

Singapore's new(ish) DSM legislation

Steve Potter
steven.potter@pinsentmasons.com
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Pinsent Masons MPillay

Introduction

- Another busy period for ISA and stakeholders
 - First wave of exploration contracts extended
 - Publication of 'draft zero exploitation' regulations
 - Article 154 Review – interim report issued
 - Increase in Sponsoring States implementing national DSM legislation governing activities in the Area (Belgium 2013; UK, Tonga 2014; Singapore, Nauru 2015; China 2016). Fiji and Tuvalu implemented Area specific DSM laws in 2013 and 2014

Presentation focus:

- Review of Singapore's Deep Seabed Mining Act 2015
- Comparison with other national Area specific DSM legislation
- Key challenge facing ISA and Sponsoring States due to dual regulatory regimes
- Sponsoring State related aspects of draft Exploitation Regulations

Singapore's Deep Seabed Mining Act 2015

- Why was it introduced?
 - Singapore's sponsorship of Ocean Mineral Singapore's application for nodules exploration PoW in 2013
 - Exploration contract entered into in January 2015 with Singapore's DSM legislation coming into force in April 2015
- Purpose (section 3)
 - Regulate exploration and exploitation of seabed mineral resources in the Area by Singapore sponsored entities
 - To ensure the effective protection of the marine environment against any harmful effects of those activities
 - To fulfil Singapore's obligations under UNCLOS

Key obligation = responsibility to 'ensure' that activities in the Area conducted in conformity with Part XI of UNCLOS + Mining Code (see Articles 139(1); 153(4))

Sponsoring States not liable for damage caused by sponsored contractor if State has adopted laws and regulations and taken administrative measures which are, within its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction (Annex III, Article 4)

Advisory Opinion (para 219) - Existence of laws, regulations not a CP for concluding ISA contract but necessary requirement for complying with due diligence obligation and for its exemption from liability

Key elements of Singapore legislation

- General prohibition (section 4)
 - Criminal offence for Singapore entities/citizens to explore for or exploit mineral resources in the Area unless authorised to do so under the Act
 - Maximum fine SGD 500,000
 - Maximum 3 months' imprisonment for individuals
 - Singapore incorporated companies may only conduct activities in the Area if granted a licence by Singapore Government to do so and a corresponding ISA contract is in force
 - Prospecting (exploration without exclusive rights) not expressly dealt with under the Act and likely prohibited
- National licensing regime
 - Similar to UK approach
 - Criteria for grant of licence (section 7)
 - Must be Singapore incorporated company (no express requirements for Singapore national ownership/control)
 - Likely to meet qualification standards under Annex III (financial/technical capability)
 - Applicant applying for ISA contract
 - In Singapore's interest to grant the licence and sponsor the application to the ISA
 - such other criteria 'as may be prescribed'

Key elements of Singapore legislation

- Licence conditions (section 10)
 - Non exhaustive list of conditions which Minister may specify are:
 - Compliance with Convention, 1994 Agreement, Mining Code and decisions of ISA organs (key part of DD obligation)
 - Compliance with ISA Contract (key part of DD obligation)
 - Reporting on activities (key part of DD obligation)
 - Provision of security (provision of guarantees for protection of marine environment in the event of ISA emergency order)
 - Indemnity in favour of Government against any liability incurred in relation to Licensee's exploration/exploitation activities

Fine of up to SGD 40,000 for breach of any licence condition

- Power to issue written directions to licensee (section 11)
- Power to issue Regulations (section 24)
- Licence revocation/suspension (section 14)
 - Licensee contravenes Act or licence;
 - ISA contract suspended;
 - Minister satisfied that licensee not carrying on exploration/exploitation in a satisfactory manner; or
 - Minister satisfied that it is in 'Singapore's interest' to suspend or revoke licence.

Key elements of Singapore legislation

- Two additional UNCLOS obligations that directly apply to States included in legislation
- Availability of compensation/other relief for Contractor wrongful acts
 - Under UNCLOS, Contractor liable for damage caused by wrongful acts in conducting operations in the Area (see UNCLOS Annex III, article 22)
 - State Party obligation (UNCLOS, Article 235) to ensure that recourse is available under its legal system for compensation or other relief for damage caused by pollution of the marine environment by a person under its jurisdiction
 - Singapore Act (section 17)

Where contractor is liable for a wrongful act under Annex III, article 3 of the Convention, Singapore High Court may order payment of compensation to a third party or grant such other relief as is ordered to be paid or granted under Annex III, article 22 of the Convention

- Seabed Disputes Chamber decisions
 - UNCLOS (Annexe VI, Article 39): Seabed Disputes Chamber decisions to be enforceable in the territory of a State Party in the same way as decisions of the highest court of that State
 - Singapore Act provides for registration of SDC decisions so that treated in the same way as a decision of Singapore's High Court for enforcement purposes

Comparisons with other DSM legislation

- Short, concise, well drafted
- Very similar (and appears to be based on) UK's DSM legislation
- Unlike SP regimes, no separate new authority created
 - Singapore regime administered by Ministry of Trade and Industry
- Arguably covers off Singapore's key UNCLOS obligations as a Sponsoring State but less detailed than South Pacific regimes
 - Tonga and Tuvalu regimes cover the Area and seabed within national jurisdiction
 - SP regimes adopt more detailed approach recommended by EU funded SOPAC deep sea minerals regulatory framework document
 - What about other direct obligations such as precautionary approach, best environmental practice and EIA requirements?
- Less focus on fees than other jurisdictions, particularly South Pacific
 - Wait and see approach?
- Act provides Minister with broad discretion including discretion to add/vary licence conditions

Comparisons with other DSM legislation

- Examples of discretion include:
 - Even if licence granted, Minister may (not must) sponsor corresponding application to ISA
 - Broad discretion to issue written directions to licensee (cf enforcement orders issued under Tongan legislation for suspected breaches)
 - Ministerial power to revoke/suspend licence combined with lack of express remedy periods for breach, incl. breach of licence conditions (cf Mining Code and South Pacific legislation)

These + other Ministerial discretion increase regulatory risk for investors

- Adopts similar approach on liability to Tonga and Tuvalu on liability by including an indemnity in favour of State
 - Singapore – licence condition to require licensee to execute an indemnity, in a form approved by the Minister, to indemnify the Government against any liability incurred by the Government (whether or not under the Convention or the 1994 Agreement) in relation to licensee's exploration or exploitation activities
 - Tonga – Sponsored Party to keep Kingdom of Tonga indemnified against all claims which may be made or brought by any third party in respect of 'Seabed Mining Activities'.

BUT, see ITLOS opinion and Annex III, article 4: State not liable for damage caused by sponsored contractor if it has in place laws and regulations and taken administrative measures that are reasonably appropriate for securing compliance by persons under its jurisdiction – see also para 202 (if the Contractor has paid the actual amount of damage, in the view of the SDC, no room for reparation by Sponsoring State)

Key Challenge facing ISA and Sponsoring States

- Parallel regime - Contractors need to comply with two regimes
- Exploitation Framework document: Stakeholder concern over lack of clarity on division of responsibilities between Sponsoring States and ISA, particularly regarding penalties, monitoring and enforcement

➤ Example:

Current ISA sanctions regime for breach of ISA contract:

Council right to suspend/revoke ISA contract including if, despite written warnings, Contractor has conducted activities in such a way as to result in serious, persistent and wilful violations of the terms of the Contract, Part XI of the Contract, the 1994 Agreement and the rules, regulations and procedures of the Authority

For other violations, Council may impose monetary penalties proportionate to the seriousness of the relevant violation.

Singapore sanctions regime as it would apply to breach of ISA contract:

Ministerial discretion to revoke/suspend licence for any breach of licence condition (which would include any breach of the ISA contract or violation of the Mining Code).

Financial penalties of up to 40,000 SGD for licence condition breaches.

Key Challenge

- Who takes the lead in compliance and enforcement issues re ISA contract and Mining Code – ISA or Sponsoring State?
 - Subject to the ISA being properly funded and staffed, where there is duplication preferable for ISA to take the lead role on penalties and compliance. This will help deter development of sponsoring states of convenience and ensure a more level playing field between SOEs and privately owned contractors
 - Protocol between the ISA and Sponsoring States should be developed to ensure effective co-operation between States and the ISA, particularly for matters where there is dual responsibility (e.g. inspection regime)
 - See Para 218 of Advisory Opinion which talks about the co-ordination of activities between Sponsoring State and the ISA to avoid duplication of work
- 2015 framework document acknowledges issue and development of matrix setting out division of responsibilities proposed
- Draft Zero Exploitation Regulations – at this stage limited guidance
 - New undertaking to comply with Sponsoring State laws (not present in exploration regs)
 - Interference with ISA inspectors to be dealt with by flag state / sponsoring state under national laws
 - Monetary penalties v much focused on non-payment of fees /royalty, not other breaches
 - Separate regulations dealing with Inspectorate/Directorate yet to be produced



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