Sponsored Party.

Renewal

It is important that no automatic renewal is provided for. Fiji needs to retain its independence and sovereign discretion.

Payments by Sponsored Parties

It is important that these provisions be retained. In no way should Fiji need to negotiate them separately with the contractor: the process should be open, transparent and free from interference and negotiation.

Fiji needs to review these fees to ensure that they will indeed cover all actual costs incurred by Fiji.

In no way should Fiji predicate its royalties allowing contractors to recover set-up, exploration and mining costs, since these are not under Fiji's control, and any such provision would be open to abuse, and would in effect result in Fiji subsidising the contractor's costs.

Security

This is a critical provision, and in no way should be subject to negotiation. It is critical to ensure that contractors can guarantee their performance, and not avoid liability due to undercapitalisation or any other mechanism.

Interference with Seabed Mineral Activities or the FISSA

Section 46 is far too broad and at present would cover lawful and legitimate activities, and free speech and would breach Fiji's obligations under international human rights law. It should be deleted or entirely re-written. The provision 'or incites another person to so behave,' is unnecessary and too broad and should be deleted. Likewise, subsection 2 is far too broad and has extraterritorial reach. In no way should 'filing of vexatious claims' be included. At most, it should also only cover violent activities such as terrorism. These may already be covered under Fiji's legislation. Any provision should not undermine rights of access to information, public participation and access to justice, the international standard for which is provided in the Aarhus Convention, to which Fiji is not a party (though Fiji could join), which provides detailed provisions on these matters.

Disputes

Section 49 at present reads:

Disputes

> 49. (1) Any dispute arising between Fiji and another State in connection with Seabed Mineral Activities shall be resolved pursuant to the provisions of the UN Convention on the Law of the Sea
>
> (2) Any dispute between Fiji and the Sponsored Party arising in connection with the administration of this Decree shall be dealt with by:

> (a) the parties attempting to reach settlement by mutual agreement or mediation, and in the event this is not successful then
>
> (b) by referral to arbitration to be conducted in accordance with the Arbitration Act.

As discussed earlier, it is critically important that Fiji, and Fijian courts, retain jurisdiction over all mining activities. This is also required by Article 235 of UNCLOS. If Fiji was to refer disputes with contractors to international arbitration, it would open itself to extensive costs, possibly enormous liability, lose the ability to pass national laws in its own sovereignty, and open itself to double jeopardy, where it may be liable for damage under international law. Additionally, arbitrations typically occur in secret, so lack transparency.

So Section 49 should read:

> 49. (1) Any dispute arising between Fiji and another State in connection with Seabed Mineral Activities shall be resolved pursuant to the provisions of the UN Convention on the Law of the Sea
>
> (2) Any dispute between Fiji and the Sponsored Party arising in connection with the administration of this Decree shall be dealt with by Fijian courts applying Fijian law.

Yours faithfully

Duncan Currie