Recap of the Third Edition of the Washington Arbitration Week: Deep Seabed Mining, the Terra Incognita

By:

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March 8, 2023

The Third Edition of the Washington Arbitration Week took place from November 28 to December 2, 2022. This event gathered experienced practitioners to discuss the developments in international arbitration. On Day 5, panelists addressed the intricate issues of “Jurisdiction, Merits, and Quantum in Seabed Mining”, in the context of the rapid technological developments that have broadened the options for exploring and exploiting natural resources in the depths of the Oceans.

A learned panel moderated by Patricia Cruz Trabanino, (ICSID), included Tafadzwa Pasipanodya, (Foley Hoag), David Attanasio (Dechert), James Burrows (Charles River Associates), and Chris Milburn (Secretariat) to discuss the challenges ahead of the expected developments of mining activities in the

Seabed.

State of the Field of the International Area (“the Area”) under UNCLOS

In a comprehensive overview of the topic, Patricia Cruz Trabanino discussed the purposes of seabed mining as well as its relevance in the current context of climate concerns. As she noted, with the transition from fossil fuels to renewable energies, the demand for certain minerals is rising sharply. The Area , i.e., ‘the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction’ (as per Art. 1.1 UNCLOS), is rich in these minerals and is therefore attracting the attention of both private and state actors. There are three main categories of resources that have attracted interest: cobalt-rich crust, polar metallic sulfides, and polymetallic nodules. The Area represents half of the earth’s surface.

An Upcoming Exploitation Stage Post-exploration by July 2023

Seabed mining activities are at the exploration stage, but exploitation may begin very soon with the issuance of exploitation regulations by the International Seabed Authority, (ISA), which are expected by July 2023. But as Cruz Trabanino mentioned, there already exists exploration contracts that cover more than a million square kilometers of the Area, still just half of half a percent of the deep seabed.

As all this suggests, there is enormous room for growth and, given its scale, exploration will require very high levels of investment and technologies as well as the participation of both private and state actors. Therefore, in the words of the moderator, from legal and technological perspectives, seabed mining represents ‘a cutting-edge enterprise’.

Current Legal Framework for the Seabed Resources

As for the current legal framework, Ms. Cruz Trabanino referred to the United Nations Convention on the Law of the Sea, (UNCLOS, 1982). UNCLOS provides some key legal principles, one of these being that all the resources of the seabed are the common heritage of mankind (Art. 136). In terms of regulations, ISA will operate a contract-based licensing system for the exploration and ultimately exploitation of deep seabed resources. That system allows private

actors to conduct mining activities with the sponsorship or control of a UNCLOS state party. Thus, seabed mining appears to represent an area of new and interesting collaboration between private actors and States.

With this overview, Ms. Cruz Trabanino opened the conversation by inviting David Attanasio, in light of the expected development of activities in the Area, to elaborate on the nature of disputes that might arise in respect of seabed mining activities and the existence of fora where such disputes could be brought for resolution.

Nature and Fora of Seabed Mining Disputes

Approaching these questions as an arbitration practitioner with experience in both commercial and investor-state arbitration, David Attanasio stated that although the Area is the common heritage of mankind, it is a potential source of highly commercial activities and therefore a source of disputes. Three options for the settlement of such disputes were identified, namely the Seabed Disputes Chamber (SDC) established pursuant to art. 186 and 187 of UNCLOS commercial arbitration, and potentially investment arbitration.

The Seabed Disputes Chamber (SDC)

Mr. Attanasio presented the SDC as a chamber of the International Tribunal for the Law of the Sea, (ITLOS), with jurisdiction over the interpretation or application of a ‘relevant contract, or plan of work’. The SDC also has jurisdiction regarding the ISA’s potential refusal of a contract, legal issues arising in negotiation processes, as well as over various forms of liability of ISA. Following the provisions of UNCLOS, the SDC’s decisions are enforceable as judgments of the highest court of the state party where enforcement is sought (Art. 39, Statute ITLOS). Since seabed activities are still in the exploration phase, to date, the only decision of the SDC consists of an advisory opinion issued in 2011.

But as the speaker mentioned, there remains a question of private parties’ consent to proceedings before the SDC since they are not parties to UNCLOS. It was pointed out that the issue will likely be less important in practice since ‘the standard contract terms are going to provide that disputes will be resolved pursuant to the terms of the relevant section of UNCLOS’.

Arbitration

Commercial arbitration constitutes an alternative to SDC and is envisioned by UNCLOS itself pursuant to Art. 188(2)(c). Interestingly, it was mentioned that as a commercial arbitration tribunal is incompetent to interpret UNCLOS, the treaty itself allows that tribunal to refer the issue to the SDC, thus establishing a referral, (or “renvoi”), a mechanism like what is exemplified in EU law with Article 267 of the Treaty on the Functioning of the EU (ex Article 234)[1]. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

The third avenue envisioned by the panel in addition to commercial arbitration is investment arbitration. This may be the case for a dispute involving a foreign investor and a sponsoring state. But as the sponsored private party must be a national of the sponsoring party, without any control from a foreign state, investment arbitration might be restricted. As a caveat in respect of investment arbitration, Mr. Attanasio referred to the establishment of territorial jurisdiction regarding such disputes since by definition the Area is clearly outside any state territory. Therefore, some other nexus will be needed to establish jurisdiction as it has already been illustrated in some instances regarding inspection contracts (SGS v Philippines ; SGS v Pakistan). However, a current significant project (NORI-D) sponsored by Nauru and undertaken by Nauru Ocean Resources, Inc., a wholly-owned subsidiary of a Canadian company, The Metals Company, highlights the likelihood of investor-state disputes.

In sum, there are several mechanisms for the resolution of seabed mining. But in respect of the Area, these mechanisms are ‘effectively untested’ and their future utility is an area of concern.

Sources of Disputes: A Focus on the Fair and Equitable Treatment

Tafadzwa Pasipanodya elaborated on the obligations that might result in respect of seabed mining activities and the subsequent liability issues. According to her, there exists a ‘large propensity for disputes’ either between a state and ISA or between states or between a sponsoring state and a private company. Concerning the latter relationship, disputes might arise, as is also the

case in land-based mining, from termination of a contract and violation of Fair and Equitable Treatment (FET) through new regulations.

To illustrate her point, Ms. Pasipanodya referred to paragraph 10.5 of the sponsorship agreement between Nauru and Nauru Ocean Resources, which provides that: 'In enacting and implementing Nauruan Laws and regulations the Republic shall at all times accord NORI fair and equitable treatment, and will provide a stable and predictable legal framework and make decisions consistently and transparently and in accordance with the legitimate expectations of NORI and the NORI Group'. Furthermore, in its advisory opinion issued in 2011, the SDC stated that 'Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State' (§ 230). As for the practice, the appreciation of an alleged violation of a state's obligations will presumably be made by reference to decisions rendered in respect of land mining disputes such as AES v Hungary and Infinito Gold v Costa Rica. Investment arbitration jurisprudence makes it clear that the FET standard is a fact-specific provision. Therefore, it is up to states to make plain the content of any FET standard they enshrine into seabed mining instruments. These considerations have led some states such as the UK and Belgium to very intentionally avoid any reference to such standards.

Amicus Curiae and the Role of Communities

Another similarity with land-based mining is in relation to NGOs' roles as amicus curiae or supporting the disputing state. However, seabed mining is likely to raise new merit-related issues since the resources of the Area are supposed to belong to the common heritage of mankind. As noted by Ms. Pasipanodya, although the specific meaning of this provision remains unsettled, it will have important ramifications on the determination of merit-related issues.

Finally, environmental concerns will and are already at stake. In the Area, there remains a certain level of uncertainty about the environmental harm that can result from seabed activities. But such uncertainty can evolve quickly and have a huge impact on ongoing contracts. As illustrated recently, Tuvalu has rescinded a sponsorship contract in light of its new understanding of the impact of the project.

Methods of Damages Valuation: DCF vs. Market-Based Approach

Chris Milburn focused on current valuation methods that might apply in seabed mining disputes. He mentioned that there are currently three approaches, namely, the income approach, (based on future cash flow), the market approach, (based on market transactions), and the costs-based approach. Mr. Milburn stated that each of these approaches has its own limits and depends on the stage of development of the project. For instance, while the income approach supposes an advanced stage of the project where cash flows are foreseeable, the market approach, for its part, is only relevant where sufficient market data exists on the valuation of similar projects.

Milburn indicated that seabed mining tribunals will be able to refer to the considerations and criteria applied in terrestrial mining since 'the underlying valuation considerations are largely the same'. In this respect, the Rusoro v Venezuela case was referred to, where the tribunal set out six criteria they considered necessary to apply a DCF, (Discount Cash Flow), income approach to value a mining project. However, among these criteria, two will be problematic for deep seabed mining: The need to show an established record of financial performance and the requirement of a predictable regulatory environment. Therefore, DCF might not be accepted in some instances, as was the case in Bear Creek v Peru, where the tribunal considered that despite the feasibility study, the opposition to the project was so intense that it was highly uncertain that the project would have ever become profitable even absent Peru's actions.

Mr. Milburn then provided an overview of an ongoing NAFTA seabed mining case, Odyssey Marine Exploration v Mexico. In this seabed phosphate-related mining project in the Mexican waters which has given rise to the dispute, the claimant's experts used a DCF income approach while the respondent's experts argued that DCF is not appropriate because of the early stage of the project, so they proposed to use the market approach based on the current share price and looked at some of the costs exposed by claimants in comparison with similar projects undertaken where resources exist but not feasibility.

Challenges to Valuation Methods Specific to Seabed Mining

James Burrows elaborated on the challenges faced by the valuation methods considering the difference in terms of technology, forms, and risks between

seabed mining and its land-based counterpart. He mentioned that for instance, regarding the market approach, there will probably not be much market evidence or market valuation evidence in the early days of seabed mining. In this respect, reference to land-based mining will not be useful. As for the income approach, although it appears viable, it will similarly face the lack of an established record of performance. However, such an absence is not an insurmountable bar as illustrated recently in the Tethyan Copper v Pakistan case.

Burrows also noted that technology is also at stake because, as it frequently happens that despite the existence of a feasibility study and cash flow projections, the chance of success or failure of a mining project depends on the actual technology. More specifically, the newness of seabed mining means that the relevant technologies are largely untested. Therefore, extensive analysis from an engineering perspective will be required.

Another challenge arising for seabed mining is in relation to the projection of price in the case of DCF depending on the concentration or the openness of the market. Finally, for the cost-based approach, it is likely that the costs of a project would include a certain proportion of R&D costs so it would sometimes be difficult to sort out the project's specific costs. Mr. Burrows summarized his views with an optimistic remark regarding the possibility of overcoming these difficulties, although there is much left to be explored in the fields.

Conclusion

Like the previous editions, the 3rd edition of WAW brought about an opportunity to shine the spotlight on topics that are undoubtedly going to gain attention in the coming years. The panel discussed the future of seabed mining disputes in a comprehensive manner, covering of jurisdiction, merits, and quantum. The panel uncovered a double-edged sword: that mining in the Area will bring a lot of opportunities, yet, in terms of legal practice, this is largely a *terra incognita* where an analogy or comparison with land-based mining might not always be relevant.

References

[1] Art. 267 TFEU: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay”.

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