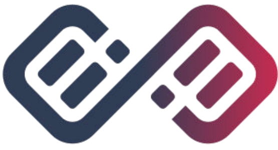

Sea of investment: 'Titanic' of international investment law meets 'iceberg' of the UNCLOS

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Abstract

As the global imperative to transition toward net-zero economies intensifies, competition for critical minerals has escalated, drawing attention to the largely untapped resources of the deep seabed. Under the United Nations Convention on the Law of the Sea (UNCLOS), the deep seabed and its resources are designated the "common heritage of mankind". However, the International Seabed Authority's (ISA) regulatory framework for exploitation remains underdeveloped, thereby creating significant potential for conflict within international law between parties with competing interests. In particular, an underexamined issue has been the interface of international investment law with deep seabed mining. This paper examines the intersection of international investment law and the UNCLOS regime in this context, highlighting the potential legal challenges arising from deep seabed mining projects in regions such as the Clarion-Clipperton Zone — as illustrated by Nauru's sponsorship of The Metals Company. In doing so, it demonstrates that the prevailing investment law regime risks creating premature limits on a state's authority to regulate based on environmental concerns, threatening the environmental stewardship objectives central to the UNCLOS regime. It focuses specifically on three issues: the threshold question of whether deep seabed mining qualifies as a protected investment; the asymmetry between UNCLOS obligations and the dispute settlement access available to sponsoring states and investors respectively; and the implications of this asymmetry for sponsoring state regulatory authority and environmental governance. By identifying a fundamental misalignment between investment law's emphasis on regulatory stability and UNCLOS's requirements for adaptive environmental management, the paper demonstrates that current international legal frameworks are inadequately designed to govern commercial activities in areas designated as the common heritage of mankind. In doing so, it points to the urgent need for legal and institutional reform before commercialization of the deep seabed forecloses the opportunity to achieve it.

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Non-Technical Summary

The world's push toward clean energy has created an urgent demand for critical minerals. As land-based sources of these minerals face increasing competition, attention has turned to the deep seabed, which contains vast untapped deposits. The ocean floor–beyond any country's borders–is emerging as the next frontier for mineral extraction, with commercial mining ventures already in advanced stages of exploration.

Under international law, the deep seabed belongs to no single country. The United Nations Convention on the Law of the Sea (UNCLOS) designates it the "common heritage of mankind", a legal concept reflecting the idea that these resources should be managed responsibly, for the benefit of all people, including future generations, and all countries. The International Seabed Authority (ISA), created by UNCLOS, is the international body responsible for regulating deep seabed activities, including mining. However, its rulebook for commercial exploitation remains incomplete, and commercial pressure to begin mining is already outpacing the development of adequate legal safeguards.

This paper identifies a serious and underexamined legal problem arising from this situation. Two bodies of international law, the law of the sea and international investment law, are pulling in opposite directions, and the consequences could be significant for environmental protection, for small developing nations, and for the coherence of international law itself.

On one side, UNCLOS places demanding environmental obligations on the countries that sponsor deep seabed mining companies. These sponsoring states, currently mostly small Pacific island nations, must ensure that the companies they authorise comply with environmental standards. Critically, these obligations are not fixed. As scientific understanding of deep-sea ecosystems evolves, sponsoring states are required to continuously strengthen their oversight and tighten their regulations accordingly. This adaptive approach to environmental governance is central to what UNCLOS demands.

On the other side, international investment law protects foreign investors from government actions that interfere with their business interests. If a government changes its regulations in ways that harm the investment, the investor may be able to sue for compensation, even where the change was made for entirely legitimate environmental reasons. The mere risk of facing such a compensation claim can deter governments from taking regulatory action they are otherwise legally required to take. This phenomenon, known as regulatory chill, lies at the heart of this paper's concern.

The tension is made worse by a structural gap in UNCLOS itself. When a dispute arises between a mining company and its sponsoring state, the company has no direct right to bring a claim against that state within the UNCLOS dispute settlement system. This forces such disputes into investment arbitration under investor-state dispute settlement (ISDS), a forum designed to adjudicate investment disputes. The result is that the legal system inadvertently privileges investor rights over the environmental governance goals that UNCLOS was designed to achieve.

The paper examines this problem through the experience of Nauru, a small Pacific island nation that has sponsored a subsidiary of The Metals Company, a Canadian mining corporation. Nauru's situation illustrates the dilemma with particular sharpness. As a low-lying island state on the frontline of climate change, Nauru has powerful reasons to take a cautious approach to deep seabed mining. Yet the sponsorship agreement it has signed contains investor protection provisions that constrain its regulatory freedom. If Nauru were to modify or withdraw its sponsorship in response to environmental concerns, it could face compensation claims potentially exceeding its entire national income or GDP. For a small, resource-constrained nation with limited

capacity to fight complex international legal battles, the mere prospect of such liability is enough to deter it from taking the regulatory steps its environmental obligations demand.

This dynamic is not unique to Nauru. Any state sponsoring deep seabed mining faces the same structural tension between its environmental duties and its exposure to investment claims. As commercial mining moves closer to reality, these pressures will only intensify. States may find themselves unable to fulfil their environmental obligations without triggering ruinous legal liability, while the common heritage principle, the foundational idea that the deep seabed belongs to humanity, risks being hollowed out by commercial interests.

The paper concludes that international law, as currently designed, is not equipped to govern commercial activity in areas such as the deep seabed. The conflict between investment law's insistence on regulatory stability and UNCLOS's requirement for adaptive environmental management is not merely a technical legal problem; it reflects a deeper failure of the international legal order to keep pace with the realities of deep seabed mining. Addressing this failure, whether through new legal arrangements, reformed arbitration practices, or stronger ISA regulations, is urgent. Once commercial deep seabed mining begins in earnest, the window to build a coherent and balanced legal framework may close permanently.

<u>Sea of investment: 'Titanic' of international investment law meets 'iceberg' of the UNCLOS</u>

- *Achyuth Anil*

1. Introduction

The global climate crisis has prompted countries to prioritize resilient supply-chains over post-war liberalization mandates. The race for critical raw material (**CRM**) exploitation has prompted countries to seek sustained access to CRMs from trusted partners and the onshoring of production opportunities through industrial policies, such as the U.S. Inflation Reduction Act. CRMs like lithium and cobalt, used in batteries, photovoltaic cells, and turbines, are critical in undertaking the green transition. This scramble for CRMs for the green transition is reminiscent of the "gold rush"[1] and is particularly attractive to investors. However, to meet their net-zero goals and consequent CRM sourcing requirements, countries are increasingly turning to unconventional sources, the ocean seabed that is abundant in CRMs, such as the Clarion-Clipperton Zone.

The mining of the deep seabed like the Clarion-Clipperton Zone is primarily governed by the international law framework under the United Nations Convention on the Law of the Sea (**UNCLOS**).[2] But this law remains relatively underdeveloped and unchartered territory of engagement in international law. The lack of legal and jurisprudential clarity creates significant risks, including the potential for unchecked and unsustainable extraction of CRMs, adverse ecological consequences and even transboundary harms. While the International Seabed Authority (**ISA**), a creation of the UNCLOS, is the institution in charge of framing the rules on deep seabed mining,[3] however it has yet to establish a fully developed regulatory framework related to exploitation. Against this background, the recent push for commercial seabed mining risks prioritization of commercial interests at the cost of undermining precautionary alternatives and risks to the "common heritage of mankind".[4] Moreover, as the exploitation of the deep seabed involves significant capital outlay, it creates a unique overlap of the international law of the seas and international investment law, inviting the rise of tensions and conflicts between the state and the investor, and between legal regimes.

These potential clashes are likely to be observed in the case of mining entities that would secure the license to mine the seabed from the ISA. Under UNCLOS, a mining entity must be sponsored by a state, provided it bears the same nationality or is effectively controlled by that state or its nationals.[5] This requirement ensures that the mining activities in the deep seabed (also called '**the Area**') are attributable to the sponsoring state, including compliance with environmental and regulatory obligations. Nauru sponsoring a local subsidiary of The Metals Company, a Canadian mining company, is a case in point.[6]

Such entities together with their sponsoring states, operate simultaneously within overlapping international legal regimes that appear to be based on divergent and contradictory principles. The UNCLOS framework establishes comprehensive environmental framework wherein states must ensure "effective protection for the marine environment" from harmful effects of activities in the Area and

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[1] *See,* The New "Gold Rush": Challenges Associated With Critical Raw Materials For The Green Transition, United Nations Office on Drugs and Crime, 11 March 2024, available at https://www.unodc.org/brulo/en/exchange-on-critical-raw-material.html; If We Want An Energy Transition, We Must Have More Mining, Arctic Economic Council, available at https://arcticeconomiccouncil.com/news/if-we-want-an-energy-transition-we-must-have-more-mining/.

[2] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (hereinafter "UNCLOS"). *See,* UNCLOS, Part XI; UNCLOS, Annex III.

[3] UNCLOS, Article 157.

[4] UNCLOS, Article 136.

[5] UNCLOS, Article 153.

[6]

implement precautionary approaches amid scientific uncertainty, which entails prevention, reduction and control of pollution, and protective measures for vulnerable ecosystems.[7] By contrast, many bilateral and multilateral investment instruments require host states to afford fair and equitable treatment, protect against unlawful expropriation, and maintain stable and predictable regulatory environments for foreign investors.[8]

The environmental and marine protection obligations placed on sponsoring states by UNCLOS can therefore come into direct conflict with investor-protection commitments exposing states to dual risks - potential responsibility for failure to adapt and enforce robust environmental measures under UNCLOS, and, conversely, potential investor–state claims where protective adaptations are alleged to breach investment protections or upset regulatory stability. This tension is particularly significant for sponsoring states like Nauru, which may face exposure to substantial investment claims where measures adopted to comply with evolving environmental obligations affect investor expectations, thereby creating an asymmetry between regulatory responsibility and financial risk. Moreover, as this paper demonstrates, the existence of substantive obligations under UNCLOS without corresponding access to dispute settlement for mining entities reflects a structural limitation within the framework to balance public and private rights, which in practice tilts the international adjudication of disputes towards investor–state dispute settlement mechanisms.

This uncharted nature of deep seabed mining law, combined with the critical importance of these minerals for global climate action and the high stakes involved for both environmental protection and economic development, presents a compelling area for legal analysis that demands urgent scholarly attention. Accordingly, this paper undertakes to examine the structural tension between the environmental obligations imposed under UNCLOS and the protections afforded to investors under international investment law in an emergent and largely unregulated area of resource extraction. The analysis reveals a systemic imbalance that risks undermining the environmental stewardship objectives central to the UNCLOS regime, as sponsoring states face impossible choices between fulfilling environmental obligations and avoiding investment arbitration liability. The paper first analyses how this tension exposes sponsoring states to legal risks, particularly where the adoption of adaptive environmental measures may give rise to investor–state claims. It then discusses the legal framework under UNCLOS governing activities in the Area, before considering the applicability of international investment law and related dispute settlement mechanisms. This shows how structural gaps in UNCLOS dispute settlement inadvertently channel disputes toward investment arbitration in ways that systematically privilege commercial interests over environmental governance. Finally, it evaluates the interaction between these regimes in practice, with particular reference to sponsoring states such as Nauru, illustrating how this asymmetry creates acute and potentially existential risks for small developing states. It concludes by assessing the resulting legal and policy implications for environmental governance and investment protection. In doing so, this paper points to the urgent need for reform before commercial deep seabed mining forecloses the opportunity to achieve it.

2. The Process of Deep Seabed Mining – Legal Overview

The legal process governing deep seabed mining in the Area is anchored in UNCLOS and implemented primarily through the ISA.[9] UNCLOS frames a dual regulatory architecture in which the ISA exercises central regulatory authority over exploration and exploitation while states retain important roles as sponsors of non-state applicants and as domestic regulators for sponsored entities.[10] This two-pronged

[7] UNCLOS, Art. 192-194, 204-206.
[8] See generally, Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012)
[9] UNCLOS, Art. 153, 157(1) and Annex III.
[10] UNCLOS, Art 153(2)(b).

process ensures that activities in the Area are tethered to national legal orders as well as to the international regime.[11]

Private entities cannot apply directly to the ISA unless they possess the nationality of a state party or are effectively controlled by such a state and hold certificates of sponsorship, making sponsorship the legal gateway linking non-state actors to the international regime.[12] An applicant seeking to operate in the Area must submit a plan of work to the ISA after entering into a sponsorship agreement with an UNCLOS member state.[13] The Legal and Technical Commission (**LTC**) of the ISA reviews technical and environmental aspects of the application, and an approved plan of work becomes the contractual basis for operations.[14]

The ISA's contract standard clauses import UNCLOS obligations and the ISA's regulations into the contractual relationship, giving the ISA broad supervisory powers, including inspection, reporting, auditing and, ultimately, suspension or termination of contracts for non-compliance. This functionally places the ISA in a regulatory role akin to a host state for contractual relations with contractors.[15]

This regulatory framework underscores the central role of states within the deep seabed mining regime. Beyond the institutional functions of the ISA, the conduct of activities in the Area is shaped by the legal and regulatory processes through which states act as sponsors and domestic regulators.

2.1 Obligations of States

2.1.1. Overview

UNCLOS establishes a comprehensive legal framework that places binding obligations on states to protect and preserve the marine environment across all maritime zones, including areas beyond national jurisdiction. Article 192 creates a general, overarching duty on states "to protect and preserve the marine environment,"[16] reinforced by related obligations across Part XII of the Convention.[17]

In the specific context of the Area, Article 145 requires the ISA and states acting through it to adopt rules, regulations and procedures to provide "effective protection for the marine environment" from harmful effects of activities in the Area, enumerating activities (drilling, dredging, excavation, disposal, construction and operation of installations, pipelines and related devices) that the regulatory regime must address.[18]

In addition to substantive obligations, UNCLOS expects states to carry out certain procedural obligations.[19] States and the ISA must take necessary measures to prevent, reduce and control pollution and other hazards and to protect rare or fragile ecosystems and habitats of depleted, threatened or endangered species.[20]

2.1.2 Common Heritage of Mankind

[11] Joanna Dingwall, 'International Investment Protection in Deep Seabed Mining Beyond National Jurisdiction' (2018) 19 Journal of World Investment & Trade 890, 910-11.
[12] UNCLOS Art. 153(2)(b).
[13] UNCLOS, Annex III, Art. 4(3)
[14] UNCLOS, Art. 153(3), 165(2)(b) and Annex III, Art. 3(5).
[15] See e.g., UNCLOS, art 153(4)-(5), Art 157, Art. 162, Art 165 and Annex. See also, Joanna Dingwall (n.11) p.890–929.
[16] UNCLOS, Art. 192.
[17] South China Sea Arbitration, Philippines v China, Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration [PCA] para. 927, 940.
[18] UNCLOS, Art. 145.
[19] UNCLOS, Art. 145.
[20] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, (hereinafter, "2011 Advisory Opinion")p.10

The designation of the Area and its resources as the "common heritage of mankind" under Article 136 creates specific legal obligations. The principle embodies several core elements: the Area cannot be subject to national appropriation; activities must be conducted for the benefit of mankind as a whole; there should be equitable sharing of benefits derived from the Area; the Area should be used exclusively for peaceful purposes; and there should be protection of the environment and conservation of resources for future generations.[21]

Article 140 operationalises these obligations by requiring that activities in the Area be carried out "for the benefit of mankind as a whole" and mandating the ISA to "provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis."[22] The principle encompasses both intergenerational equity concerns and environmental stewardship responsibilities that constrain how deep seabed resources may be exploited.

The common heritage principle also includes environmental conservation and preservation of the Area as essential components, requiring that conservation targets incorporate research to determine necessary measures for effective environmental protection.[23] This creates legal obligations to balance exploitation activities with long-term environmental preservation for current and future generations.[24]

2.1.3 Due Diligence

Articles 204–206 establish the duty to conduct environmental impact assessments (EIAs) and to monitor and report where planned activities may cause significant and harmful changes to the marine environment.[25]

UNCLOS assigns direct obligations to sponsoring states that create specific regulatory imperatives calibrated to the risks of deep seabed mining activities. Article 139(1) establishes that states 'shall have the responsibility to ensure' that sponsored entities conduct activities in conformity with Part XI, while Article 153(4) requires states to 'assist the Authority by taking all measures necessary to ensure such compliance'.[26]

These obligations are reinforced by the precautionary approach, which the ISA's exploration regulations explicitly incorporate as part of sponsoring states' due diligence duties.[27] The precautionary approach requires protective measures even under scientific uncertainty, mandating that 'the absence of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[28] In deep seabed mining contexts, this may translate to regulatory requirements for best environmental practices and adaptive management systems.

The Seabed Disputes Chamber (**SDC**) of the International Tribunal for the Law of the Sea (**ITLOS**) in its 2011 *Advisory Opinion on the Responsibilities and Obligations of Sponsoring States* (hereinafter, **2011 Advisory Opinion**)[29] clarified that these provisions establish due diligence obligations requiring

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[21] UNCLOS Art. 136; See also, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) (17 December 1970).
[22] UNCLOS Art. 140(1)-(2).
[23] UNCLOS, Art. 145.
[24] Isabel Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation' (2019) 30 European Journal of International Law 601, p.603-604
[25] UNCLOS, Art. 204, 205 and 206.
[26] UNCLOS Art. 139(1), 153(4).
[27] ISA, 'Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area' ISBA/16/A/12/Rev.1, Annex 4, s 5.1.
[28] Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26/Rev.1 (Vol. I), Principle 15.
[29] 2011 Advisory Opinion (n. 20)

states to ‘deploy adequate means, to exercise best possible efforts, [and] to do the utmost’ to ensure contractor compliance.[30] Due diligence in this context is not a static standard but requires continuous adaptation to evolving circumstances. The Chamber emphasised that ‘measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge’.[31]

This adaptive character of due diligence creates specific regulatory imperatives. States must adopt appropriate domestic laws and administrative measures to make contractor obligations enforceable within their legal systems.[32] They must establish oversight mechanisms proportionate to the risks involved, including monitoring, inspection, and enforcement capabilities.[33] Where scientific understanding evolves or new risks emerge, states are obligated to strengthen their regulatory frameworks accordingly.[34]

The obligation extends to ensuring access to domestic courts and remedies for environmental damage, as Article 235(2) requires states to ensure that ‘recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief’ for pollution damage,[35] creating both substantive and procedural regulatory requirements that states cannot satisfy through passive or minimal approaches.[36]

2.1.4 Regulatory Tools

The ISA has a central regulatory role under UNCLOS as the organisation “through which States Parties shall … organise and control activities in the Area.”[37] The LTC is tasked with preparing regulations, reviewing plans of work and assessing environmental impacts for Council consideration.[38]

The ISA’s exploration regulations and LTC guidance operationalise these procedural duties by requiring contractors and sponsoring states to prepare EIAs, monitoring programmes and environmental management and mitigation plans as part of plans of work.[39] Article 162(2)(x) gives the ISA Council explicit power to disapprove areas for exploitation where “substantial evidence indicates the risk of serious harm to the marine environment,”[40] thereby embedding a precautionary safeguard in decisions to permit exploitation.[41]

Article 162(2)(x) empowers the ISA Council to ‘disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment’.[42] This provision establishes a precautionary threshold that prioritises environmental protection over commercial exploitation where serious harm risks are evident.

Similarly, Article 162(2)(w) requires the ISA Council to ‘issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine

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[30] 2011 Advisory Opinion (n. 20), para 110
[31] 2011 Advisory Opinion (n. 20), para 117.
[32] 2011 Advisory Opinion (n. 20), paras 218-220; UNCLOS Annex III Art 4(4)
[33] 2011 Advisory Opinion (n. 20), para 115
[34] 2011 Advisory Opinion (n. 20), para 117
[35] UNCLOS Art. 235(2).
[36] 2011 Advisory Opinion (n. 20), para 117-120, 230.
[37] UNCLOS, Art. 157(1).
[38] UNCOS, Art. 165.
[39] UNCLOS Art. 165. See also ISA, ‘The Legal and Technical Commission’ (ISA, 17 March 2022) https://www.isa.org.jm/organs/the-legal-and-technical-commission/
[40] UNCLOS Art. 162(2)(x)
[41] Pradeep A Singh, Aline Jaeckel and Jeff A Ardron, ‘A Pause or Moratorium for Deep Seabed Mining in the Area? The Legal Basis, Potential Pathways, and Possible Policy Implications’ (2025) 56 Ocean Development & International Law 18
[42] UNCLOS Art. 162(2)(x)

environment arising out of activities in the Area'.[43] These emergency powers reflect recognition that environmental protection in deep seabed contexts may require rapid regulatory responses that cannot await lengthy consultative processes.[44]

At the sponsoring state level, the regulatory toolbox includes the authority to modify or revoke sponsorship certificates where necessary to ensure compliance with environmental obligations. While UNCLOS does not explicitly regulate sponsorship termination procedures, the due diligence framework requires states to maintain effective control over sponsored entities, including the authority to withdraw sponsorship where contractors fail to meet environmental standards.[45]

The exercise of these regulatory tools is not merely permissible but may be legally required where environmental protection obligations demand action. The Advisory Opinion confirmed that sponsoring states bear liability for damage resulting from their failure to exercise due diligence, creating legal incentives for robust regulatory oversight and prompt corrective action.[46]

3. The Investment Question

The question of whether deep seabed mining investors can invoke the protection of investment law requires careful analysis of both jurisdictional prerequisites and the application of substantive investment protection standards to this novel regulatory context. While theoretical pathways exist for such investment treaty claims, their availability remains subject to significant legal uncertainty, particularly in light of jurisdictional and substantive barriers, including nationality conflicts, territorial requirements, and definition of covered investment, may limit the scope of available remedies. The following analysis examines these threshold issues and considers whether the sponsorship framework can create sufficient legal and economic connections to support investment protection claims.

Notwithstanding these analytical pathways, the application of international investment law to deep seabed mining remains characterised by a degree of doctrinal uncertainty. The unique legal status of the Area as a space beyond national jurisdiction, coupled with the interposition of the sponsorship framework under UNCLOS, raises unresolved questions as to how core investment law requirements are to be satisfied in this context. These uncertainties do not preclude the possibility of investment protection, but they qualify the extent to which such protection can be regarded as settled.

3.1 Investment Definition

A preliminary and threshold issue in applying international investment law to deep seabed mining is whether exploration or exploitation activities in the Area qualify as an "investment" under bilateral or multilateral investment treaties (BITs/MITs). Examining entities that apply for sponsorship and enter into agreements with the ISA through the lens of the *Salini* test, such entities could constitute an investment.[47] The Salini tribunal introduced a clear four-pronged test to determine the existence of an investment: (1) a contribution of money or assets; (2) a certain duration over which the project was to be implemented; (3) an element of risk; and (4) a contribution to the host state's economy.[48]

Moreover, most investment treaties adopt broad, asset-based definitions of "investment," covering physical assets, shares, IP rights, and financial claims, all integral to deep-sea mining operations.[49] In

[43] UNCLOS Art. 162(2)(w).
[44] Neil Craik, 'Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining' ISA Discussion Paper No 4 (June 2016) p.22
[45] 2011 Advisory Opinion (n. 20), paras 117-120; ISA, (n. 27).
[46] 2011 Advisory Opinion (n. 20), paras 189, 184.
[47] *Salini Costruttori SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) paras 50–58
[48] ibid para 52.
[49] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012) 62–65

treaty practice, most investment agreements condition protection upon the existence of an "investment" in the form of a contribution of capital or resources, entailing risk and an expectation of gain, and that such an investment is made "in the territory" of the host State.[50]

The latter requirement becomes contentious in the case of deep seabed mining because the "Area," as defined in Article 1(1) of the United Nations Convention on the Law of the Sea (UNCLOS), comprises the "seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction," and is expressly excluded from the sovereignty of any State and designated the *common heritage of mankind*.[51] The UNCLOS further prohibits any claim to or exercise of sovereignty over any part of the Area or its resources.[52] This *sui generis* legal status raises an interpretive challenge: if the mining site is not the *territory* of any state, can the sponsoring state nonetheless serve as the territorial anchor for investment law purposes?

Sponsoring states are indispensable under the UNCLOS as any contractor seeking an exploration or exploitation contract from the International Seabed Authority (ISA) must be "sponsored" by a State Party of which it is a national, or which effectively controls it.[53] Most sponsoring states require the contractor to incorporate locally, obtain a certificate of sponsorship, and sometimes enter into a sponsorship agreement governed by national law.[54]

Such sponsorship is not a mere formality but the jurisdictional and regulatory bridge between the global commons and national legal systems. This was confirmed in the 2011 Advisor Opinion by the SDC noting that the 'notion of "sponsorship" is a key element in the system for the exploration and exploitation of the resources in the Area.'[55] The SDC further explained that the sponsorship system is designed to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems.[56]

The SDC also affirmed that a sponsoring state is under a binding duty of due diligence to ensure that entities it sponsors comply with UNCLOS, the rules, regulations, and procedures of the ISA, and the terms of the approved plan of work.[57] This duty requires the adoption of domestic legislation, the establishment of administrative and enforcement mechanisms, and the maintenance of on-going oversight, calibrated to the risks posed by the activity. A failure to fulfil these functions, resulting in a contractor's non-compliance and causing damage, the responsibility of which may be on the sponsoring state.[58]

Moreover, by entering into a contract with the ISA, a private contractor becomes directly bound by the various international legal obligations related to deep seabed mining. The standard clauses in the ISA contract incorporate both the substantive requirements of UNCLOS provisions on activities in the Area and the ISA Regulations, into the contractual framework. In doing so, it establishes a nexus between the UNCLOS, and the secondary law enacted by the ISA [i.e., the ISA Regulations] and the contract for exploration.[59]

[50] Ibid.
[51] UNCLOS, Art. 136.
[52] UNCLOS, Art. 137(1).
[53] UNCLOS, Art. 153(2)(b) and Annex III, Art. 4.
[54] Alberto Pecoraro, 'UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?' (2020) GCILS Working Paper No 5.
[55] 2011 Advisory Opinion (n. 20), para 74
[56] 2011 Advisory Opinion (n. 20), Para 75.
[57] 2011 Advisory Opinion (n. 20), paras. 117-120, 180, 230.
[58] 2011 Advisory Opinion (n. 20), Para 121
[59] Markos Karavias, Corporate Obligations Under International Law (OUP 2013) 124.

Thus, the sponsorship regime can operate as an intentional legal "tether" that brings otherwise non-territorial mining activities in the seabed within the orbit of a sponsoring state's domestic legal order, similar to national licensing or concession regimes for natural resource extraction onshore.[60] The sponsoring state confers legal rights to operate, subjects the investor to national regulation, collects fees or royalties, and often provides the jurisdiction for dispute settlement. These actions arguably reinforce the legal and economic integration of the deep seabed mining activity into the sponsoring state's jurisdiction. The structuring of these activities through locally incorporated subsidiaries subject to national approval and sponsorship potentially creates a plausible territorial connection to bring seabed investments within the scope of BITs.[61]

3.2 Investor Nationality

Ordinarily, customary rules on the protection of investment do not afford protection to investors against their own state of nationality, as would be the case in deep seabed mining arising out of sponsorship.[62] However, the parties can choose to recognise an entity that formally holds the host state's nationality can be treated as a foreign investor because it is subject to external control. Under the ICSID Convention an entity can be considered to be a national of another contracting state when it has the nationality of the contracting state which is a party to the dispute on the date that the parties consented to submit their dispute to conciliation or arbitration and which, 'because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'.[63]

When there is no agreement to treat a local corporation as foreign, a foreign shareholder of a local company may nonetheless be permitted to pursue a claim in its own name. The definition of investment in most international investment treaties includes participation in a company as part of the protected international investment.[64] Through this definition, participation in the locally incorporated company qualifies as the investment and, even though the local company cannot pursue the claim internationally, its foreign shareholder may pursue a claim in its own name.

Further, the ILC Draft Articles on Diplomatic Protection also provides an exception to this scenario. It recognizes that the state of nationality of the shareholders of a corporation may seek diplomatic protection for injury to the corporation even though it is incorporated in the state alleged to have caused the injury where 'incorporation in that State was required by it as a precondition for doing business there.'[65] This exception applies to deep sea mining since UNCLOS require the sponsorship applicant to be a body corporate registered in its sponsoring state.

3.3 Territoriality

Investment treaty jurisprudence has interpreted "territory" broadly adopting a functional than a strictly territorial approach, looking not only to the physical location of assets but also to zones under the host state's functional jurisdiction or regulatory control.

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[60] Joanna Dingwall (n.11).
[61] Pecoraro (n.54)
[62] *Dunkwa Continental Goldfields Limited & Continental Construction and Mining Company Limited v The Government of the Republic of Ghana* (ICC Case No. 18294/ARP/MD/TO) Award, 9 July 2015, paras 345, 346 and *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, para 46.
[63] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), Art. 25(2)(b)
[64] For example, see Bahrain-Japan BIT, Art. 1(a)(ii) provides "*shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom*" to be part of covered investment.
[65] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections) (Judgment)* [2007] ICJ Rep 582, para 39.

Tribunals have recognized their jurisdiction over economic operations even in situations where substantial aspects of those operations occurred outside the host state's territory. In *SGS v. Pakistan*, for example, the tribunal accepted jurisdiction over services performed partly abroad, stressing that the legal and economic relationship was anchored in Pakistani law.[66] The tribunal in *Holiday Inns v. Morocco*[67] articulated that an investment is a complex operation composed of interrelated transactions. The tribunal clarified that "the act which is the basis of the investment" (the principal investment contract) must be identified and other juridical acts should be treated as "measures of execution."[68]

However, the *Deutsche Telekom v. India*[69] award provides a particularly relevant precedent. The case concerned the Indian government's refusal to permit the use of electromagnetic spectrum allocated to India by the International Telecommunications Union (similar to the ISA to the extent both allocates a common resource). The claimant in this case held shares in a corporation which had entered into a contract to lease S-band transponders on two satellites to Devas in order to provide internet services in India.[70] This contract was terminated on the grounds of national security considerations[71], which subsequently gave rise to the case. India did not contest jurisdiction on the basis of the investment's location, even though significant aspects of the investment activities occurred outside beyond its border. The tribunal held that the investment occurred in the territory of India. The tribunal also clarified that 'the requirement that the investment be in the territory of the host state does not restrict the way in which such investment can be made. It suffices that the result of the investment activity, i.e. relevant assets, be in the territory of the host state.'[72]

As noted earlier, deep seabed mining operations can satisfy the core jurisdictional requirements for investment protection of meeting investment definitions, establishing territorial nexus through sponsorship frameworks, and satisfying nationality requirements through complex corporate structures. UNCLOS oblige the foreign investor in deep seabed mining to incorporate a company in the sponsoring state. The foreign investors are also required to establish and acquire in the sponsoring state a combination of assets that traditionally sustain investment activity.[73] However, does UNCLOS integrate investment protection standards into its regulatory framework, or should investors rely solely on investment treaties for protection? This question is particularly significant given that UNCLOS serves as the foundational legal regime for all activities in the Area and provides its own comprehensive dispute settlement mechanisms.

4. Investment Protection and Dispute Settlement in UNCLOS

4.1 Customary International Law

In establishing that deep seabed mining enterprises may qualify as "investments" under international investment law, it is clear that such enterprises can avail the protections under applicable investment treaties. However, it is worth exploring whether UNCLOS itself incorporates customary international law standards, specifically regarding investment protections, into its regulatory framework. This analysis is crucial because if UNCLOS integrates such standards, the UNCLOS's dispute settlement mechanisms could provide a forum for resolving investment disputes, rather than relying on investor-

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[66] *SGS Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (2003).
[67] *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1 (Jurisdiction). (ICSID Arbitral Tribunal, Case No ARB/72/1, 12 May 1974)
[68] ibid, para 159.
[69] *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award of 13 December 2013
[70] ibid, para 386.
[71] ibid, para 178.
[72] *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award of 13 December 2013, para 151.
[73] Pecoraro (n.54)

state dispute settlement considering the UNCLOS serves as the basis for all activities in the Area. The extent to which UNCLOS incorporates customary international investment law standards depends on careful analysis of specific treaty provisions that reference general international law principles and UNCLOS's relationship to broader customary law obligations. Several provisions suggest significant integration of customary standards that may provide substantive protection for investor interests.

Article 138 requires that the 'general conduct of States' in relation to the Area 'shall be in accordance with this Part and the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding'.[74] This provision explicitly incorporates 'other rules of international law' into the deep seabed mining regime, creating potential for customary investment protection standards to apply within the UNCLOS framework.[75]

The reference to 'principles embodied in the Charter of the United Nations' may encompass fundamental principles of international economic law, including non-discrimination, proportionality, and good faith in international relations.[76] These principles bear close resemblance to core investment protection standards and may provide substantive constraints on sponsoring state conduct that affects foreign investor interests.[77]

Further, Article 139(2) establishes that sponsoring states bear responsibility for ensuring contractor compliance with UNCLOS obligations, but limits state liability to circumstances where they have failed to carry out their responsibilities with due diligence.[78] The Seabed Disputes Chamber's 2011 Advisory Opinion clarified that this provision incorporates customary international law standards of state responsibility, including the requirement that states exercise due diligence in preventing harm by entities under their jurisdiction.[79]

Significantly, the 2011 Advisory Opinion noted that where sponsoring states fail to fulfil their due diligence obligations but no material damage results, 'the consequences of such a wrongful act are determined by customary international law'.[80] This incorporation of customary law standards for state responsibility may extend to protection of investor interests where sponsoring state conduct violates international minimum standards of treatment.[81]

Additionally, Article 304 provides that UNCLOS provisions concerning responsibility and liability are 'without prejudice to the existing rules and the development of further rules regarding responsibility and liability under international law'.[82] This preservation clause ensures that customary international law obligations concerning treatment of foreign nationals continue to apply within the deep seabed mining regime, potentially including customary investment protection standards.[83]

The 2011 Advisory Opinion emphasised that this provision 'opens the liability regime for deep seabed mining to new developments in international law', suggesting that evolving customary investment law standards may be incorporated into UNCLOS obligations as they develop.[84] This dynamic approach to

[74] UNCLOS, art 138
[75] Pecoraro (n.54), page 28.
[76] Pecoraro (n.54), page 28-30.
[77] Pecoraro (n.54), page 28-30.
[78] UNCLOS, Art. 139(2)
[79] 2011 Advisory Opinion (n. 20), paras 110-120.
[80] 2011 Advisory Opinion (n. 20), para 210.
[81] Pecoraro (n.54), page 31
[82] UNCLOS, Art. 304
[83] 2011 Advisory Opinion (n. 20), para 211.
[84] ibid.

customary law integration may prove particularly significant as investment protection standards continue to evolve through state practice and judicial decisions.[85]

4.2 Standards of Protection of Investment

Beyond general incorporation of customary international law, UNCLOS contains specific provisions that create investment-like protections for contractors, suggesting intent to afford substantive investment security within the treaty regime. These provisions may be interpreted and applied with reference to customary investment law standards to provide comprehensive protection for investor interests.

a. Security of Tenure

Article 153(6) requires that contracts between the ISA and contractors 'shall provide for security of tenure', while Annex III, Article 16 grants contractors 'the exclusive right to explore for (or exploit) the resources of the allocated area'.[86] This security of tenure guarantee functions analogously to investment treaty protections against expropriation, creating legitimate expectations that contracted rights will not be arbitrarily withdrawn.[87]

The SDC has emphasised that security of tenure represents a 'crucial feature' of the deep seabed mining regime, suggesting that interference with these rights would require substantial justification consistent with international legal standards.[88] Where sponsoring state conduct effectively undermines contractor security of tenure, such as through arbitrary sponsorship termination, customary investment law standards may inform assessment of whether such conduct violates UNCLOS obligations.[89]

b. Non-Discrimination Requirements

Several UNCLOS provisions require non-discriminatory treatment of contractors and sponsoring states. Article 157(4) requires the ISA to fulfil its powers 'in good faith', while various provisions mandate 'uniform' application of regulations and prohibition of discrimination in the ISA's exercise of powers.[90] These requirements extend beyond the ISA to encompass sponsoring state conduct that affects the broader regulatory framework.[91]

The non-discrimination principle in international investment law prohibits states from treating foreign investors less favourably than domestic investors in like circumstances, or from singling out particular foreign investors for adverse treatment.[92] Sponsoring state conduct that discriminates against particular contractors or foreign investor interests might violate both UNCLOS non-discrimination requirements and customary international law standards.[93]

c. Reasonableness

UNCLOS contains multiple references to 'reasonable' and 'appropriate' standards that may incorporate proportionality requirements analogous to those found in investment law. Article 17(2)(f) of Annex III

[85] Pecoraro (n.54) page 32
[86] UNCLOS Art. 153(6) and Annex III, Art 16
[87] Joanna Dingwall (n.11), pages 905-907
[88] 2011 Advisory Opinion (n. 20), para 102.
[89] Joanna Dingwall (n.11), page 907
[90] UNCLOS art 157(4)
[91] Joanna Dingwall (n.11), page 910
[92] National Treatment, OECD Declaration on International Investment and Multinational Enterprises (adopted 21 June 1976, revised 2011).
[93] Pecoraro (n.54), p.30

requires environmental protection measures to be 'reasonably appropriate', while Article 4(4) of Annex III requires sponsoring state measures to be 'reasonably appropriate for securing compliance'.[94]

Investment arbitration tribunals regularly apply proportionality analysis to assess whether regulatory measures bear appropriate relationships to their stated objectives and avoid unnecessarily burdensome impacts on investor interests.[95] Similar analysis might apply to sponsoring state measures affecting deep seabed mining investments, requiring that regulatory actions be proportionate to identified risks and avoid excessive interference with contractor operations.[96]

d. Emergency Powers

UNCLOS provides the ISA Council with powers under Article 162(2)(w) to 'issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area'.[97]These emergency powers reflect recognition that environmental protection in deep seabed contexts may require rapid regulatory responses that cannot await lengthy consultative processes. However, the exercise of such powers must be balanced against investor legitimate expectations and security of tenure guarantees.[98]

e. Compensation Mechanisms

Article 235(2) of UNCLOS requires that states ensure their domestic legal systems provide for 'prompt and adequate compensation or other relief' for damage to the marine environment caused by natural or juridical persons under their jurisdiction.[99] This provision establishes a framework for compensation that may extend to investor claims where sponsoring state conduct results in damage to investment interests, particularly where such conduct violates due diligence obligations or undermines security of tenure.[100]

Taken together, these provisions indicate that UNCLOS embeds a coherent set of substantive protections that closely parallel core standards of international investment law. While framed within a distinct law-of-the-sea context and balanced by heightened environmental imperatives, these standards support an interpretative approach in which customary investment law may inform the content and application of UNCLOS obligations, thereby reinforcing legal certainty and investor confidence without undermining the treaty's overarching objectives.

4.3. UNCLOS Dispute Settlement

The incorporation of customary international law standards, potentially encompassing investment protections, within the UNCLOS framework raises the critical question of whether investors possess the requisite capacity to invoke these protections through the Convention's dispute settlement mechanisms. The existence of substantive protections within the UNCLOS framework, while legally significant, remains of limited practical utility absent corresponding procedural avenues for their enforcement. This inquiry necessitates a careful analysis of the jurisdictional provisions governing UNCLOS dispute settlement bodies.

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[94] UNCLOS Annex III, arts 17(2)(f), 4(4)
[95] *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 122
[96] Pecoraro (n.54), p.31
[97] UNCLOS Art 162(2)(w)
[98] Neil Craik, 'Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining' ISA Discussion Paper No 4 (June 2016) 22
[99] UNCLOS Art. 235(2)
[100] 2011 Advisory Opinion (n. 20), para 184, 189

The UNCLOS establishes a comprehensive and sophisticated dispute settlement architecture specifically tailored to the unique challenges of regulating activities in the deep seabed beyond national jurisdiction. The system is a sui generis dispute-settlement architecture for "activities in the Area" that combines treaty adjudication, specialised chamber review and contractual arbitration in a single, interlocking system. At the heart of the UNCLOS dispute settlement system lies the Seabed Disputes Chamber (SDC) of the ITLOS, which enjoys contentious jurisdiction over various categories of disputes relating to activities in the Area.[101] Article 187 of the UNCLOS confers on the SDC jurisdiction over disputes between State Parties concerning the interpretation or application of Part XI and its related Annexes, disputes between State Parties and the International Seabed Authority concerning alleged violations of the deep seabed mining regime, and crucially, disputes between parties to mining contracts, including disputes between the Authority and contractors regarding the interpretation or application of contracts or plans of work.[102] The Chamber's jurisdiction extends to acts or omissions by parties to contracts that affect legitimate interests, liability questions under Article 22 of Annex III, and disputes concerning the Authority's refusal to grant contracts where legal prerequisites have been satisfied.[103]

This broad jurisdictional grant is, however, subject to important limitations codified in Article 189. The UNCLOS expressly prohibits the SDC from exercising judicial review over the ISA's discretionary powers stating "in no case shall it substitute its discretion for that of the Authority," and prevents the SDC from pronouncing on whether the ISA's rules, regulations and procedures conform to the SDC or declaring such instruments invalid.[104] The SDC's review jurisdiction is instead "confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and claims for damages."[105] This careful delimitation preserves the ISA's regulatory autonomy while ensuring that contractors and states retain meaningful judicial recourse against ultra vires acts or individual applications that breach treaty or contractual obligations.

a. Commercial Arbitration

Recognising the commercial nature of deep seabed mining operations, Article 188(2) of UNCLOS permits parties to contractual disputes to submit their disagreements to binding commercial arbitration conducted under the UNCITRAL Arbitration Rules.[106] This option provides contractors and the ISA with access to specialised commercial dispute resolution procedures that may be more suited to technical mining disputes than traditional inter-state adjudication. However, the UNCLOS establishes a crucial limitation: arbitral tribunals are expressly forbidden from deciding questions concerning the interpretation of UNCLOS or its related agreements.[107]

Where such interpretive questions arise, as they inevitably will in disputes touching on the scope of ISA powers, the meaning of treaty obligations, or the relationship between contractual terms and UNCLOS requirements, the arbitral tribunal must refer the question to the Seabed Disputes Chamber for a binding ruling.[108] Once the Chamber delivers its interpretive determination, the arbitral tribunal must render its award "consistently with the decision of the Seabed Disputes Chamber."[109] This mandatory preliminary

[101] UNCLOS, art 187; Joanna Dingwall (n.11), 920-925
[102] UNCLOS, art 187(a)-(c).
[103] UNCLOS, art 187(c)-(e); see Joanna Dingwall (n.11),p. 922-923.
[104] UNCLOS, art 189.
[105] UNCLOS, art 189.
[106] UNCLOS, art 188(2)(a) and (c).
[107] UNCLOS, art 188(2)(a).
[108] UNCLOS, art 188(2)(a).
[109] UNCLOS, art 188(2)(b).

reference mechanism serves several critical functions. First, it ensures uniform interpretation of the UNCLOS across multiple dispute resolution fora. Second, it preserves the Chamber's authoritative role in treaty interpretation, and finally, it prevents fragmentation of UNCLOS jurisprudence that might otherwise result from inconsistent arbitral awards.

However, while the system ensures coherent interpretation of UNCLOS obligations, it simultaneously reinforces the Convention's restrictive approach to standing. The mandatory referral of treaty interpretation questions to the SDC effectively channels all UNCLOS-related disputes through a forum where contractors lack general standing against sponsoring states. This structural limitation becomes particularly significant when contractors seek to invoke customary investment law protections that may be incorporated within UNCLOS as contractors cannot directly challenge sponsoring state conduct. Therefore, the UNCLOS dispute settlement mechanism effectively excludes the disputes against sponsoring states from contractors, thereby channelling such claims toward alternative forums outside the UNCLOS framework.

b. Access to Dispute Settlement

The UNCLOS's provisions carefully delineate which actors may bring claims before the various dispute settlement mechanisms. State parties enjoy broad access to the SDC for disputes concerning interpretation and application of Part XI, while the ISA may bring claims against states for alleged violations of their sponsoring obligations.[110] Contractors possess specific standing rights under Article 187(c) to challenge contractual interpretations, to contest acts or omissions affecting their legitimate interests, and to seek remedies for the ISA's wrongful refusal to grant contracts.[13] However, significantly, the UNCLOS does not grant contractors general standing to bring direct claims against their sponsoring states before the SDC, a limitation that channels such disputes toward domestic remedies, sponsorship agreements,[111] or of particular relevance for this paper, towards investment tribunals.

The legislative history of Part XI reveals that the drafters' attention was primarily focused on the ISA's supervisory functions rather than potential conflicts between contractors and their state sponsors.[112] The rationale for the omission is unclear with some suggesting that the omission may reflect the assumption that only companies sharing the nationality of their sponsoring state would engage in deep seabed mining activities.[113]

Further, while Article 188 permits disputes between parties to mining contracts to be submitted to commercial arbitration, such tribunals lack jurisdiction over questions of UNCLOS interpretation.[114] More critically, there exists no mechanism within Part XI for settling disputes arising from the termination of sponsorship certificates, despite the only requirement being written notice to the ISA with accompanying reasons.[115] A contractor has no direct routes for dispute resolution again its sponsoring state within the UNCLOS system.[116] This limitation extends beyond sponsorship

[110] UNCLOS, art 187(a)-(b).
[111] UNCLOS, art 187; See also, Tara Davenport, 'Responsibility and Liability for Damage Arising Out of Activities in the Area: Potential Claimants and Possible Fora' (CIGI Liability Issues for Deep Seabed Mining Series Paper No 5, February 2019)
[112] 2nd Meeting of the First Committee, Third United Nations Conference on the Law of the Sea, Official Records, 1st Comm, 3rd sess, 22nd mtg, UN Doc A/CONF.62/C.1/SR.22 (28 April 1975) 69 [41]; See also, Alberto Pecoraro, 'Law of the Sea and Investment Protection in Deep Seabed Mining' (2020) 41 Melbourne Journal of International Law 530, p. 542.
[113] Alberto Pecoraro, 'Law of the Sea and Investment Protection in Deep Seabed Mining' (2020) 41 Melbourne Journal of International Law 530, p. 542.
[114] UNCLOS, Art. 188(2)(a).
[115] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/19/C/17, reg 29(2).
[116] Linlin Sun, 'Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective' (2017) 18 Melbourne Journal of International Law 71, p. 83; See also Joanna Dingwall (n.11), p. 929

termination to encompass broader regulatory disputes, as contractors lack standing to bring claims before the Seabed Disputes Chamber against their sponsoring state, other independent contractors, or third states conducting activities in the Area.[117]

Consequently, any disputes between contractors and sponsoring states, including those related to the terms of sponsorship agreements themselves, fall to be resolved through other means viz., domestic law.[118] This framework effectively channels dispute resolution through domestic legal orders rather than international mechanisms, requiring investors to secure adequate protections within their sponsorship agreements and domestic legal frameworks when structuring their investments.[119] Therefore, the exclusion of direct access to UNCLOS dispute settlement mechanisms for contractor-sponsoring state disputes compels consideration of whether alternative international avenues for dispute resolution remain available to investors. Specifically, this raises the question of whether investors in deep seabed mining ventures may invoke investor-state dispute settlement (**ISDS**) mechanisms under investment treaties, notwithstanding the specialised regulatory framework governing activities in the Area. The viability of such ISDS claims would depend upon establishing both the jurisdictional prerequisites of the relevant investment treaty and demonstrating that the subject matter of the dispute falls within the treaty's substantive scope of protection.

5. Investment Arbitration as an Alternative Dispute Resolution

The absence of direct recourse to UNCLOS dispute settlement mechanisms for contractor-sponsoring state disputes necessitates examination of alternative avenues for the international adjudication of investment-related claims arising from deep seabed mining activities. Investment treaty arbitration represents a potential alternative forum through which foreign investors may seek redress against sponsoring states for measures affecting their deep seabed mining operations. Unlike the UNCLOS framework, which limits standing in disputes between contractors and sponsoring states, the modern network of bilateral and multilateral investment treaties provides qualifying foreign investors with direct access to international arbitration against host states. The proliferation of ISDS mechanisms has created a parallel system of international economic adjudication that operates independently of specialised sectoral regimes, potentially offering deep seabed mining investors an avenue to vindicate investment rights that may be unavailable under the UNCLOS's dispute resolution framework. The question thus arises whether this extensive treaty network can accommodate disputes arising from the distinctive legal and territorial characteristics of deep seabed mining activities conducted beyond national jurisdiction under the auspices of the ISA's regulatory authority.

The jurisdictional foundation for ISDS requires satisfaction of three core elements of covered investment status, investor nationality, and territorial nexus.[120] As explained hereinabove, a deep seabed mining contractor can fulfil these conditions, thereby opening the doors to a potential ISDS dispute in the event of investor's rights being affected. The territorial nexus requirement, potentially the most challenging element given that physical mining occurs beyond national jurisdiction, has been addressed by arbitral jurisprudence.[121] The sponsorship system itself creates the requisite territorial connection by legally "tethering" extraterritorial activities to domestic regulatory frameworks.[122] Therefore, where a sponsoring state withdraws the sponsorship to a deep seabed mining entity. imposes additional environmental obligations or takes any other action that may adversely affect the deep sea mining

[117] ibid, Joanna Dingwall (n.11), p.929.
[118] Linlin Sun (n. 117), p. 83
[119] Joanna Dingwall (n.11), p. 929
[120] *Salini Costruttori SpA v Kingdom of Morocco* (n. 47), paras 50-58
[121] See *Holiday Inn vs. Morrocco* (n. 68) and *Deutsche Telekom v. India* (n. 70).
[122] Joanna Dingwall (n.11), 897

investor's rights, this can overcome the jurisdictional hurdle and potentially violate substantive investor protection standards.

5.1. Investment Protections Under International Investment Law

Deep seabed mining investors enjoy comprehensive protection under international investment law through multiple overlapping frameworks. The contractual relationship with sponsoring states creates property-like rights that constitute covered investments under standard treaty definitions.[123] These rights include the sponsorship certificate itself, associated operational permits, and the broader economic relationship encompassing exploration and potential exploitation activities.

Substantive protection standards include fair and equitable treatment (**FET**), protection against unlawful expropriation, full protection and security, and national treatment obligations.[124] The FET standard proves particularly relevant given the long-term nature of deep seabed mining projects and the legitimate expectations created by extensive regulatory frameworks. Investment tribunals have established that FET requires states to maintain stable and predictable regulatory environments, particularly where investors have made substantial commitments in reliance on existing legal frameworks.[125] At the same time, subsequent jurisprudence has clarified that such expectations must be specific, reasonable, and assessed in light of the regulatory context of the investment, including the host state's right and obligation to adapt its regulatory framework in pursuit of legitimate public interests.

Protection against indirect expropriation provides crucial safeguards where sponsoring states modify or revoke mining authorizations. The *Metalclad*[126] tribunal's formulation, focusing on whether regulatory measures "deprive the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property", encompasses sponsorship revocation scenarios that effectively terminate operational capacity.[127] The complete dependence of deep seabed mining operations on state sponsorship under UNCLOS Article 153(2)(b) means that authorization withdrawal typically constitutes substantial interference with investment value.

Any action by the sponsoring state inter alia, revocation of sponsorship or increased regulatory requirements or changes, would be scrutinized by tribunals including the sponsoring state's justification for such action, examining whether it was based on contractor non-compliance with UNCLOS or ISA regulations, environmental protection concerns, breach of sponsorship agreement terms, or changes in national policy or regulatory frameworks. The legitimacy of these grounds would be assessed against both domestic law and international legal standards.

a. FET

Any revocation could violate fair and equitable treatment (FET) standards. FET analysis would focus on whether sponsoring state conduct meets the customary international law minimum standard, incorporating requirements of consistency, transparency, and procedural fairness.[128] The *Waste Management* tribunal's emphasis on avoiding "arbitrary, grossly unfair, unjust, idiosyncratic" treatment or involves a "complete lack of transparency and candour in an administrative process" establishes a

[123] See *RREEF Infrastructure (GP) Ltd v Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/13/30, 6 June 2016) [123] *And Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) paras 310-315.
[124] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 130-190.
[125] *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 154.
[126] *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000)
[127] ibid, para 103.
[128] *Waste Management Inc v. Mexico*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004), para 98

framework for evaluating regulatory decisions affecting deep seabed mining projects.[129] However, more concerning for deep seabed mining projects is that investors could plausibly invoke the more expansive formulation found in *Tecmed v Mexico,* held that the FET standard requires the host state to provide a stable and predictable legal framework that does not frustrate the "basic expectations that were taken into account by the foreign investor to make the investment."[130] *Tecmed* potentially allows an investor to argue that the revocation of a sponsorship certificate, the foundational authorization for its deep seabed operation, fundamentally violates such basic expectations.

However, subsequent jurisprudence and scholarship have clarified that *Tecmed* represents an expansive articulation of FET, clarifying that legitimate expectations must be specific and reasonable, and must be balanced against the state's inherent right to regulate in the public interest.[131] Tribunals have affirmed that for a regulatory measure to be considered a breach of FET, there must not be an "appropriate correlation between the state's public policy objective and the measure adopted to achieve it."[132] For example, in *Crystallex International Corp v Bolivarian Republic of Venezuela,* the denial of a mining permit was found to be arbitrary *because* it lacked a clear evidential or legal basis and ignored scientific evidence submitted by the investor.[133]

In the unique context of deep seabed mining, an investor's "basic expectations" are structurally and legally qualified from the outset. The regulatory regime is explicitly experimental and evolving, with the ISA still in the process of developing a comprehensive mining code for exploitation. Furthermore, as explained earlier, the sponsoring state operates under a binding "due diligence" obligation under the UNCLOS to ensure contractors comply with evolving international standards and to continuously adapt its own laws in light of new scientific knowledge. This duty, clarified in the 2011 Advisory Opinion, means an investor should reasonably expect progressively more stringent regulation, not a static legal framework.

Therefore, while an FET claim against a sponsoring state for arbitrary, discriminatory, or procedurally unfair conduct remains a distinct possibility, a claim based solely on the frustration of expectations due to a proportionate and non-discriminatory regulatory change aimed at enhancing environmental protection is on much weaker ground. The investor's legitimate expectation is not one of regulatory stability, but rather of a rational and fair process of regulatory adaptation consistent with the sponsoring state's duties under the UNCLOS. However, it is still not possible to exclude *Tecmed* type reasoning as a matter of principle and the potential of such an exceptional circumstance arising for an area where the regulation is still evolving such as deep seabed mining is a source for concern.

b. Expropriation

For expropriation analysis, tribunals would examine whether sponsorship modification or revocation substantially deprives investors of investment value,[134] lacks adequate compensation, fails to serve a

[129] ibid.

[130] *Tecmed v. Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003), para 154.

[131] See generally, *Parkerings–Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), paras 332-337; *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para 351; *El Paso v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011), para 374; Rudolf Dolzer, 'Standards of Protection' in Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, OUP 2022); and Chen Yu, 'Disentangling Legal Stability from Legitimate Expectations: Towards Greater Deference to Regulatory Changes in Renewable Energy Transition Policies in Investment Arbitration' (2025) 24 World Trade Review 101.

[132] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award (23 September 2010), para 10.3.9.

[133] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016), para 596-597.

[134] *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) paras 96-102

legitimate public purpose, or operates in a discriminatory manner.[135] The *Metalclad* test for indirect expropriation examines whether measures have the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.[136] Deep seabed mining's front-loaded investment requirements substantial exploration costs, technology development, and regulatory compliance before revenue generation. This could be argued to create particularly strong legitimate expectations of continued authorization.[137]

However, tribunals would also consider legitimate regulatory justifications, particularly environmental protection measures. The police powers doctrine preserves state regulatory space for measures addressing genuine public welfare concerns, though it does not provide blanket immunity from investment treaty obligations.[138] The proportionality principle requires that regulatory measures employ the least restrictive means necessary to achieve legitimate objectives while providing adequate procedural safeguards.[139] Sponsoring states may also invoke their obligations under the "common heritage of mankind" principle as justification for revocation.[140] The common heritage principle establishes that the Area and its resources are the common heritage of mankind, requiring activities to be carried out for the benefit of mankind as a whole.[141] This could encompass environmental protection, compliance with evolving ISA regulations, and precautionary measures against serious environmental harm.[142]

5.2. Investment Arbitration Against Sponsoring States: The Nauru Paradigm

The theoretical framework outlined above finds concrete expression in the sponsorship arrangements established by Pacific Small Island Developing States, which have emerged as key players in the deep seabed mining regime despite limited technical and financial capabilities. These small island states face unique vulnerabilities that exemplify the tension between investment protection obligations and evolving environmental duties under UNCLOS. Their experiences provide crucial insights into how investment arbitration might operate in practice within the deep seabed mining context, particularly given the asymmetric power relationships between multinational mining corporations and resource-constrained island nations.

The case of Nauru demonstrates how sponsorship arrangements may create multiple pathways to investment arbitration while simultaneously exposing sponsoring states to potentially existential financial risks. Jurisdictions such as Nauru have structured their deep seabed mining frameworks to attract foreign investment through sophisticated legal mechanisms[143], yet they remain bound by identical environmental due diligence obligations under international law regardless of their development status or capacity constraints.

<u>Nauru: The Archetypal Case Study</u>

The Republic of Nauru exemplifies the potential for investment arbitration in deep seabed mining through its sponsorship of Nauru Ocean Resources Inc. (**NORI**), a subsidiary of Canadian corporation The Metals

[135] *ADC v. Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006), para 432
[136] *Metalclad Corp v. Mexico* (n.126), para 103.
[137] Joanna Dingwall (n.11), p.920-925.
[138] *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) paras 265-266.
[139] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para 557.
[140] UNCLOS, art. 136
[141] UNCLOS, art 140(1)
[142] UNCLOS, art. 136
[143] Nicolò Andreotti and Franka Nodewald, 'Redefining the Rules: A New Generation of Sponsorship Agreements in Deep Sea Mining?' (EJIL: Talk!, 27 August 2025) https://www.ejiltalk.org/redefining-the-rules-how-new-sponsorship-agreements-are-transforming-deep-seabed-mining/

Company.[144] This arrangement creates multiple jurisdictional pathways for potential investment disputes while illustrating acute regulatory tensions between investment protection and UNCLOS environmental obligations faced by small island developing states.

Nauru ratified the ICSID Convention in April 2016, shortly after enacting its International Seabed Minerals Act 2015, suggesting deliberate policy coordination to facilitate investment arbitration access.[145] No comprehensive bilateral investment treaty exists between Canada and Nauru, limiting treaty-based protection options**.** A more immediately accessible form of dispute resolution is the contractual arbitration framework established in the NORI sponsorship agreement. This contract contains sophisticated investor protection provisions requiring that "the Republic shall at all times regard predictable legal framework and make decisions consistently and transparently and in accordance with the legitimate expectations of NORI."[146] The agreement is also stated to designated British Columbia law as governing law and provides for UNCITRAL arbitration, creating direct arbitration rights without requiring treaty coverage.[147] The contractual provisions incorporate international law concepts such as "proportionality" and establish that "any Nauruan laws and regulations brought into effect after the commencement date will not interfere with or diminish NORI's rights" except where required by international law obligations.[148]

Consider this scenario. If a Canada-Nauru BIT existed with standard investment protection provisions, The Metals Company could pursue treaty-based claims for sponsorship modifications. The territorial nexus requirement would be satisfied through NORI's domestic incorporation, regulatory compliance obligations, royalty payments, and onshore support operations.[149] Deep seabed mining's front-loaded investment requirements, substantial exploration costs and technology development before revenue generation, create particularly strong legitimate expectations of continued authorization under fair and equitable treatment standards.[150]

What then, could be risks that confront Nauru, and what is its risk of exposure to ISDS? The Seabed Disputes Chamber's 2011 Advisory Opinion established that all sponsoring states bear identical due diligence obligations to ensure contractor compliance with environmental protection requirements, including duties to "apply the precautionary approach" and implement "best environmental practices."[151] These obligations require Nauru to "deploy adequate means, to exercise best possible efforts, [and] to do the utmost" to prevent environmental harm from deep seabed mining activities.[152]

The temporal dimension creates particular challenges. UNCLOS Article 145 requires the ISA and sponsoring states to adopt measures ensuring "effective protection for the marine environment from harmful effects which may arise from activities in the Area."[153] As scientific understanding of deep-sea ecosystem impacts evolves, Nauru may face obligations to strengthen regulatory oversight or revoke sponsorship. However, such measures would likely trigger investment arbitration claims seeking substantial compensation. Thus**,** Nauru faces exceptional vulnerability. As a low-lying island nation facing

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[144] International Seabed Authority, 'Letter Dated 30 June 2021 from the President of the Council of the International Seabed Authority Addressed to Members of the Council' (1 July 2021) ISBA/26/C/3; and The Metals Company, 'NORI-D Project – Nauru Ocean Resources Inc', https://metals.co/nori-page-v2/
[145] Alberto Pecoraro (n. 113), 563.
[146] Sponsorship Agreement between the Republic of Nauru, the Nauru Seabed Minerals Authority, and Nauru Ocean Resources Inc (5 June 2017), clause 10.5.
[147] Alberto Pecoraro (n. 54).
[148] Sponsorship Agreement between the Republic of Nauru, the Nauru Seabed Minerals Authority, and Nauru Ocean Resources Inc (5 June 2017), clause 10.1.
[149] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) paras 99-110.
[150] Joanna Dingwall (n.11),p. 920-925.
[151] 2011 Advisory Opinion (n. 20), paras 117-131.
[152] 2011 Advisory Opinion (n. 20), para 117.
[153] UNCLOS, Art. 145.

existential climate change threats, Nauru confronts immediate environmental imperatives that may require precautionary regulatory approaches conflicting with deep seabed mining operations.[154] The country's history of environmental degradation from phosphate mining creates additional political pressure for environmental protection measures.[155]

This creates potential for conflict between two different legal regimes. UNCLOS obligations may require sponsorship modification or revocation based on emerging environmental evidence, yet such measures would trigger investment claims seeking compensation potentially exceeding Nauru's entire GDP.[156] The Seabed Disputes Chamber recognized that developing states might require "necessary assistance" to fulfil UNCLOS obligations, but provided no mechanism for reconciling environmental duties with investment protection commitments.[157] Nauru lacks both the financial resources to provide compensation and the technical capacity to defend complex international arbitrations, creating asymmetric risks that may compromise legitimate regulatory decision-making.

6. Impact and Implications on State Regulatory Authority and UNCLOS Obligations

The regulatory vulnerabilities exposed in Nauru's sponsorship arrangements have broader implications that extend far beyond individual case outcomes. The structural tensions between investment protection mechanisms and evolving UNCLOS environmental obligations create systemic risks to effective marine environmental governance, particularly as scientific understanding of deep-sea ecosystem impacts continues to develop. These conflicts require careful analysis of how investment arbitration might constrain state regulatory authority and compromise the achievement of UNCLOS environmental objectives. Broadly, there are two categories of implications:

a. Legal Implications

The common heritage of mankind principle underlying UNCLOS Part XI contemplates that deep seabed resources should be managed for the benefit of humanity as a whole, with particular regard for developing state interests.[158] The intersection between investment protection and UNCLOS obligations presents complex questions about competing international legal duties. The Seabed Disputes Chamber's 2011 Advisory Opinion established that sponsoring states bear due diligence obligations to ensure contractor compliance with environmental protection requirements, including duties to "apply the precautionary approach" and implement "best environmental practices".[21] These obligations create legitimate grounds for regulatory intervention but may not automatically override existing investment protection standards.

Also, the due diligence obligations established under Articles 139 and 153(4) of UNCLOS require sponsoring states to ensure contractor compliance with environmental standards through "all necessary and appropriate measures."[159] The Advisory Opinion of the Seabed Disputes Chamber established that sponsoring states must continuously adapt their oversight mechanisms as scientific knowledge evolves, stating that "measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."[160] This can create a complexity to legal compliance whereby states face prospective liability under both regimes. Sates' failure to adapt regulatory frameworks can constitute a breach of due diligence obligations under

[154] Isabel Feichtner (n. 24), 630-632.
[155] Nancy Pollock, 'Nauru Phosphate History and the Resource Curse Narrative' (2014) 138 Journal de la société des océanistes 107.
[156] Isabel Feichtner (n. 24), 632.
[157] 2011 Advisory Opinion (n. 20), para 169
[158] UNCLOS Art. 136, 140.
[159] UNCLOS, Art. 139, 153(4).
[160] 2011 Advisory Opinion (n. 20), para 117.

UNCLOS, while under investment law, such adaptations may constitute indirect expropriation or violations of fair and equitable treatment standards.

Tribunals would likely apply harmonious interpretation principles[161] that seek to reconcile competing international obligations rather than finding irreconcilable conflicts. The *Glamis Gold* tribunal's recognition that investment treaty obligations must be interpreted "in harmony with other rules of international law" provides a framework for accommodating UNCLOS environmental duties within investment arbitration analysis.[162] However, the application of harmonious interpretation faces significant constraints when the underlying policy objectives of the treaties diverge fundamentally. The UNCLOS prioritizes collective environmental stewardship and intergenerational equity, while investment treaties protect commercial interests and property rights. The challenge lies not merely textual or procedural reconciliation but of reconciling fundamentally divergent normative frameworks.

Investment arbitration awards typically require monetary compensation for treaty violations, but their broader effect involves creating precedential expectations that influence future regulatory decision-making.[163] Beyond individual case outcomes, investment arbitration can also create systemic legal effects through *jurisprudence constante*, whereby consistent arbitral awards establish expectations that can influence state behaviour.[164] Ultimately, the cumulative effect is that discrete commercial disputes may become broader constraints on states' regulatory sovereignty over environmental protection.

b. Policy Implications

Successful investor claims against sponsoring states would be concerning as they could create significant constraints on regulatory discretion while potentially conflicting with UNCLOS environmental protection obligations. If states anticipate that adaptive measures for environmental protection based on the precautionary principle will trigger investment claims, they may refuse to strengthen their regulatory frameworks despite clear UNCLOS obligations to do so. This creates a direct conflict between treaty obligations and practical state behaviour driven by investment protection concerns. This regulatory paralysis is particularly problematic given the precautionary principle's requirement for proactive environmental protection under conditions of scientific uncertainty. In such circumstances, regulatory inaction prompted by investment-protection concerns may result in environmental degradation, potentially violating UNCLOS obligations through such inaction.

The potential for investor claims can also influence deliberations within international bodies such as the ISA. States advocating for stricter regulations may face opposition from states whose investors are heavily involved in deep seabed mining, creating deadlock or watering down of proposed regulations to appease industry interests.[165] This dynamic has the potential to fundamentally alter the multilateral character of ISA decision-making by introducing asymmetric commercial incentives that may override environmental considerations. This dynamic is particularly evident in discussions surrounding the "two-year rule" triggered by Nauru's notification[166], where pressure to accommodate investor expectations may compromise the development of robust environmental safeguards.[167]

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[161] For example, Art. 31(3)(c) of the Vienna Convention on the Law of Treaties.
[162] *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009) para 8.
[163] *Chorzów Factory Case* (Germany v Poland) [1928] PCIJ Rep Series A No 17.
[164] James Harrison, 'Harmonization of International Investment Law: Illustrations from the Case of Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A. and AWG Group v Argentine Republic' (University of Edinburgh School of Law Working Paper No 2010/40, 2 December 2010).
[165]Isabel Feichtner (n. 24),p. 625–630.
[166] Pradeep A. Singh, (2022). The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications. The International Journal of Marine and Coastal Law, 37(3), 375-412.
[167] Joanna Dingwall (n.11),p. 925–927.

Investment arbitration's focus on protecting individual commercial interests may tension with these broader distributive objectives, particularly where compensation awards reduce resources available for benefit-sharing mechanisms. Small developing states serving as sponsors, such as Nauru, face particular vulnerability, as potential arbitral awards may represent significant portions of national budgets, looming as formidable deterrents to regulatory measures that may trigger investor claims regardless of environmental necessity.

However, the availability of investment arbitration fundamentally alters the regulatory dynamics of deep seabed mining by creating binding international legal constraints on sponsoring state decision-making. While this may enhance investor confidence and facilitate capital mobilization for deep seabed mining development, it also raises questions about the balance between commercial interests and environmental protection in areas beyond national jurisdiction.

These conflicts extend beyond technical legal questions to challenge the coherence of international law itself, where competing treaty regimes may systematically undermine each other's core objectives. The asymmetry between investment expectations and environmental and resource concerns, suggest that current legal frameworks may be inadequately calibrated to balance these competing interests.[168] The challenge for international law is to develop mechanisms that can reconcile these competing imperatives without sacrificing either investment security or environmental protection in humanity's last frontier.

7. Conclusion

The potential for investment claims against sponsoring states represents a fundamental challenge to the effective governance of deep seabed mining that extends far beyond individual dispute resolution. The sponsorship system, designed as a regulatory bridge between the global commons and national legal orders, has inadvertently created pathways for investment arbitration that may fundamentally undermine the environmental protection objectives central to the UNCLOS regime with the case of Nauru exemplifying this tension.

The legal implications identified in this analysis, whereby States may refrain from strengthening environmental protections due to investment-protection concerns, stands in direct tension with the precautionary principle and the adaptive management requirements articulated in the 2011 Advisory Opinion. The practical result suggests that states may face impossible choices between fulfilling UNCLOS environmental obligations and avoiding investment arbitration liability, with either option potentially threatening national fiscal sustainability or environmental security.[169] The systematic effects of regulatory chill, combined with structural disincentives for adaptive management and environmental responsiveness, threaten to undermine the environmental protection objectives that are central to the UNCLOS regime.[170] More critically, the systematic privileging of investment protection over environmental obligations may fundamentally compromise UNCLOS's common heritage framework and its intergenerational environmental stewardship mandate.

The deep seabed mining regime represents a critical test case for international law's capacity to govern activities in the global commons while balancing commercial development with environmental stewardship. The structural tensions identified in this analysis reflect broader challenges facing international law in addressing transboundary environmental issues where multiple regulatory regimes intersect. As commercial deep seabed mining moves closer to reality, the resolution of these tensions will

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[168] Pradeep A Singh, Aline Jaeckel and Jeff A Ardron, 'A Pause or Moratorium for Deep Seabed Mining in the Area?' (2025) 56 Ocean Development & International Law 18, 33–34.
[169] Pradeep A Singh, Aline Jaeckel and Jeff A Ardron (n. 166),p. 33-34.
[170] Duncan French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 International Journal of Marine and Coastal Law 525, 545–550.

significantly influence both the effectiveness of marine environmental protection and the stability of investment frameworks governing activities in areas beyond national jurisdiction.

The analysis reveals fundamental misalignment between investment law's emphasis on regulatory stability and UNCLOS's requirements for adaptive environmental management in response to scientific uncertainty. This structural tension, exemplified in the Nauru case study, suggests that current legal frameworks are inadequately designed to govern commercial activities in areas designated as the common heritage of mankind. Effective governance of humanity's remaining global commons requires legal systems capable of managing competing normative imperatives. The current collision between these normative systems highlights that international law itself requires urgent adaptation to address the challenges of governing humanity's last frontier.