LAW OF THE SEA AND INVESTMENT PROTECTION IN DEEP SEABED MINING

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An essential feature of the United Nations Convention on the Law of the Sea ('UNCLOS') is the designation of the seabed beyond national jurisdiction ('the Area') as the 'common heritage of mankind', with the creation of the International Seabed Authority ('ISA') to allocate mining rights therein. The only private persons that may conclude a contract with the ISA and conduct extractive activities in the Area are those which are sponsored by their state of nationality or control. Currently, among those contractors, there are various corporations owned by nationals from states other than their sponsor. UNCLOS and its related instruments impose certain direct obligations on sponsoring states, including a duty of due diligence to ensure that deep-sea miners respect their own obligations owed to the ISA. This may require the frequent adaptation of national legislation to attain, for example, higher levels of environmental protection. This article suggests that international investment law is relevant to the relation between the contractor and its sponsoring state. Arguably the contractors' foreign shareholders are investors protected by international investment law, and deep-sea mining activities may constitute, in certain circumstances, an investment in the territory of the sponsoring state. In fact, investment tribunals have flexibly interpreted the investment treaty requirement of territoriality, upholding their jurisdiction over investments that are inclusive of transactions located beyond host state borders. However, it is unclear how international norms protecting investments might be interpreted and applied in the peculiar context provided by the common heritage of mankind.

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I INTRODUCTION

Due to the rising demand for minerals and recent technological advances, the last decade has seen a resurgence of interest in mineral resources located on the seabed. Manganese nodules, cobalt-rich crusts and sea-floor massive sulphides are considered to be valuable because they contain, amongst others, nickel, copper,

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cobalt, molybdenum and rare-earth elements.[1] These resources are located to a considerable extent on the seabed lying beyond state sovereignty.[2] For example, some of the greatest concentrations of metal-rich nodules discovered so far occur in the international waters located in the Clarion-Clipperton Fracture Zone in the eastern Pacific Ocean.[3]

The seabed, ocean floor and subsoil thereof, which lies beyond national jurisdiction ('the Area'), is governed by a complex international legal regime,[4] which is based on the *United Nations Convention on the Law of the Sea* ('*UNCLOS*'),[5] the 1994 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*,[6] and the rules and regulations approved by the International Seabed Authority ('ISA').[7] This regime recognises the Area and its resources as the 'common heritage of mankind'.[8] Economic activities therein are allowed, but only 'for the benefit of mankind as a whole',[9] and they must be 'carried out with reasonable regard for other activities in the marine environment'.[10] For these purposes, *UNCLOS* created the ISA,[11] an international organisation with a legislative and executive mandate for administering mining activities in the Area.[12]

Mining activities in the Area may only be carried out by certain categories of persons enumerated in *UNCLOS*, including natural or legal persons 'which possess the nationality of States Parties or are effectively controlled by them or

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1 Paul AJ Lusty and Bramley J Murton, 'Deep-Ocean Mineral Deposits: Metal Resources and Windows into Earth Processes' (2018) 14(5) *Elements* 301, 303. Manganese nodules are also known as 'ferromanganese nodules'.

2 S Petersen et al, 'News from the Seabed: Geological Characteristics and Resource Potential of Deep-Sea Mineral Resources' (2016) 70 *Marine Policy* 175, 176. According to the authors, only 19% of the favourable area for manganese nodules lies within the continental shelf of coastal states, while 42% of the favourable areas for massive sulphides and 54% for cobalt-rich crusts are situated in zones under state jurisdiction: at 175.

3 'A Geological Model of Polymetallic Nodule Deposits in the Clarion Clipperton Fracture Zone' (Technical Study No 6, International Seabed Authority, 2010) 1 <https://www.isa.org.jm/documents/geological-model-polymetallic-nodule-deposits-clarion-clipperton-fracture-zone>, archived at <https://perma.cc/9FRM-UB7H>; 'Prospector's Guide for Polymetallic Nodule Deposits in the Clarion Clipperton Fracture Zone' (Technical Study No 6, International Seabed Authority, 2010) 1, 97 <https://www.isa.org.jm/documents/geological-model-polymetallic-nodule-deposits-clarion-clipperton-fracture-zone>, archived at <https://perma.cc/9FRM-UB7H>.

4 *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), UN GAOR, 25th sess, 1933rd plen mtg, Supp No 28, UN Doc A/RES/2749(XXV) (17 December 1970) paras 1, 4 ('*Declaration of Principles Governing the Sea-Bed*').

5 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 1(1)(3), pt XI ('*UNCLOS*').

6 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 3 (entered into force 16 November 1994) ('*Agreement Relating to the Implementation of Part XI of UNCLOS*').

7 See 'The Mining Code', *International Seabed Authority* (Web Page) <https://www.isa.org.jm/mining-code>, archived at <https://perma.cc/B9GD-5P7P>.

8 *UNCLOS* (n 5) art 136; *Declaration of Principles Governing the Sea-Bed*, UN Doc A/RES/2749(XXV) (n 4) para 1; *Agreement Relating to the Implementation of Part XI of UNCLOS* (n 6) Preamble para 1.

9 *UNCLOS* (n 5) art 140.

10 Ibid art 147.

11 Ibid art 156(1).

12 Ibid arts 157, 160, 162.

their nationals'.[13] Thus, the existing legal framework foresees a triangular relationship involving: (1) the contractor, which prospects, explores and exploits minerals located in the Area; (2) the state sponsoring it; and (3) the ISA. A private corporation may not apply for the right to explore or exploit resources in the Area until it is sponsored by one or more states party.[14] The sponsoring state retains the responsibility to ensure that the contractor complies with *UNCLOS* and the instruments based thereupon.[15] In other words, through its sponsorship, a state 'exercises control over the contractor, by requiring it to comply with the provisions of *UNCLOS*'.[16]

Developing Pacific Island states are in a crucial position when it comes to deep-sea mining in the Area. The Cook Islands, Kiribati, Nauru and Tonga have become sponsoring states in order to reap the allegedly significant benefits to be obtained from offshore extractive activities.[17] According to the island state of Nauru, such gains may include 'employment; training; capacity building; technology transfer; foreign investment; increased tax revenue; and national self determination'.[18] Realistically, however, most of these states do not possess the financial and technical capabilities to explore and develop deep-sea resources on their own:[19] as an emerging industry, deep-sea mining requires significant capital outlay and offers no guarantee of returns.[20] Thus, for many developing states, the main means of participating in such activities in the Area may be to attract foreign investment by partnering with private sector enterprises.[21]

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13 Ibid art 153(2).

14 Ibid.

15 Ibid art 139.

16 Ximena Hinrichs Oyarce, 'Sponsoring States in the Area: Obligations, Liability and the Role of Developing States' (2018) 95 *Marine Policy* 317, 317.

17 'Exploration Contacts', *International Seabed Authority* (Web Page) <https://www.isa.org.jm/deep-seabed-minerals-contractors>, archived at <https://perma.cc/Z9WK-PU8E>.

18 'Statement by the Republic of Nauru regarding the Questions Submitted to the Seabed Disputes Chamber for an Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Entities with Respect to Activities in the International Seabed Area', *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* (International Tribunal for the Law of the Sea, Case No 17, 5 August 2010) 1 [5] ('Written Statement of Nauru').

19 Pacific Island countries, such as Kiribati, the Solomon Islands, Tuvalu and Vanuatu, include several of the smallest nations by mass and population, and are classified as 'Least Developed Countries': 'UN List of Least Developed Countries', *United Nations Conference on Trade and Development* (Web Page) <https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>, archived at <https://perma.cc/7YRV-BL5W>. The small population and thus 'limited pool of skilled workers from which to draw can mean severe capacity constraints within Government': Hannah Lily, 'A Regional Deep-Sea Minerals Treaty for the Pacific Islands?' (2016) 70 *Marine Policy* 220, 220–1. Pacific Islands also generally have limited natural resource bases and national industry, and thus rely heavily on international aid and remittances from nationals living overseas, with the result that any Pacific Island economies are not achieving sustainable economic development.

20 Phillip Blumenthal, 'Deep Sea Mining', *Allianz* (Risk Briefing, April 2019) <https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/esg-risk-briefing-4-2019.html>, archive at <https://perma.cc/HG8N-8ZV6>; Edward L Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973–1982* (Martinus Nijhoff Publishers, 1998) 353.

21 Lily, 'A Regional Deep-Sea Minerals Treaty for the Pacific Islands?' (n 19) 221.

Nonetheless, certain provisions of *UNCLOS* require that each contractor be sponsored by the state party of nationality or of control.[22] For this reason, foreign corporations have channelled their investment through local subsidiaries or joint ventures entered into with government agencies. For instance, the contractor Nauru Ocean Resources Inc is a wholly-owned subsidiary of DeepGreen Metals Inc, a private company incorporated in Canada.[23] Another relevant example is the partnership between the Cook Islands Investment Corporation and the Belgian enterprise G-TEC Sea Mineral Resources NV to explore a contract area granted by the ISA.[24] Hence, whereas these deep-sea mining corporations are incorporated in Pacific Island states, the resources committed to their activity are foreign.

A stable legal framework is crucial for foreign investors and state authorities alike,[25] but regulatory changes may become desirable or even necessary as the social and environmental implications of deep-sea mining become apparent.[26] In this context, international investment law might operate, in parallel with the law of the sea, to constrain sponsoring states when they adopt, modify or enforce rules relevant to deep-sea mining. If applicable, international investment law will grant additional rights to foreign investors and provide for separate forums to enforce these rights against sponsoring states. For instance, upon the termination of state sponsorship, the contractor's foreign shareholder may seek compensation through international arbitration under an investment treaty applicable between its home state and the sponsoring state. Such a claimant may argue that the termination of state sponsorship constituted an expropriation forbidden by the investment treaty and customary international law. That would create considerable difficulties for sponsoring states which possess limited financial and technical capacities.

Nevertheless, whether deep-sea mining in the Area constitutes a foreign investment protected by international law is yet to be determined. Indeed, the crux of deep-sea mining activities takes place beyond national jurisdiction, whereas

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22 *UNCLOS* (n 5) art 153(2)(b), annex III art 4(3).

23 DeepGreen Metals, '43-101 Technical Report for the NORI Clarion: Clipperton Zone Project, Pacific Ocean' (Press Release, 24 September 2018) <https://deep.green/43-101-technical-report-for-the-nori-clarion-clipperton-zone-project-pacific-ocean/>, archived at <https://perma.cc/2Y2M-YJD7> ('NORI Project Technical Report Press Release').

24 Briar Douglas, 'Cooks Partners with Belgium on Seabed Minerals', *Cook Islands News* (online, 27 December 2013) <http://www.cookislandsnews.com/item/43133-cooks-partners-with-belgium-on-seabed-minerals/43133-cooks-partners-with-belgium-on-seabed-minerals>, archived at <https://perma.cc/F6VB-ETU5>. See also Council, International Seabed Authority, *Decision of the Council of the International Seabed Authority Relating to a Request for Approval of a Plan of Work for Exploration for Polymetallic Nodules Submitted by G-TEC Sea Mineral Resources NV*, 18th sess, 181st mtg, ISBA Doc ISBA/18/C/28 (26 July 2012).

25 See Hannah Lily, *Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation* (Report, July 2012) iii, 6, 16–17, 28, 46 <https://dsm.gsd.spc.int/index.php/publications-and-reports>, archived at <https://perma.cc/FQ5M-Q5L5>; Marawa Research and Exploration Ltd, 'Submission to the International Seabed Authority regarding the Development and Implementation of a Payment Mechanism in the Area' (Submission, 29 May 2015) 4 <https://isa.org.jm/files/marawa_comments_29_may_payment_mechanism.pdf>, archived at <https://perma.cc/AQ7M-4LRJ>.

26 Deep-sea mining would interact with ecosystems that are fragile, unique and yet to be fully understood: see generally Laura Kaikkonen et al, 'Assessing the Impacts of Seabed Mineral Extraction in the Deep Sea and Coastal Marine Environments: Current Methods and Recommendations for Environmental Risk Assessment' (2018) 135 *Marine Pollution Bulletin* 1183.

most international investment agreements are predicated on state territory in defining their spatial application.[27] At first sight, the investment treaty regime would appear to be ill-suited for economic activities concerning the common heritage of mankind, where national sovereignty is supplanted by an international administration of exploitation and exploration rights.[28] However, the required territorial nexus has been interpreted loosely by past jurisprudence: arbitral tribunals have already held that they retained jurisdiction for services performed outside of the host state's territory, as long as the investments were made available and utilised by the state at issue.[29] In spite of their distance from national coasts, 'deep seabed mining [activities] will not take place in isolation from land-based processing and transportation and will influence the development of new coastal economies'.[30] Depending on how the deep-sea miner has structured its activities, the benefitting 'new coastal economies'[31] may be the sponsoring states.

The present article analyses the relevance of international investment law for deep seabed mining in the Area and its possible interaction with the international law of the sea. In order to do so, it starts by describing concisely the legal framework of deep-sea mining under *UNCLOS*. Afterward, it argues that the assets required to carry out deep-sea mining may constitute an investment in the territory of a host state, while foreign indirect investors of deep-sea mining corporations are considered to be protected investors by international investment law. At least according to this article, such a conclusion is not affected by the special status of the Area as common heritage of mankind. This said, in its conclusion, this work briefly considers that the common heritage of mankind principle may have some implications for investment tribunals when deciding the merits of a dispute and the quantum of the owed compensation.

II DEEP-SEA MINING'S LEGAL FRAMEWORK: THE COMMON HERITAGE OF MANKIND AND THE INTERNATIONAL SEABED AUTHORITY

Under art 136 of *UNCLOS*, the Area and the resources therein are the common heritage of mankind.[32] This concept permeates the Area's legal regime but is not defined in *UNCLOS*. The provisions in pt XI of *UNCLOS* outline certain

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27 See, eg, *Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment*s, signed 3 September 1990, [1991] ATS 38 (entered into force 20 October 1991) art 2(1) ('*Australia–PNG BIT*'); *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Tonga for the Promotion and Protection of Investments*, [1997] UKTS 71 (signed and entered into force 22 October 1997) arts 2, 3, 5 ('*UK–Tonga BIT*').

28 Isabel Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation' (2019) 30(2) *European Journal of International Law* 601, 603–4; Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed' (2003) 4(2) *Melbourne Journal of International Law* 375, 394; *UNCLOS* (n 5) Preamble para 4, annex III.

29 *SGS Société Générale de Surveillance SA v Philippines (Decision on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/6, 29 January 2004) [112] ('*SGS v Philippines*'); *Fedax NV v Venezuela (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/96/3, 11 July 1997) [41] ('*Fedax v Venezuela*').

30 Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30(2) *European Journal of International Law* 573, 578.

31 Ibid.

32 *UNCLOS* (n 5) art 136.

corollaries of this concept. Broadly speaking, they are: the prohibition on the acquisition of the deep seabed and its resources,[33] the possibility of using the deep seabed for peaceful purposes only,[34] the equitable sharing of benefits gained from deep seabed mining,[35] and an international management regime centred on the ISA.[36] Article 311(6) of *UNCLOS*, which prohibits any amendment to 'the basic principle relating to the common heritage of mankind set forth in article 136',[37] makes it clear that this is one of the fundamental principles of the law of the sea.

Mankind is therefore declared to be the one to dispose of the seabed and its resources while the ISA acts as a trustee thereof. The meaning of the term 'mankind', which is employed by *UNCLOS* instead of the narrower 'states' or 'the international community', is clarified by art 140 of *UNCLOS*. This provision stipulates that

> [a]ctivities in the Area shall … be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States …[38]

Furthermore, the use of the term 'mankind' implies that the obligations contained in *UNCLOS* and the instruments adopted thereunder are owed to present and future generations too.[39] In this connection, according to Professor Rüdiger Wolfrum, '[t]he adoption of the term "mankind" from the *Outer Space Treaty* taken together with the term "[common] heritage" at least indicates that the interests of future generations have to be respected in making use of the sea-bed'.[40]

The ISA is tasked with the authorisation, organisation and control of activities in the Area.[41] The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea ('ITLOS') has held that the notion of 'activities in the Area' includes 'the recovery of minerals from the seabed', 'their lifting to the water surface' and 'the preliminary separation of materials of no commercial interest', but does not encompass transportation to points on land and onshore processing.[42] The rules applied by the ISA are principally set out in annex III of *UNCLOS*, as modified by the *Agreement Relating to the Implementation of Part XI of the United*

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33 Ibid art 137(1).

34 Ibid art 141.

35 Ibid art 140(2).

36 Ibid arts 137(2), 156(1). See also Guntrip (n 28) 392–3.

37 *UNCLOS* (n 5) art 311(6).

38 Ibid art 140(1).

39 Aline Jaeckel, Kristina M Gjerde and Jeff A Ardron, 'Conserving the Common Heritage of Humankind: Options for the Deep-Seabed Mining Regime' (2017) 78 *Marine Policy* 150, 151.

40 Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Journal of Foreign Public Law and International Law (Heidelberg Journal of International Law)] 312, 318. See *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).

41 *UNCLOS* (n 5) arts 157(1)–(2).

42 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber) (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 17, 1 February 2011) [94]–[96] ('*Responsibilities and Obligations of Sponsoring States (Advisory Opinion)*').

Nations Convention on the Law of the Sea.[43] These are supplemented by the 'Mining Code', a set of regulations issued by the ISA and binding by virtue of art 153(1) of *UNCLOS*, which outline the procedures to apply for exploration rights and the standard terms of exploration contracts.[44] To date, the ISA has issued *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*,[45] *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*[46] and *Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*.[47] The *Draft Regulations on Exploitation of Mineral Resources in the Area* are yet to be completed and issued as a binding document.[48]

Article 153 of *UNCLOS* restricts seabed mining activities to specific categories of persons: 'States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States'.[49] For private persons, the sponsorship of one or more states is essential: the withdrawal of state sponsorship entails the end of the contractor's right to continue deep seabed mining in the Area.[50] Applicants are therefore qualified if they are entities possessing the nationality of a state party or effectively controlled by them or their nationals. According to the wording of annex III art 4(3) of *UNCLOS*, if effective control lies elsewhere, the controlling state or the state of nationality of the controller must co-sponsor the applicant.[51] However, in its past practice, the ISA has interpreted the effective control requirement as being equivalent to 'regulatory control' or

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43 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, GA Res 48/263, UN GAOR, 48th sess, 101st plen mtg, Agenda Item 36, Supp No 49, UN Doc A/RES/48/263 (17 August 1994, adopted 28 July 1994).

44 'The Mining Code' (n 7); *UNCLOS* (n 5) art 153(1).

45 Council, International Seabed Authority, *Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters*, 19th sess, 190th mtg, ISBA Doc ISBA/19/C/17 (22 July 2013) annex ('*Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*').

46 Assembly, International Seabed Authority, *Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, 16th sess, 130th mtg, ISBA Doc ISBA/16/A/12/Rev.1 (15 November 2010) annex ('*Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*').

47 Assembly, International Seabed Authority, *Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, 18th sess, 138th mtg, ISBA Doc ISBA/18/A/11 (22 October 2012) annex ('*Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*').

48 'Draft Regulations on Exploitation of Mineral Resources in the Area', *International Seabed Authority* (News Post, 25 August 2017) <https://www.isa.org.jm/news/draft-regulations-exploitation-mineral-resources-area>, archived at <https://perma.cc/3J82-7U2C>; International Seabed Authority, *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA Doc ISBA/23/LTC/CRP.3* (8 August 2017), archived at <https://perma.cc/BRF7-N8FZ>.

49 *UNCLOS* (n 5) art 153(2).

50 See, eg, *Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, ISBA Doc ISBA/18/A/11 (n 47) reg 31. If a sponsor state terminates its sponsorship, contractors have a six-month grace period to find another sponsor state: at reg 31.

51 *UNCLOS* (n 5) annex III art 4(3).

incorporation in the sponsoring state.[52] Consequently, 'no contractor or potential contractor has ever been asked to present a sponsorship certificate issued by the state of the nationality of its controllers'.[53]

III THE DUTIES OF SPONSORING STATES

States hold a general duty of due diligence and specific international legal obligations when overseeing the activities of sponsored entities. First, sponsoring states have the duty to

> ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with [*UNCLOS*, the regulations of the ISA and the relevant contract].[54]

However, this does not create a regime of absolute responsibility for all failures by the sponsored entity to observe its obligations. According to annex III art 4(4) of *UNCLOS*, a sponsoring state will not be

> liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.[55]

The Seabed Disputes Chamber has held that the responsibility of sponsoring states requires them to 'deploy adequate means, to exercise best possible efforts, [and] to do the utmost' to ensure contractors comply with their obligations.[56] This duty of due diligence, as it is known in international law, involves the adoption of appropriate rules and a certain level of vigilance in their implementation through administrative control and the monitoring of the activities at issue.[57] The concept remains variable and what it requires will be influenced by the available scientific knowledge and the level of risk entailed by a specific activity.[58] This is potentially important in the case of deep-sea mining, which allies glaring gaps in scientific knowledge with potentially high risks.

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52 Legal and Technical Commission, International Seabed Authority, *Analysis of Regulation 11.2 of the Regulations on Prospecting and Exploration for Polymetallic Nodules and Polymetallic Sulphides in the Area*, 20th sess, ISBA Doc ISBA/20/LTC/10 (5 June 2014) [20]–[21].

53 Andrés Sebastián Rojas and Freedom-Kai Phillips, 'Effective Control and Deep Seabed Mining: Toward a Definition' (Liability Issues for Deep Seabed Mining Series Paper No 7, Centre for International Governance Innovation, February 2019) 6 <https://www.cigionline.org/publications/effective-control-and-deep-seabed-mining-toward-definition-1>, archived at <https://perma.cc/6SC6-KXHJ>.

54 *UNCLOS* (n 5) art 139(1).

55 Ibid annex III art 4(4).

56 *Responsibilities and Obligations of Sponsoring States (Advisory Opinion)* (n 42) [110].

57 Ibid 41 [110]–[111]; *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment*) [2010] ICJ Rep 14, 77 [187], 79 [197].

58 *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights) (Advisory Opinion)* (Inter-American Court of Human Rights, Series A No 23, 15 November 2017) [142], [154], [174].

Secondly, there are direct obligations which sponsoring states possess independently of the behaviour of sponsored entities and which constitute a minimal threshold with which all sponsoring states must comply. According to the Seabed Disputes Chamber,

> [a]mong the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the [ISA] in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the [ISA] for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.[59]

States are left a large degree of discretion as to how to comply with these obligations.[60] Nevertheless, under art 209(2) of *UNCLOS*, national regulation on 'pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices' under state authority 'shall be no less effective than the international rules, regulations and procedures' established under pt XI of *UNCLOS*.[61]

Article 209 refers to 'rules, regulations and procedures' adopted in accordance with pt XI.[62] A wider formulation is used in art 208(3) of *UNCLOS*, which provides that the laws, regulations and measures adopted by coastal states to prevent, reduce and control pollution from seabed activities subject to their jurisdiction are 'no less effective than international rules, standards and recommended practices and procedures'.[63] It is unclear whether this wording is wide enough to include such other non-binding instruments as the ISA's *Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area*.[64] According to the ISA's standard terms for exploration contracts, these recommendations must be observed as far as reasonably practicable by the deep-sea miners.[65] A wider formulation is used by art 208(3) of *UNCLOS* on '[p]ollution from sea-bed activities subject to national jurisdiction', which operates so as to render binding on coastal states 'international rules, standards and recommended practices and procedures'.[66] The resulting situation is

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59 *Responsibilities and Obligations of Sponsoring States (Advisory Opinion)* (n 42) [122].

60 'The Convention leaves it to the sponsoring State to determine what measures will enable it to discharge its responsibilities': ibid [227].

61 *UNCLOS* (n 5) art 209(2), quoted in *Responsibilities and Obligations of Sponsoring States (Advisory Opinion)* (n 42) [241]. In addition, states are authorised by annex III art 21(3) of *UNCLOS* to adopt and enforce rules more stringent than those of the ISA: see *Responsibilities and Obligations of Sponsoring States (Advisory Opinion)* (n 42) [240].

62 *UNCLOS* (n 5) art 209.

63 Ibid art 208.

64 Legal and Technical Commission, International Seabed Authority, *Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area*, 19th sess, ISBA Doc ISBA/19/LTC/8 (1 March 2013).

65 See, eg, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, ISBA Doc ISBA/19/C/17 (n 45) annex IV ('*Standard Clauses for Exploration Contract*') s 13.2(e). All of the regulations stipulate that exploration contracts must contain the listed standard clauses: at reg 23.

66 *UNCLOS* (n 5) art 208(3).

somewhat ambiguous. Assuming that the ISA's recommendations are encompassed by this language, they will be obligatory under national legislation but not always under ISA exploration contracts.

IV DISPUTES BETWEEN CONTRACTORS AND SPONSORING STATES: THE APPLICABILITY OF INTERNATIONAL INVESTMENT LAW

The limited means of various sponsoring states and the very remote locations where these mining activities take place pose important challenges for national regulators. Other difficulties are related to the preferences of local stakeholders: deep-sea mining, at least when conducted within waters under national jurisdiction, has been mired by community opposition and litigation.[67] All this suggests that, in deploying their best efforts to fulfil these responsibilities, sponsoring states may have to adopt measures that negatively affect the contractors' economic activity. In certain situations, national authorities may even make the political choice of interrupting exploration, for example, by revoking their sponsorship of a contractor. This is not difficult to imagine given certain precedents involving mining in waters under national jurisdiction. An illustrative example is New Zealand's decision to accept and then suspend two applications to mine iron sand in its waters.[68]

Under art 187 of *UNCLOS*, the Seabed Disputes Chamber has absolute competence to hear a variety of disputes, including: disputes between a state party and the ISA concerning violations of pt XI of *UNCLOS* and related instruments; disputes between the ISA and a contractor over the refusal to grant a contract or over acts or omissions relating to activities in the Area; and disputes concerning the liability of the ISA under annex III art 22 of *UNCLOS*.[69] However, art 187 is qualified by the successive provision which makes it clear that certain disputes may be referred to fora other than the Chamber.[70] Under art 188(1), disputes between states party on the interpretation or application of *UNCLOS* pt XI — which can be heard by the Seabed Disputes Chamber under art 187(a)[71] — may be submitted to an ad hoc chamber of the Seabed Disputes Chamber at the request

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67 See, eg, Natalie Lowrey, 'Legal Action Launched over the Nautilus Solwara 1 Experimental Seabed Mine' (Media Release, Deep Sea Mining Campaign, 8 December 2017) <http://www.deepseaminingoutofourdepth.org/legal-action-launched-over-nautilus-solwara-1/>, archived at <https://perma.cc/U4D7-DX4E>.

68 'Trans-Tasman Resources Given Leave to Appeal Quashing of Seabed Mining Consent', *Whanganui Chronicle* (online, 24 December 2018) <https://www.nzherald.co.nz/environment/news/article.cfm?c_id=39&objectid=12182159>, archived at <https://perma.cc/A3AP-UTMD>; Laurel Stowell, 'Appeal Court Upholds Decision to Quash Trans-Tasman Resources' Seabed Mining Application', *NZ Herald* (online, 3 April 2020) <https://www.nzherald.co.nz/environment/news/article.cfm?c_id=39&objectid=12322253>, archived at <https://perma.cc/53UQ-RENF>.

69 *UNCLOS* (n 5) art 187; Herbert Smith Freehills, 'Dispute Resolution Considerations Arising under the Proposed New Exploitation Regulations' (Discussion Papers to Support the Development of an Exploitation Code No 1, International Seabed Authority, April 2016) 2 <https://www.isa.org.jm/files/documents/EN/Pubs/DPs/DP1.pdf>, archived at <https://perma.cc/Y4Q6-N6GT>.

70 *UNCLOS* (n 5) art 188; Herbert Smith Freehills (n 69) 2.

71 *UNCLOS* (n 5) art 187(a).

of either disputing party, or to a special chamber of ITLOS upon the request of all disputing parties.[72]

Furthermore, art 188(2) of *UNCLOS* provides that disputes between parties to a contract concerning the interpretation or application of that contract can be submitted, at the request of any party to the dispute, to a commercial arbitral tribunal for resolution.[73] Such ad hoc tribunals do not have jurisdiction to decide questions on the interpretation of *UNCLOS*.[74] The context provided by various treaty provisions suggests that the competence of those ad hoc tribunals also does not encompass the interpretation and application of contractual arrangements in force between the contractor and its sponsoring state. In this respect, art 153(3) of *UNCLOS* clarifies that '[a]ctivities in the Area shall be carried out in accordance with a formal written plan of work … approved by the Council after review by the Legal and Technical Commission' and that 'the plan of work shall … be in the form of a contract'.[75]

These different mechanisms do not touch upon the relationship between contractors and their respective sponsor states: there seems to be no mechanism in pt XI of *UNCLOS* for the settlement of disputes arising out of the termination of a certificate of sponsorship.[76] The only condition imposed on the sponsoring state if it terminates its sponsorship is the requirement to give the ISA written notice of the termination of the sponsorship and the reasons thereof.[77] The *travaux préparatoires* of *UNCLOS* reveal that early discussions on a dispute settlement regime for the Area did not mention disputes between deep-sea miners and their state of nationality.[78] Instead, the attention of the drafters was focused on the

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72 Ibid art 188(1).

73 Ibid arts 187(c)(i), 188(2)(a). Article 188(2)(c) of *UNCLOS* provides that the default arbitral rules for such disputes are the *Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res 31/98, UN GAOR, 31st sess, 99th plen mtg, Supp No 39, UN Doc A/RES/31/98 (15 December 1976). Since their original adoption in 1976, these rules have subsequently been revised and adopted by the General Assembly in 2010 and 2013: 'UNCITRAL Arbitration Rules', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>, archived at <https://perma.cc/52FZ-M2HL>.

74 Disputes regarding the interpretation of *UNCLOS* pt XI and the annexes thereto are to be referred to the Seabed Disputes Chamber, not to commercial arbitral tribunals: *UNCLOS* (n 5) art 188(2)(a).

75 Ibid art 153(3).

76 See Linlin Sun, 'Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective' (2017) 18(1) *Melbourne Journal of International Law* 71, 83.

77 *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, ISBA Doc ISBA/19/C/17 (n 45) reg 29(2); *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA Doc ISBA/16/A/12/Rev.1 (n 46) reg 31(2); *Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, ISBA Doc ISBA/18/A/11 (n 47) reg 31(2).

78 See *Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text*, Third United Nations Conference on the Law of the Sea, Official Records, 1st Comm, 8th sess, UN Docs A/CONF.62/C.1/L.25 and Add.1 (23 May 1979) 109 [1], 110 [6], annex I; *Summary Records of Meetings of the First Committee: 2nd Meeting*, Third United Nations Conference on the Law of the Sea, Official Records, 1st Comm, 2nd sess, 2nd mtg, UN Doc A/CONF.62/C.1/SR.2 (11 July 1974) 7 [14] ('*Summary Record of the First Committee's Second Meeting at the Second Session of UNCLOS III*'). According to Mr Pinto, the Representative of Sri Lanka,

exercise of the ISA's supervisory functions. For example, the Australian delegation's support for a specific dispute settlement regime in pt XI of *UNCLOS* was motivated by a need to uphold the 'rule of law in all matters connected with the operation of the [ISA]'.[79] Perhaps this type of dispute was purposefully left out of *UNCLOS* because it was presumed that only companies of the same nationality as the sponsoring state would be involved in deep-sea mining.

This said, whilst *UNCLOS* allows states to sponsor entities of their nationality or under their control (or under the control of their nationals),[80] in reality, foreign capital has become increasingly involved in deep-sea mining. For example, Nauru Ocean Resources Inc, a Nauruan entity which was granted an exploration contract in 2011,[81] is a subsidiary of the Canadian corporation DeepGreen Metals Inc.[82] Another example is Tonga Offshore Mining Ltd, which was granted an exploration contract in 2011.[83] The Tongan entity was a subsidiary of Nautilus Minerals Inc ('Nautilus Minerals'),[84] a Canadian company whose principal shareholders were Omani and Cypriot corporate bodies.[85] This changed in August 2019, when a sanction order of the Supreme Court of British Columbia allowed Nautilus Minerals' former funding partner, Deep Sea Mining Finance Ltd, to acquire the remaining assets of Nautilus Minerals.[86] Deep Sea Mining Finance Ltd is a newly-

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> [w]ith regard to the very important question of a system for settling disputes between member States, between a State and the organization, between the organization and an entity engaged in operations on the sea-bed, between one or more such entities and *between a State and any such entity which was not its national*, it was clear that agreement on a system for settling disputes of a technical or legal nature would greatly facilitate negotiations.

UNCLOS III Summary Record of the First Committee's Second Meeting, UN Doc A/CONF.62/C.1/SR.2 (n 78) 7 [14] (emphasis added).

79 *22nd 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].

80 *UNCLOS* (n 5) art 153(2)(b).

81 International Seabed Authority, 'Seabed Authority Signs Contract for Exploration of Polymetallic Nodules in a Reserved Area by Nauru Ocean Resources Incorporated' (Special Press Release SB/17/17, 22 July 2011) <https://isa.org.jm/files/files/documents/sb-17-17.pdf>, archived at <https://perma.cc/QEK9-42J3>.

82 'NORI Project Technical Report Press Release' (n 23).

83 Council, International Seabed Authority, *Decision of the Council Relating to a Request for Approval of a Plan of Work for Exploration for Polymetallic Nodules Submitted by Tonga Offshore Mining Limited*, 17th sess, 168th mtg, ISBA Doc ISBA/17/C/15 (19 July 2011).

84 Nautilus Minerals, *Nautilus Minerals Annual Report 2014: Forging Ahead* (Report, 2014) 18 <barrons.annualreports.com/HostedData/AnnualReportArchive/n/TSX_NUS_2014.pdf>, archived at <https://perma.cc/SD95-ARKA>.

85 'Nautilus Minerals: Resignation of Mark PM Horn as a Director' (Press Release 2017–19, Nautilus Minerals, 5 October 2017) <http://dsmobserver.com/wp-content/uploads/2017/10/NautilusMineralsResignationofMarkPMHornasaDirector.pdf>, archived at <https://perma.cc/Q469-DHWU>; Nautilus Minerals Inc, 'Nautilus Files for Relief under the Companies' Creditors Arrangement Act and Receives Additional Loan under Secured Loan Facility', *GlobeNewswire* (online, 22 February 2019) <https://www.globenewswire.com/news-release/2019/02/22/1741013/0/en/Nautilus-files-for-relief-under-the-Companies-Creditors-Arrangement-Act-and-receives-additional-loan-under-secured-loan-facility.html>, archived at <https://perma.cc/9ARR-SNE2>.

86 Cecilia Jamasmie, 'Nautilus Minerals' Plans to Mine the Seafloor Sink Deeper', *Mining.com* (online, 13 August 2019) <https://www.mining.com/nautilus-minerals-plans-to-mine-the-seafloor-sink-deeper/>, archived at <https://perma.cc/H4ZT-5KY8>. For the details of the funding mandate, see *Funding Mandate Agreement*, Nautilus Minerals Inc–Deep Sea Mining Finance Ltd, signed 10 October 2017, archived at <https://perma.cc/ZFL3-66UM>.

incorporated company in the British Virgin Islands, intended to be owned equally by entities incorporated by Nautilus Minerals' former principal shareholders.[87] Subsequently, in April 2020, DeepGreen Metals Inc announced its acquisition of Tonga Offshore Mining Ltd and thus gained a third exploration area.[88]

International investment law, which regulates the relationship between foreign investors and the states hosting their assets, could potentially fill this gap left by the dispute settlement system of pt XI of *UNCLOS*. For instance, cancellation of a sponsorship certificate could constitute an unlawful expropriation for which the contractor would be owed compensation under the applicable international investment instrument. This would generally be through an international investment treaty but may also be possible through an investment contract or national legislation incorporating international legal standards by reference. Moreover, these disputes would be submitted to the jurisdiction of inter-state or investor-state arbitral tribunals. Consequently, the ability of sponsoring states to modify or withdraw their support for seabed mining could be constrained by international investment law. Nonetheless, this will be the case only when the economic activity of the sponsored entity constitutes an investment in the territory of the sponsoring state and if such investment is owned or controlled by a foreign investor.

V IS DEEP-SEA MINING AN INVESTMENT WITHIN THE TERRITORY OF A STATE?

At first sight, there are strong arguments militating against the application of international investment law to seabed investments in areas beyond national jurisdiction. Indeed, international investment law is premised, either explicitly or

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87 Nautilus Minerals Inc, 'Nautilus Obtains Court Approval of Plan of Compromise and Arrangement', *Bloomberg* (online, 14 August 2019) <https://www.bloomberg.com/press-releases/2019-08-13/nautilus-obtains-court-approval-of-plan-of-compromise-and-arrangement>, archived at <https://perma.cc/G976-K4B8>; 'Welcome to Deep Sea Mining Finance', Deep Sea Mining Finance (Web Page) <https://dsmf.im>, archived at <https://perma.cc/CE9S-A3WE>; Ewen Hosie, 'A Sea Change for Mining', *Australian Mining* (online, 8 December 2017) <https://www.australianmining.com.au/features/sea-change-mining/>, archived at <https://perma.cc/53AV-JW2M>. Interestingly, the bilateral investment treaty ('BIT') in force between the United Kingdom and Tonga, which foresees investor-state arbitration in art 8, is not applicable to investors from the British Virgin Islands: see *UK–Tonga BIT* (n 27) arts 1(c) (definition of 'nationals' sub-para (i)), (d) (definition of 'companies' sub-para (i)). Article 12 of the *UK–Tonga BIT* foresees that the treaty may be extended to territories 'for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes'. However, the UK and Tonga have not agreed to an extension of the *UK–Tonga BIT* to the British Virgin Islands: see Deepa Somasunderam, 'Do Companies Registered in British Overseas Territories and Crown Dependencies Have Adequate Investment Protection?', *Practical Law Arbitration Blog* (Blog Post, 26 July 2018) <http://arbitrationblog.practicallaw.com/do-companies-registered-in-british-overseas-territories-and-crown-dependencies-have-adequate-investment-protection/>, archived at <https://perma.cc/UW57-2D3K>. Furthermore, in *Menzies Middle East and Africa SA v Senegal (Award)* (ICSID Arbitral Tribunal, Case No ARB/15/21, 5 August 2016), the tribunal declined jurisdiction due to the claimant's incorporation into the British Virgin Islands, maintaining that the territorial scope of the relevant BIT, does not include overseas territories of the UK: at [154].

88 'With TOML Acquisition, DeepGreen Expands Its Footprint Across the Pacific', *DSM Observer* (online, 16 April 2020) <http://dsmobserver.com/2020/04/with-toml-acquisition-deepgreen-expands-its-footprint-across-the-pacific/>, archived at <https://perma.cc/U8KE-77AM>.

implicitly, on the existence of an investment within the territory of a state.[89] For instance, ch 9 art 1 of the *Pacific Agreement on Closer Economic Relations Plus* ('*PACER Plus*') defines its scope of application by prescribing that a covered investment with respect to a host party is

> an investment in its territory of an investor of another Party, in existence as of the date of entry into force of this Agreement, or established, acquired or expanded thereafter, which has been admitted by the host Party subject to its relevant laws, regulations and policies …[90]

Similar language is employed by a plurality of international investment agreements.[91] Other treaties diverge slightly in that they define their coverage as including the territory of a state as well as the maritime zones under its jurisdiction in accordance with international law.[92] Even where the definition of investment does not expressly refer to the location of an investment, foreign investors have been held to be protected by investment treaties only in so far as they hold an investment in the host state.[93] In this context, the crux of the seabed miner's economic activity takes place beyond national jurisdiction and is carried out by virtue of a contract concluded with the ISA. International investment treaties cannot easily be interpreted as applicable to mining activities in areas beyond national jurisdiction, as '[s]uch areas are clearly not within the territory or maritime zones of a coastal state'.[94]

Upon a closer look, however, deep-sea mining operations may constitute an investment within the territory of a host state on various accounts. First, art 153(2)(b) of *UNCLOS* opens deep-sea mining in the Area only to sponsored

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89 See, eg, *Texaco Overseas Petroleum Co v Libya (Award on the Merits)* (1978) 17 ILM 1 16–17 [45]; *Revere Copper and Brass Inc v Overseas Private Investment Corporation (Award)* (1978) 17 ILM 1321, 1331, 1334. Both decisions hold economic development agreements as assuming a real importance in the development of the country where they are performed. They both emphasise the long duration of those contracts, which requires permanent installations by the investor.

90 *Pacific Agreement on Closer Economic Relations Plus*, signed 14 June 2017, [2017] ATNIF 42 (not yet in force) ch 9 art 1 (definition of 'covered investment') ('*PACER Plus*').

91 See, eg, *Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments*, signed 12 November 1987 (entered into force 18 May 1988) art 1(3)(b), 2(2) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/666/bulgaria-cyprus-bit-1987>, archived at <https://perma.cc/6BJL-5XDJ>; *Australia–PNG BIT* (n 27) arts 1(1)(d), 2(1).

92 See, eg, *Agreement between the Government of the French Republic and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments*, signed 26 November 2007, 2796 UNTS 215 (entered into force 20 August 2011) arts 1(1), (4).

93 See Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Brill, 2018) 67, citing *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/08/8, 8 March 2010) [113]–[121]. This rule was nuanced in *Romak SA (Switzerland) v Uzbekistan (Award)* (Permanent Court of Arbitration, Case No AA280, 26 November 2009) ('*Romak v Uzbekistan*'), which held that whilst 'no treaty provision requiring that the investor's contribution physically take place within the boundaries of the host State to trigger substantive protection' could be found in the applicable BIT, references to territory elsewhere in the BIT 'normally refer to the benefit that the host State expects to derive from the investment': at [237].

94 James Harrison, 'International Investment Law and the Regulation of the Seabed' in Catherine Barnet (ed), *The Law of the Seabed: Access, Uses, and Protection of Seabed Resources* (Brill Nijhoff, 2020) 481, 488.

'state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals'.[95] Consequently, state legislation on deep-sea mining beyond national jurisdiction generally limits access to exploration and exploitation activities in the Area to persons which have the nationality of that state.[96] In addition, various national laws foresee the possibility for sponsored parties to enter into additional contracts or sponsorship agreements, to establish supplementary terms and conditions related to the terms of such sponsorship.[97] The sponsored parties which eventually conclude contracts with the ISA are also required to pay royalties and administrative fees to their sponsoring state.[98]

Assets mentioned by ch 9 art 1 of *PACER Plus* as constituting an investment include 'an enterprise', 'shares, stock and other forms of equity participation in an enterprise', 'production and revenue sharing contracts, concessions and other similar contracts' and 'licences, authorisations, permits and similar rights conferred pursuant to a Party's domestic law'.[99] Arguably, each of those assets is a fundamental prerequisite for the economic operation carried out by deep-sea miners. In the case of a state terminating its sponsorship, the deep-sea miner may argue that its assets within the sponsoring state — the shares of the corporation it created or the rights deriving from a sponsorship contract — were nullified as a consequence of state action. Under this argument, it does not matter that the assets at issue produced effects outside of that state's territory. However, the fact that a certain asset is a 'contract' or an 'enterprise' does not automatically render it an investment under *PACER Plus* or other international investment treaties. It must also have 'the characteristics of an investment', which comprises, at least, 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[100] Hence, whether there occurred an investment within the sponsoring state's territory will largely depend on how the deep-sea miner structured its operations. This matter is further complicated by the fact that the recovery and transport of the minerals may be effectuated by subcontractors of a different nationality using vessels that fly another state's flag, while the processing of the recovered minerals may very well take place in a third state's territory.

Two further doctrines originating in arbitral case law might warrant the application of an investment treaty to the entirety of the deep-sea miner's operations, including those conducted beyond areas under national jurisdiction.

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95 *UNCLOS* (n 5) art 153(2)(b).

96 See, eg, *Deep Seabed Mining Act 2015* (Singapore) s 5 ('*Singapore DSM Act*'); *Zákon o vyhledávání, průzkumu a těžbě nerostných zdrojů z mořského dna za hranicemi pravomocí států a o změně některých zákonů* [Act on Prospecting, Exploration for and Exploitation of Mineral Resources from the Seabed beyond the Jurisdiction of States and Amending Certain Laws] (Czech Republic) art 3 ('*Czech Republic Seabed Minerals Act*'); *International Seabed Minerals Act 2015* (Nauru) s 23(2)(a)(i) ('*Nauru Seabed Minerals Act*').

97 See, eg, *Seabed Minerals Act 2014* (Tonga) s 82; *International Seabed Mineral Management Decree 2013* (Fiji) s 31(1) ('*Fiji Seabed Mineral Decree*').

98 See, eg, *Nauru Seabed Minerals Act* (n 96) ss 40, 43–5; *Fiji Seabed Mineral Decree* (n 97) ss 45–8; *Seabed Minerals Act 2019* (Cook Islands) ss 139(3), 140, 153, 156, 158 ('*Cook Island Seabed Minerals Act*').

99 *PACER Plus* (n 90) ch 9 art 1 (definition of 'investment' paras (a), (c), (g)–(h)).

100 See, eg, ibid art 1 (definition of 'investment'); *The United States–Peru Trade Promotion Agreement*, signed 12 April 2006, KAV 8675 (entered into force 1 February 2009) art 10.28. See also *Romak v Uzbekistan* (n 93) [207].

Such doctrines can play an important role in those abovementioned cases where there are ambiguities surrounding the existence of an investment. These doctrines are the economic benefits theory and the general unity of an investment operation theory.[101] They would operate so as to warrant that extractive operations beyond national jurisdiction be examined alongside assets within the sponsoring state in order to determine the existence of an investment in that state.

A *The Economic Benefits Theory*

The economic benefits theory line of case law, developed through arbitral decisions regarding financial products, interpreted the required 'territorial link' as being equivalent to contributing to the economy of a certain state. In *Fedax NV v Venezuela* ('*Fedax v Venezuela*')[102] and *Abaclat v Argentina*,[103] the tribunals upheld jurisdiction for financial transactions performed outside of the host state's territory, as long as the capital associated with those transactions was made available and utilised 'for the benefit' of the state at issue. As stated in *Abaclat v Argentina*:

> [W]ith regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is where [sic] the invested funds ultimately made available to the Host State and did they support the latter's economic development?[104]

The *Fedax v Venezuela* award justified this reasoning by citing the specific nature of the investments which did not consist of physical assets.[105] It also observed that the drafters of the *Netherlands–Venezuela BIT*[106] had included such assets within their definition of investment.[107] Such reasoning was faithfully reproduced by the arbitral tribunal in *Abaclat v Argentina*. Ruling on claims by Italian holders of interests in Argentinian state bonds acquired in the secondary market, the majority held that such assets were investments made in the territory of Argentina since the entire bond-issuing process, including the circulation of security entitlements on the secondary market, was devised by Argentina to raise money for its own budgetary needs and further its economic development.[108]

The *Deutsche Bank AG v Sri Lanka* arbitral tribunal applied this reasoning to a hedging agreement concluded in order to minimise the impacts of oil price

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101 See, eg, *Fedax v Venezuela* (n 29); *OKO Pankki Oyj v Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/6, 19 November 2007) [204], [206]; *Holiday Inns SA v Morocco (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/72/1, 12 May 1974) ('*Holiday Inns v Morocco*'). *Holiday Inns v Morocco* is not reported, but for an extensive account with quotations, see Pierre Lalive, 'First "World Bank" Arbitration (Holiday Inns v Morocco): Legal Problems' (1980) 51(1) *British Yearbook of International Law* 123, 159.

102 *Fedax v Venezuela* (n 29) [41].

103 *Abaclat v Argentina (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/07/5, 4 August 2011) [374] ('*Abaclat v Argentina (Decision)*').

104 Ibid [374], [378].

105 *Fedax v Venezuela* (n 29) [41].

106 *Agreement on Encouragement and Reciprocal Protection of Investments*, Venezuela–Netherlands, signed 22 October 1991, 1788 UNTS 45 (entered into force 1 November 1993) ('*Netherlands–Venezuela BIT*').

107 *Fedax v Venezuela* (n 29) [31]–[32].

108 *Abaclat v Argentina (Decision)* (n 103) [374]–[378].

fluctuations.[109] Arguing that the place of conclusion and payment of the hedging contract were not significant to localise the investment, the tribunal looked exclusively at the intended benefit and concluded that the conditions of a territorial nexus with Sri Lanka were satisfied. In this regard, they found it irrelevant that the contract was regulated by English law and designated English courts for the settlement of disputes. Again, this was done based on the transaction's contribution to the Sri Lankan economy and by reference to the nature of modern banking, with London being the world's first financial place.[110] Somewhat hurriedly, the tribunal concluded that,

> [i]n the present case, it is undisputed that the funds paid by Deutsche Bank in execution of the Hedging Agreement were made available to Sri Lanka, were linked to an activity taking place in Sri Lanka and served to finance its economy which is oil dependent.[111]

This test was more recently replicated in *British Caribbean Bank Ltd (Turks & Caicos) v Belize* in respect of agreements which granted the claimant security interests in the shares of a local telecom company:[112] Belize did not contest the general applicability of the test adopted in *Abaclat v Argentina*, but rather argued that it had not ultimately benefitted from the agreements.[113]

If applied to deep-sea mining in waters beyond national jurisdiction, this line of reasoning could apparently furnish a ground for linking such economic activity to the territory of a host state. Indeed, according to numerous national legislations, the sponsorship of deep-sea mining companies may be accompanied by contractually-determined royalties to be paid by the holder of a sponsorship certificate to the treasury.[114] Thus, this economic activity may doubtlessly generate funds which are placed at the disposal of national authorities. This is in addition to the arrangements contained in sponsorship agreements which could presumably regulate other aspects of the deep-sea mining operation, such as the use of infrastructure, the involvement of local communities or the use of local workforce.[115] For instance, the sponsorship agreement concluded between Nauru and Nauru Ocean Resources Inc foresees a program of scientific technical assistance and prioritises Nauruan nationals for employment in the relevant project.[116]

However, in reality, this reading of the 'territoriality' requirement is questionable. First of all, the economic benefits theory is problematic because it does not correspond to the wording contained in the relevant bilateral investment

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109 *Deutsche Bank AG v Sri Lanka (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/02, 31 October 2012).

110 Ibid [291]–[292].

111 Ibid [292].

112 *British Caribbean Bank Ltd (Turks & Caicos) v Belize (Award)* (Permanent Court of Arbitration, Case No 2010-18, 19 December 2014) [206]–[211].

113 Ibid [201]–[203]. See also Margaret Clare Ryan, 'Is There a "Nationality" of Investment? Origin of Funds and Territorial Link to the Host State' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (JurisNet, 2018) 97, 123.

114 See, eg, *Seabed Minerals Act 2017* (Kiribati) s 91.

115 Joseph Bell et al, *Mining Contract: How to Read and Understand Them* (Revenue Watch Institute, 2013) 17 <https://eiti.org/document/mining-contract-how-to-read-understand-them>, archived at <https://perma.cc/UG97-WU9M>.

116 Written Statement of Nauru (n 18) app 1 ('Sponsorship Agreement') cls 37–9.

treaties ('BITs').[117] In fact, the requirement that an investment be made 'for the benefit' of a state 'clearly goes against the ordinary meaning of the words included in the treaty',[118] which often explicitly require the investment be made 'in the territory' of the host state.[119] Additionally, the economic benefit theory 'converts the *objective* condition attached to the localization in the territory of the host State into a *subjective* criterion'.[120] Furthermore, the BITs at issue frequently contain definitions of territory that refer to areas within maritime or land boundaries of the contracting parties or also areas over which they exercise sovereignty, sovereign rights, or jurisdiction. An instance of this is art 1(4) of the *Argentina–Italy BIT* which refers to (i) 'areas within land and maritime boundaries' of one of the Contracting Parties, and (ii) 'maritime zones, namely marine and submarine zones, over which one of the Contracting Parties has sovereignty, sovereign rights or exercise jurisdiction, in conformity with their respective laws and international law'.[121]

This arguably constitutes evidence that there is a link between territoriality and the extent of a state party's sovereign powers. As noted in the dissenting decision of Professor Torres Bernárdez in *Ambiente Ufficio SpA v Argentina*, the definition of art 1(4) of the *Argentina–Italy BIT* should 'prevail in the relations between Argentina and Italy by virtue of the "special meaning" rule of Article 31(4) of the [*Vienna Convention on the Law of Treaties*]'.[122] Moreover, many commercial transactions, such as the export of pharmaceutical products from Canada to the United States, will doubtlessly produce benefits within the importing country, but this does not suffice to find the existence of an investment therein.[123] In addition,

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117 See Alessandra Arcuri and Federico Violi, 'Reconfiguring Territoriality in International Economic Law' (2017) 47 *Netherlands Yearbook of International Law* 175, 203. The language of 'territory' is also adopted in the *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*: International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Report, 18 March 1965) [12]; *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*').

118 Arcuri and Violi (n 117) 203–4.

119 Ibid. For example, the BIT applicable to the dispute in *Abaclat v Argentina* defines investment as any kind of asset invested or reinvested in the territory of another state: at 203–4; *Accordo fra la Repubblica Italiana e la Repubblica Argentina sulla Promozione e Protezione degli Investimenti* [Agreement between the Government of the Italian Republic and the Government of the Argentine Republic on the Promotion and Protection of Investments], signed 22 May 1990 (entered into force 14 October 1993) art 1(1) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/135/argentina-italy-bit-1990>, archived at <https://perma.cc/76VB-88CT> ('*Argentina–Italy BIT*').

120 Caroline Kleiner and Francesco Costamagna, 'Territoriality in Investment Arbitration: The Case of Financial Instruments' (2018) 9(2) *Journal of International Dispute Settlement* 315, 323 (emphasis in original).

121 *Argentina–Italy BIT* (n 119) art 1(4).

122 *Ambiente Ufficio SpA v Argentina (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/08/9, 2 May 2013) [304] (Santiago Torres Bernárdez) ('*Ambiente Ufficio SpA v Argentina (Dissenting Opinion)*'), citing *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(4).

123 See *Apotex Inc v United States of America (Award on Jurisdiction and Admissibility)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, Case No UNCT/10/2, 14 June 2013) ('*Apotex Inc v USA*') [235].

numerous investment treaties provide for national legal rules to form part of the law applicable to resolve disputes,[124] and in doing so incorporate private international law rules.[125] Favouring the economic benefits theory sits uneasily with this since private international law rules may lay down their own criteria for identifying the locus of an investment.[126] Furthermore, the claim that financial instruments are not like other investments, and thus require special criteria to assess territoriality, is legally ungrounded because international investment agreements generally provide a unitary definition of investment without stipulating a variable application of the conditions that define their scope of application.[127]

A supplementary consideration is that international investment law and its arbitral system of dispute resolution originally emerged to shield the foreign investor from the abuses of the exercise of sovereign authority by the host state.[128] Sovereignty is a concept that is very much linked to territory, particularly when it comes to the exercise of enforcement jurisdiction.[129] Unsurprisingly, the definitions of territory in numerous treaties refer to sovereignty or sovereign rights.[130] This element was shortly considered, but ultimately rejected, in *Ambiente Ufficio SpA v Argentina*, in the sense that

> nowhere in the *ICSID Convention* or the *Argentina–Italy BIT* it is said that an investment may only be considered to be made in the territory of the host State if

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124 See, eg, *Treaty on the Encouragement and Reciprocal Protection of Investments*, Germany–Argentina, signed 9 April 1991, 1910 UNTS 171 (entered into force 8 November 1993) art 10(2); *United States–Singapore Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2004) arts 15.21, 20.1, archived at <https://perma.cc/FQ45-BWTL>. See also Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press, 2009) app IV ('*Chinese Model BIT Version III (Current)*') art 9(2)(a); Christoph Shreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) *McGill Journal of Dispute Resolution* 1, 12, 19.

125 For example, the *Argentina–Italy BIT* (n 119) art 8(7) provides that

> [t]he arbitral tribunal will decide on the basis of the laws of the Contracting Party involved in the dispute — including its rules on the conflict of laws — of the provisions of the Agreement, of clauses of any particular agreements relating to the investment, as well as on the basis of the principles of international law applicable in the matter.

See *Abaclat v Argentina (Decision)* (n 103) [270]–[273]; Shreuer (n 124) 12; Christopher R Zheng, 'The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism' (2016) 34 *Singapore Law Review* 139, 147–9.

126 *Abaclat v Argentina (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/07/5, 4 August 2011) [82] (Georges Abi-Saab) ('*Abaclat v Argentina (Dissenting Opinion)*').

127 Kleiner and Costamagna (n 120) 323.

128 Zachary Douglas, 'Property, Investment, and the Scope of Investment Protection Obligations' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 363, 386–7; Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' (Legal Studies Research Paper No 9/2014, Faculty of Law, University of Cambridge, February 2014) 15, archived at <https://perma.cc/4ZNX-3R2E>.

129 Zachary Douglas notes that '[a] state cannot enforce its laws and regulations in respect of property that is not situated in its territory': Douglas (n 128) 384.

130 See, eg, *Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Kazakhstan and the Kingdom of the Netherlands*, signed 27 November 2002, 2877 UNTS 41 (entered into force 1 August 2007) art 1(c); *Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments*, signed 23 February 2006, 2461 UNTS 237 (entered into force 3 May 2007) art 1(4); *Australia–PNG BIT* (n 27) art 1(1)(h).

> that State can exercise full sovereign rights or, for that matter, otherwise full control in regard to those investments.[131]

However, the conception behind the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ('*ICSID Convention*')[132] was to encourage private foreign investment in developing countries by offering an alternative adjudication forum for investment disputes which would have normally been subject to national laws and courts.[133] This hypothesis is supported by the wording of the Preamble to the *ICSID Convention*, which presents international methods of dispute settlement as an alternative to national legal processes.[134] The notion that 'it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration'[135] also underlies arbitral decisions which have limited the applicability of umbrella clauses in investment treaties to acts undertaken by the respondent state as a sovereign.[136] This indicates that the investment treaty arbitration regime was conceived to protect the investor against the host state's exercise and enforcement of its authority: as investment arbitration is a substitute of national courts, it would be surprising if its purview extended beyond the competence of state courts.

B *The Economic Unity of the Investment Theory*

An alternative to the economic benefits theory is the 'overall operation' or 'economic unity of the investment' doctrine, which also stems from arbitral case law. This approach involves verifying whether a 'substantial and non-severable aspect of the overall service was provided in [the host state's territory]' and that the investor's 'entitlement to be paid was contingent on that aspect'.[137] In other words, an activity carried outside of state's borders will qualify as an investment in the territory of that state if it is inherent to a wider operation that is delivered within the borders of a state. The *SGS v Pakistan*,[138] *SGS v Philippines*[139] and *SGS v Paraguay*[140] ('*SGS* cases') claims concerned the host states' non-execution of contracts for the provision of pre-shipment inspection services for exports directed to those states. The respondent states argued that those assets were not covered by the relevant investment treaties because the services provided by SGS SA ('SGS') were performed in the ports of origin rather than in the state party to the contract.

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131 *Ambiente Ufficio SpA v Argentina (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/08/9, 8 February 2013) [507] ('*Ambiente Ufficio SpA v Argentina (Decision)*').

132 *ICSID Convention* (n 117).

133 *Abaclat v Argentina (Dissenting Opinion)* (n 126) [74].

134 *ICSID Convention* (n 117) Preamble para 3.

135 *El Paso Energy International Co v Argentina (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 27 April 2006) [80].

136 See, eg, *Sempra Energy International v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) [310].

137 *SGS v Philippines* (n 29) [102].

138 *SGS Société Générale de Surveillance SA v Pakistan (Decision on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/13, 6 August 2003) ('*SGS v Pakistan*').

139 *SGS v Philippines* (n 29).

140 *SGS Société Générale de Surveillance SA v Paraguay (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/29, 12 February 2010) ('*SGS v Paraguay*').

SGS 'merely' opened liaison offices in the respondent states to facilitate the processes of inspection.[141] In all three cases, the arbitrators rejected this defence based on similar arguments. For the *SGS v Pakistan* tribunal, it was enough that the claimant could adduce evidence of expenditures it had incurred in Pakistan to establish and operate liaison offices therein so to perform its obligations under the underlying agreement: the tribunal held that these expenditures made pursuant to the Pre-Shipment Inspection Agreement involved an injection of funds into the territory of the respondent state and constituted an investment within the meaning of the *Switzerland–Pakistan BIT*.[142]

In *SGS v Philippines*, the tribunal granted that 'investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the [*Philippines–Switzerland BIT*]'.[143] It remarked, however, that the services provided by SGS could not be subdivided so as to place some parts thereof — the activities of the liaison office in the Philippines — within the remit of the treaty, while removing another part — the actual inspection services — outside of it.[144] On the contrary, according to the arbitrators, 'SGS's inspections abroad were not carried out for their own sake but in order to enable it to provide, in the Philippines, an inspection certificate' for the entrance of goods to the customs of the Philippines and for the assessment of the ensuing revenue.[145] In this regard, the operations of inspection were arranged through SGS's Manila liaison office, so that a substantial and non-severable aspect of the overall service was provided in the Philippines. Thus,

> [t]here was no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment 'in the territory of' the Philippines.[146]

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141 *SGS v Pakistan* (n 138) [76]–[77]; *SGS v Philippines* (n 29) [57]–[59]; *SGS v Paraguay* (n 140) [81], [111].

142 *SGS v Pakistan* (n 138) [136]–[140]. See also *Accord entre la Confédération suisse et la République islamique du Pakistan concernant la promotion et la protection réciproque des investissements* [Agreement between the Swiss Confederation and the Islamic Republic of Pakistan concerning the Promotion and Reciprocal Protection of Investments] (Switzerland) RO 1998 2601, signed 11 July 1995 (entered into force 6 May 1996) art 1(2) (definition of 'investment') ('*Switzerland–Pakistan BIT*'). For an English translation of the *Switzerland–Pakistan BIT*, see 'Pakistan–Switzerland BIT (1995)', *UNCTAD Investment Policy Hub* (Web Page) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2721/pakistan-switzerland-bit-1995>, archived at <https://perma.cc/FG7M-AHDG>.

143 *SGS v Philippines* (n 29) [99]. See also *Accord entre la Confédération suisse et la République des Philippines concernant la promotion et la protection réciproque des investissements* [Agreement between the Swiss Confederation and the Republic of the Philippines concerning the Promotion and Reciprocal Protection of Investments] (Switzerland) RO 2001 438, signed 31 March 1997 (entered into force 23 April 1999) art 2 ('*Switzerland–Philippines BIT*'). For an English translation of the *Switzerland–Philippines BIT*, see 'Philippines–Switzerland BIT (1997)', *UNCTAD Investment Policy Hub* (Web Page) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2766/philippines-switzerland-bit-1997>, archived at <https://perma.cc/RF8E-FTRX>.

144 *SGS v Philippines* (n 29) [101], [103].

145 Ibid.

146 Ibid [112].

The *SGS v Paraguay* tribunal endorsed this approach, holding that it was not 'consistent with the facts presented to subdivide [the] Claimant's activities into services provided abroad and services provided in Paraguay, and to then attribute [the] Claimant's claims solely to the former category'.[147]

In this regard,

> SGS's inspections abroad were not carried out for separate purposes, but rather in order to enable it to provide, in Paraguay, a final Inspection Certificate on which the Paraguayan authorities relied to enter goods into the customs territory of Paraguay and to assess and collect the resulting customs revenue. These inspections, and the resulting information that was conveyed to the liaison offices in Paraguay, were indispensable operations for the issuance of the final certifications in Paraguay. Thus they were also indispensable to the benefits of the Contract that were received by the Paraguayan state.[148]

Another significant precedent is the *Deutsche Telekom AG v India* award.[149] The claimant indirectly held shares in Devas Multimedia Pvt Ltd ('Devas'), a corporation which had entered into a contract to deliver hybrid satellite and terrestrial telecommunications services in India. Under the contract, the Indian party would lease S-band transponders on two satellites to Devas in order to provide internet services in India.[150] Devas and Deutsche Telekom AG ('Deutsche Telekom') expended significant resources by preparing the launch of the two satellites and conducting experimental trials in Germany and China.[151] However, the contract was subsequently terminated because national security considerations prompted the Indian authorities to refuse the required orbital slots for commercial activity.[152] The investor had been denied the use of electromagnetic spectrum given to India by the International Telecommunications Union[153] — another international regime for the allocation of a resource. India did not raise any objection in relation to the location of the investment, even though an essential part of the investment activities — the trials and lease of S-band transponders — took place beyond state borders. The tribunal itself focused on Deutsche Telekom's equity contribution in Devas, an Indian corporation, as the protected investment admitted by India in its territory.[154] While upholding its jurisdiction over Deutsche Telekom's indirect investment, the tribunal observed:

> The second part of Article 1(c) of the [*Germany–India BIT*] requires the investment to be 'in the territory' of the host state. It is common ground that Devas is a company incorporated and existing in India. In the Tribunal's view, the requirement that the investment be in the territory of the host state does not restrict the way in which

147 *SGS v Paraguay* (n 140) [113].

148 Ibid.

149 *Deutsche Telekom AG v India (Interim Award)* (Permanent Court of Arbitration, Case No 2014-10, 13 December 2017) ('*Deutsche Telekom v India*'). See also *CC/Devas (Mauritius) Ltd v India (Award on Jurisdiction and Merits)* (Permanent Court of Arbitration, Case No 2013-09, 25 July 2016), which arose from the same facts and saw the tribunal reach the same conclusions.

150 *Deutsche Telekom v India* (n 149) [5].

151 Ibid [386].

152 Ibid [79]–[82]. For a summary of the arbitration facts, see Marco Aliberti, *India in Space: Between Utility and Geopolitics* (Springer, 2018) 138.

153 *Deutsche Telekom v India* (n 149) [51].

154 See ibid [178].

> such investment can be made. It suffices that the result of the investment activity, ie relevant assets, be in the territory of the host state.[155]

In other words, the assets held by Devas in India anchored its activities outside the host state, even if those activities were essential to carrying out the investment. In all of these cases, the tribunals verified whether the operations performed by the claimant abroad were part and parcel of a wider service which was ultimately performed inside the respondent state — that is, whether these different actions constitute 'an indivisible whole'.[156] This said, it has also been argued that for the proclamation of the general unity of a given series of transactions (some taking place abroad), it is necessary that at least some of the transactions involved are per se investment operations in the territory of the respondent state.[157]

The case law of the *North American Free Trade Agreement* ('*NAFTA*')[158] tribunals on cross-border trade operations confirms this approach while affirming that the appointment of distributors or the incorporation of subsidiaries in the respondent state will not per se suffice to fulfil the criterion of territoriality. *Grand River Enterprises Six Nations Ltd v United States of America* ('*Grand River v USA*') concerned the claims of Grand River Enterprises Six Nations Ltd ('Grand River'), a Canadian corporation involved in the manufacture of tobacco products.[159] The claimant had entered into a Cigarette Production Agreement with a separate US company under which Grand River would manufacture cigarettes and the other company would have the exclusive rights to distribute those cigarettes in the US. Grand River itself did not sell any cigarettes in the US nor did it maintain any place of business therein.[160] Relying on the *Bayview Irrigation*

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155 Ibid [151]. See also *Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments*, signed 10 July 1995, 2071 UNTS 121 (entered into force 13 July 1998) art 1(c) ('*Germany–India BIT*').

156 *Enron Corporation v Argentina (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 14 January 2004) [70] ('*Enron v Argentina*').

157 See, eg, *Ambiente Ufficio SpA v Argentina (Decision)* (n 131) [500]–[510]. The majority in *Ambiente Ufficio SpA v Argentina* held that 'looking at the investment operation at stake as whole and in terms of its economic realities, it is hard to imagine the investment's *situs* to be elsewhere than in Argentina': at [508]. The majority agreed with the respondent that a number of 'connecting factors' do not point to Argentina, such as the fact that the bond was issued outside Argentine territory, is not subject to Argentine law, is held by non-Argentine residents who acquired it in Italy, and registered to accounts of banks which are located outside Argentina: at [376], [508]. However, the majority held that it

> cannot join the Respondent's conclusion that the investment was not made in the Respondent's territory since the decisive elements, notably the fact that the funds involved were destined to contribute to Argentina's economic development and were actually made available to it for that purpose, qualify the investments pertinent to the present case as having been made in Argentina.

Ambiente Ufficio SpA v Argentina (Decision) (n 131) [508]. Cf *Ambiente Ufficio SpA v Argentina (Dissenting Opinion)* (n 122) [304]–[311].

158 *North American Free Trade Agreement*, Canada–Mexico–United States of America, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('*NAFTA*').

159 *Grand River Enterprises Six Nations Ltd v United States of America (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 12 January 2011) ('*Grand River v USA*').

160 Ibid [23]–[25].

District v Mexico decision,[161] the tribunal excluded the claimant's production facilities in Canada from the remit of *NAFTA*'s investment chapter.[162] It also held that the separate US company appointed as the distributor of the claimant's products did not form, when considered together with Grand River's production facilities located in Canada, an overall economic operation qualifying as an investment protected by *NAFTA*.[163]

An even more telling decision is *Apotex Inc v United States of America* ('*Apotex Inc v USA*').[164] Apotex Inc ('Apotex'), a Canadian producer of pharmaceutical products, had made significant expenses to obtain the approval required for the sale of its generic drugs in the US market. For that purpose, it had designated its US affiliate and distributor as its agent during that application.[165] The tribunal declined to exercise its jurisdiction even though Apotex's rights were regulated by the law of the US.[166] It did so because 'each of the specific activities and expenses relied upon by Apotex simply supported and facilitated its Canadian-based manufacturing and export operations'.[167] The tribunal held that the efforts made by Apotex to obtain clearance to export its products did not constitute investments within the US because Apotex merely submitted to procedures which apply to the export of products into the US.[168] In addition, according to the tribunal, the costs incurred by Apotex within the framework of clearance procedures were actually incidental to the sales contracts, and therefore fell outside of *NAFTA*'s definition of investment.[169] Thus, they did not change the inherent nature of the activity for which clearance was sought.[170] Similarly, the tribunal found that the utilisation of a US subsidiary as distributor did not transform the activity from one of export to one of investment: it merely constituted a mechanism through which exports would have been conducted.[171]

Hence, the tribunal declined jurisdiction because it was convinced that all the activities undertaken by Apotex were ancillary to the manufacturing and export of products from Canada to the US — commercial activities which are excluded from the remit of *NAFTA*. They did not constitute a novel economic operation, or an investment, which 'anchored' the operations performed abroad to the US territory. In this sense, the *Apotex Inc v USA* award and its predecessors[172] may be readily reconciled with the reasoning in the *SGS* cases on the locus of an investment, in

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161 *Bayview Irrigation District v Mexico (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, Case No ARB(AF)/05/1, 19 June 2007) [98] ('*Bayview v Mexico*'):

> [A] salient characteristic [of an investment covered by the protection of *NAFTA* ch 11] will be that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and that this law is created and applied by that State which is not the State of the investor's nationality.

162 *Grand River v USA* (n 159) [88]–[89].
163 Ibid [93].
164 *Apotex Inc v USA* (n 123).
165 Ibid [148].
166 Ibid [240].
167 Ibid [235].
168 Ibid [186]–[195].
169 Ibid [193]–[194]; *NAFTA* (n 158) art 1139.
170 *Apotex Inc v USA* (n 123) [193]–[194].
171 Ibid [237].
172 *Grand River v USA* (n 159); *Bayview v Mexico* (n 161).

so far as both lines of case law are tacitly premised upon the principle of general unity of the investment operation. On a related note, this suggests that the distinction between the territoriality of investment and its existence *tout court* can become blurred.

The principle of general unity of the investment operation was invoked in the first International Centre for Settlement of Investment Disputes ('ICSID') arbitration, *Holiday Inns SA v Morocco* ('*Holiday Inns v Morocco*'),[173] with respect to loan contracts separate from the basic investment contract which contained the parties' consent to ICSID arbitration. These loan agreements contained a valid choice of forum clause in favour of Moroccan courts, a fact on which the respondent relied to challenge the competence of the tribunal to decide on the performance by Morocco of its obligations toward the investor.[174] The arbitral tribunal instead upheld its jurisdiction on various grounds, including that

> [i]t is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.[175]

The *Holiday Inns v Morocco* decision was therefore based on the intent of the parties to the investment contract and the economic reality of the investment, which denotes the coexistence of subjective and objective criteria. The decision also emphasised that the application of this principle requires the identification of the principal act which underlies the investment and those other acts which constitute mere measures of execution.

Another ICSID tribunal affirmed its jurisdiction in a similar situation in *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal* ('*SOABI v Senegal*').[176] The claimant and the respondent state were engaged in a project for the construction of affordable housing in Dakar which comprised two phases falling under different contracts: the construction of a factory ('Establishment Agreement') and the edification of 15,000 habitations ('habitation contracts').[177] Although consent for ICSID arbitration was contained in the Establishment Agreement,[178] the dispute concerned the termination of the habitation contracts.[179] The Republic of Senegal contended that because the habitation contracts did not contain clauses consenting to ICSID arbitration, this proves that the parties instead intended to opt for the jurisdiction of domestic courts.[180] However, consistent with the *Holiday Inns v Morocco* decision, the arbitrators looked at the intent of the

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173 *Holiday Inns v Morocco* (n 101); Lalive (n 101).
174 Lalive (n 101) 155–6.
175 Ibid 159.
176 *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal (Award on 25 February 1988)* (1994) 2 ICSID Rep 164, 190 ('*SOABI v Senegal*').
177 Ibid 197 [2.06], 199 [2.15].
178 Ibid 199 [2.15], 204 [4.01]–[4.02].
179 Ibid 204 [4.04].
180 See ibid 205 [4.05].

parties, as expressed in the various different contracts, to conclude that the habitation contracts

> are implicitly embraced by the Establishment Agreement, and therefore that the disputes relating to their execution or to the rights and obligations arising thereunder fall within the scope of [the arbitration clause] of the Establishment Agreement.[181]

The arbitral tribunal considered it important that the Preamble of the Establishment Agreement connected the construction of the factory with the broader purpose of providing accessible housing to the inhabitants of Dakar.[182] The arbitrators also observed that certain provisions of the Establishment Agreement, such as articles on the incorporation of legal persons tasked with commercialising the housing after its construction, extended the contractual scheme beyond the mere factory.[183] These factors convinced the tribunal that the common intent of the parties to the contract did not concern the execution of two independent projects but rather the realisation of one unique project consisting of two interrelated stages, among which the construction of the factory would be the technical precondition for the execution of the successive phase.[184]

This doctrine has been replicated by numerous other tribunals when considering the existence of an investment for the purpose of determining their jurisdiction. However, the jurisdiction of these successive tribunals was founded on BITs, not investment contracts. Therefore, the issue of jurisdiction was no longer limited to the scope of contractual schemes. Instead, it concerned the existence of an investment within the meaning of art 25 of the *ICSID Convention* and of the applicable BIT.[185] In *Ceskoslovenska Obchodni Banka AS v Slovakia* ('*CSOB v Slovakia*'), the dispute arose out of the refusal by the Slovak government to honour its obligations, as stipulated by a consolidation agreement, on the privatisation of Československá Obchodní Banka ('CSOB'), a state-controlled bank.[186] This foresaw the assignment by CSOB of certain non-performing loans to a collection company in Slovakia which was to pay CSOB for the receivables. To enable such payment, CSOB provided an initial loan to the collection company on the condition that the repayment of the loans and interest thereon be secured by an obligation of the Slovak government.[187] The Slovak government argued that the obligation to cover the losses incurred by the collection company did not constitute an investment.[188] The tribunal rejected this argument, stating that

> [a]n investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before [ICSID] must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the

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181 Ibid 206 [4.13].
182 Ibid 207 [4.15]–[4.16].
183 Ibid 208–12 [4.19]–[4.29].
184 Ibid 207–8 [4.16]–[4.17].
185 *ICSID Convention* (n 117) art 25.
186 *Ceskoslovenska Obchodni Banka AS v Slovakia (Decision on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/4, 24 May 1999) [1] ('*CSOB v Slovakia*').
187 Ibid [2].
188 Ibid [62].

> [*ICSID*] *Convention*, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[189]

Applying this to the facts, the tribunal held:

> The contractual scheme embodied in the Consolidation Agreement shows, however, that the CSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB. As stated in the first part of Article 1, the Consolidation Agreement was designed to provide for 'the implementation of the project of the second phase of CSOB's transformation' …[190]

According to the tribunal, this finding was warranted not only because of the purpose for including the obligation to repay in the Consolidation Agreement, as gleaned from the Consolidation Agreement provisions, but also given the wording of art 25 of the *ICSID Convention*, under which ICSID has jurisdiction over disputes arising directly out of an investment.[191] The tribunal found further confirmation in the Preamble of the *ICSID Convention*, which, according to its understanding,

> permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.[192]

The quoted precedents suggest that tribunals have consistently 'refused to dissect an investment into individual steps taken by the investor, even if these steps were identifiable as separate legal transactions', and instead attempted to identify the 'entire operation directed at the investment's overall economic goal'.[193] Unsurprisingly, the conceptualisation of an investment as an 'indivisible whole' has been described by the *Ambiente Ufficio SpA v Argentina* tribunal as being 'well-established in international investment law'.[194]

If this extensive case law is applied to the situation of deep-sea miners, one can conclude that both the operations outside national waters and the assets within state territory may be considered when evaluating the existence of an investment. In this way, the entirety of the contractor's operations would come into play as constituting an investment in the territory of its sponsoring state. However, this is not a foregone conclusion. First, one of the criteria justifying this doctrine of economic unity of the investment is the intent of the parties to the investment contracts that underlie such economic operation. In other words, two distinct transactions should not be considered part of the same economic operation where that was not the intent of the parties to the relevant investment contract. It is generally debatable whether the intent of a deep-sea miner and the sponsoring state is to treat the two sets of contracts — sponsorship agreements and exploration

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189 Ibid [72].

190 Ibid [80].

191 Ibid [74]–[75], citing *ICSID Convention* (n 117) art 25(1).

192 *CSOB v Slovakia* (n 186) [64], citing *ICSID Convention* (n 117) Preamble para 1.

193 Christoph Schreuer and Ursula Kriebaum, 'At What Time Must Legitimate Expectations Exist?' in Jacques Werner and Arif Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde* (Cameron May, 2009) 265, 272. See also *Arif v Moldova (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/23, 8 April 2013) [367] ('*Arif v Moldova*').

194 *Ambiente Ufficio SpA v Argentina (Decision)* (n 131) [428].

contracts — as part of an overall operation. Each is concluded with the involvement of different parties and under different bodies of law. This is particularly significant given that in *Bayview Irrigation District v Mexico* and *Grand River v USA* the regulation of activities by laws other than the law of the respondent state was one of the factors leading to a finding that the transactions at issue did not fulfil the requirement of territoriality imposed by *NAFTA*.[195] In addition, distinct from the cross-referencing contracts at issue in *SOABI v Senegal* and *CSOB v Slovakia*, exploration contracts granted by the ISA contain very scant reference to the sponsoring state and no reference whatsoever to possible investment contracts between the deep-sea miner and its sponsoring state.[196] On the other hand, under art 153(2)(b) of *UNCLOS*, any contract between the ISA and a private contractor is factually and legally premised upon an arrangement between the contractor and the sponsored state.[197]

Secondly, it must be verified whether the activities of these entities within the sponsoring state's territory constitutes an investment: this is the requirement that there exists a basic transaction in the host state that meets the criteria of an investment, and not measures of execution.[198] This aspect was not discussed as extensively as it could have been by the tribunals of the *SGS* cases: that a liaison office constitutes per se an investment is not entirely self-evident and might have required a more detailed analysis in light of the objective criteria elaborated by the jurisprudence.[199] The case of *Apotex Inc v USA* suggests that, in certain cases, the requirement of territoriality of an investment and its material existence may overlap so that a more detailed analysis of its existence might be required.[200] The tribunal held that the designation of an affiliate US company as the product's distributor does not suffice to generate a protected investment[201] — despite previous *NAFTA* tribunals upholding jurisdiction on transboundary networks of distribution.[202] This sits uneasily with the reasoning of the tribunals of the *SGS* cases that pre-shipment inspections in export states were part of a single integrated process to fulfil obligations made to the contracting states and thus a protected investment.[203] Either way, a finding of jurisdiction will likely be found where the

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195 See *Bayview v Mexico* (n 161) [93]–[104]; *Grand River v USA* (n 159) [85]–[89].

196 Section 20 of the 'Standard Clauses for Exploration Contract' annexes of each of the ISA exploration regulations, which regards the consequences of the termination of sponsorship, is the only standard clause that refers to the powers of the sponsoring states: see *Standard Clauses for Exploration Contract*, ISBA Doc ISBA/19/C/17 (n 65) s 20; *Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, ISBA Doc ISBA/18/A/11 (n 47) annex IV ('*Standard Clauses for Exploration Contract*') s 20; *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA Doc ISBA/16/A/12/Rev.1 (n 46) annex 4 ('*Standard Clauses for Exploration Contract*') s 20.

197 Conversation with James Harrison (Alberto Pecoraro, Skype, 24 June 2019); *UNCLOS* (n 5) art 153(2)(b).

198 *Holiday Inns v Morocco* (n 101), quoted in Lalive (n 101) 159; *Ambiente Ufficio SpA v Argentina (Dissenting Opinion)* (n 122) [304]–[311].

199 See, eg, *Poštová Banka AS v Greece (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/8, 9 April 2015) [360] ('*Poštová Banka v Greece*'). The tribunal spoke of 'contribution, duration, risk' as the criteria of the objective test.

200 See Fontanelli (n 93) 68.

201 *Apotex Inc v USA* (n 123) [160], [174]–[176].

202 See, eg, *Cargill Inc v Mexico (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009) [153]–[154].

203 *SGS v Pakistan* (n 138); *SGS v Philippines* (n 29); *SGS v Paraguay* (n 140). See above 21–2.

sponsored miner operates liaison offices and processing or other onshore facilities in the territory of the host state, or where the mining operations are conducted by vessels that fly the sponsoring state's flag. However, the situation of the deep-sea miner will be less clear where its activities in the sponsoring state are minimal and when mining is carried out by a subcontractor or through foreign vessels, or when the processing of minerals is carried out in a third state. This was, for example, the case for Nautilus Minerals' operation in Tonga: Nautilus Minerals contracted a Chinese company to conduct the processing and refining of the extracted minerals.[204]

VI A Defence Based on the Common Heritage of Mankind?

In order to prevent the application of the 'economic unity' doctrine to the question of jurisdiction, the sponsoring state may attempt to assert that its application is incompatible with the status of the Area as the common heritage of mankind. This is because it would actually entail a 'creeping' extension of sovereignty over an environment that is an international public utility administered exclusively through an international organisation in the form of the ISA.[205] More specifically, since the common heritage of mankind excludes any exercise of sovereignty by states,[206] a finding of jurisdiction *ratione loci* would amount to an affirmation of state sovereignty over activities which only the ISA is allowed to organise. Thus, the assets of a deep-sea miner in the sponsoring state and the extraction of the deep-sea minerals must arguably constitute two separate operations, one of which is situated beyond national jurisdiction and primarily regulated by the ISA. As a result, the mere fact that an enterprise within the sponsoring state is affected by the termination of sponsorship would not be sufficient to establish the right of that enterprise to protection under an international investment treaty.[207]

National interests are very much expunged from the regime of the Area under *UNCLOS*.[208] Article 137 of *UNCLOS* prohibits any 'exercise of sovereignty or sovereign rights over any part of the Area or its resources', stipulating that '[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the [ISA] shall act'.[209] The language of this provision is particularly wide since it refers not only to sovereignty over the Area per se — that is, the impossibility of appropriating the seabed lying beyond national jurisdiction — but also to the exercise of any sovereign right regarding the resources in the Area. Such a wide language is telling because, before the emergence of the common

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204 Blue Ocean Law and the Pacific Network on Globalisation, 'Resource Roulette: How Deep Sea Mining and Inadequate Regulatory Frameworks Imperil the Pacific and Its Peoples' (Report, 9 May 2018) 18 <http://www.savethehighseas.org/resources/publications/resource-roulette-how-deep-sea-mining-and-inadequate-regulatory-frameworks-imperil-the-pacific-and-its-peoples/>, archived at <https://perma.cc/38MF-LXNV>.

205 See Gbenga Oduntan, 'Imagine There Are No Possessions: Legal and Moral Basis of the Common Heritage Principle in Space Law' (2005) 2(1) *Manchester Journal of International Economic Law* 30, 33.

206 *UNCLOS* (n 5) art 137(1).

207 See *Bayview v Mexico* (n 161) [101].

208 See Christopher C Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35(1) *International and Comparative Law Quarterly* 190, 191–5.

209 *UNCLOS* (n 5) art 137.

heritage of mankind principle, the status of the high seas as *res communis* already implied the impossibility of appropriating that territory.[210] In this sense, in order to have any meaning, the prohibition on the exercise of sovereign powers over resources in the Area must go one step further by creating some institutional machinery for the common space at issue.[211] This is understandable, given that one of the considerations underlying the principle of the common heritage of mankind was the insufficiency of the hitherto existing principles to draw a line against the 'creeping' extension of state jurisdiction over the seabed beneath international waters.[212]

Article 157(1) of *UNCLOS* adds that '[t]he [ISA] is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area, particularly with a view to administering the resources of the Area'.[213] The plain wording of these provisions suggests that states party can only act multilaterally through the ISA, which holds an extensive legislative and executive mandate for administering mining activities in the Area. Its competencies span 'distributing users' rights and economic benefits, promoting peaceful uses of the [Area] and facilitating the settlement of disputes' — all roles which are usually reserved to sovereign states.[214] Given this, an extension of the geographical scope of investment treaties to extractive activities in the Area may be inconsistent with the ISA's competencies, as recognised by *UNCLOS*.[215]

Sponsoring states may also object that the dispute settlement clauses of pt XI of *UNCLOS* implicitly exclude recourse to investment arbitration by the contractor. Indeed, under art 188(2)(a) of *UNCLOS*, commercial arbitral tribunals formed to hear contract-based disputes between the ISA and a contractor must refer any question on the interpretation of *UNCLOS* to the Seabed Disputes Chamber for a ruling.[216] This provision, which preserves the role of the Seabed

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210 See ibid art 89; Alexandre Kiss, 'The Common Heritage of Mankind: Utopia or Reality?' (1985) 40(3) *International Journal* 423, 423. See also *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 2.

211 Rüdiger Wolfrum, 'Common Heritage of Mankind' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, as at November 2009) [15].

212 This issue was first made prominent by Arvid Pardo in his speech to the first committee of the United Nations General Assembly: see *Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind*, UN GAOR, 1st Comm, 22nd sess, 1515th mtg, Agenda Item 92, UN Doc A/C.1/PV.1515 (1 November 1967) paras 56–9, 90–1. See also Wolfgang Graf Vitzthum, 'International Seabed Area' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, as at June 2008) [24].

213 *UNCLOS* (n 5) art 157(1).

214 Joyner (n 208) 194.

215 According to Rüdiger Wolfrum, the ISA acts as a trustee of humanity: Wolfrum, 'The Principle of the Common Heritage of Mankind' (n 40) 316. Powers similar to the ISA can be found in the context of the Mandates System, wherein a government 'mandatory' acts as an international trustee of a territory with only limited title to the territory. Various courts have held that such mandatories, in pursuance of the international duties imposed by their mandate, have full and complete jurisdiction over the territory at issue: see *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 150–2 (Judge McNair); *Ffrost v Stevenson* (1937) 58 CLR 528. Similarly, whilst the ISA, as trustee, has exclusive control over the Area (non-jurisdictional seas), its power is limited to that in *UNCLOS*.

216 *UNCLOS* (n 5) art 188(2)(a).

Disputes Chamber as the sole interpreter of pt XI of *UNCLOS*, arguably cannot be reconciled easily with recourse to investment arbitration: any arbitral proceeding will necessarily raise the issue of territoriality of the alleged investment. Ruling on this matter will inevitably involve examining the scope of the common heritage of mankind principle. In this way, a dispute settlement body other than the ones foreseen in *UNCLOS* would have to interpret the Convention's terms, thus acting ultra vires given art 188(2)(a).

Yet, in my opinion, such a defence would be unpersuasive because it is not altogether evident that the common heritage of mankind principle conflicts with the application of international investment law to deep-sea mining enterprises. This is because the provisions in pt XI of *UNCLOS* which specify this principle do not seem to exclude the application of investment instruments in the relationship between the deep-sea miner and its sponsoring state. Article 137(1) of *UNCLOS* bans the exercise of sovereignty over 'any part of the Area or its resources' while not elaborating on the deep-sea miner itself.[217] Further, art 153(1) of *UNCLOS* states that only '[a]ctivities in the Area shall be organized, carried out and controlled by the [ISA]'.[218] According to the Seabed Disputes Chamber, this expression includes only the recovery of minerals from the seabed, lifting such minerals to the water surface and activities directly connected therewith.[219] Article 157(2) further limits the mandate of the ISA by stating that '[t]he powers and functions of the [ISA] shall be those expressly conferred upon it by this Convention'.[220]

The provisions of pt XI on dispute settlement are equally silent when it comes to the competence of investment tribunals to hear disputes involving deep-sea mining in the Area. Arguably, the foregoing objection based on art 188 of *UNCLOS* is not supported by the wording of that provision. The requirements of art 188(2)(a) apply uniquely to disputes concerning the interpretation or application of the contracts concluded between the deep-sea miner and the ISA.[221] Hence, the exclusion of the interpretation of *UNCLOS* from the remit of ad hoc commercial arbitration is worded too narrowly to operate in disputes sourced in the international investment law applicable between the contractor and its sponsoring state. This entails a risk of contradictory interpretations of the common heritage of mankind principle by *UNCLOS* tribunals and investment tribunals respectively. Although this would not contribute to fulfilling the Convention's objective of providing a comprehensive legal order for the seas,[222] international tribunals may not add to the stipulated treaty's requirements, even if such additions would be supported on policy grounds.[223]

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217 Ibid art 137(1).

218 Ibid art 153(1).

219 *Responsibilities and Obligations of Sponsoring States (Advisory Opinion)* (n 42) [94]–[96].

220 *UNCLOS* (n 5) art 157(2). The same provision further grants to the ISA 'such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area'.

221 Ibid art 188(2)(a).

222 Ibid Preamble para 4.

223 *Tokios Tokelės v Ukraine (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/18, 29 April 2004) [36] ('it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits [that are] nowhere evident from the negotiating history'). See also *Plama Consortium Ltd v Bulgaria (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 8 February 2005) [193]:

It must therefore be presumed that the states party to *UNCLOS* were left free to elaborate the norms applicable to their relationship with deep-sea miners. Perhaps a parallel may be made here with the rejection by investment tribunals of defences based on the incompatibility between European Union law and intra-EU BITs. After all, both scenarios delved into the relation between international investment law and the exclusive competences of an international organisation. Significantly, the *Binder v Czech Republic* tribunal concluded:

> Intra-EU investor-state arbitration is not inconsistent with the EC [European Community] legal order. Investor-state arbitration is not addressed by EC law, and the EC legal order has not offered a substitute for investor-state arbitration … As there is no conflict between the *Czech–German BIT* and EC law, the primacy of EU law is a moot point.[224]

Similarly, *UNCLOS* and its related instruments do not address dispute settlement between the deep-sea miner and its sponsoring state. They offer no substitute for investor-state arbitration. An arbitral tribunal is likely to apply this reasoning to the relationship between its competence and the competence of the ISA over the common heritage of mankind. Hence, the ramifications of the principle of the common heritage of mankind may not be as far-reaching as previously anticipated. This said, the inapplicability of this principle over the jurisdiction of investment tribunals does not signify that it will be irrelevant to determine the merits of the dispute or the damages to be awarded.

VII Is the Deep-Sea Miner a Protected Investor under International Investment Law?

Under art 153(2)(b) of *UNCLOS* the private entities which have access to deep-sea mining in the Area are those 'juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States'.[225] Generally speaking, national laws typically require that the sponsored entities be incorporated under the law of that state.[226] However, this does not exclude the applicability of international investment law to deep-sea mining. In this regard, investments made through a local vehicle or even through companies interposed between the local vehicle and the ultimate owner have been usual and commonplace for decades.[227] Broadly speaking, there are two different mechanisms through which the investment represented by the deep-sea miner

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> Such statements [on the BIT's object and purpose] are as such undeniable in their generality, but they are legally insufficient to conclude that the Contracting Parties to the *Bulgaria–Cyprus BIT* intended to cover by the MFN provision agreements to arbitrate in other treaties … the Tribunal is mindful of Sir Ian Sinclair's warning of the 'risk that the placing of undue emphasis on the "object and purpose" of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties'.

224 *Binder v Czech Republic (Award on Jurisdiction)* (UNCITRAL Arbitral Tribunal, 6 June 2007) [40]–[42]. See also *Blusun SA v Italy (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/14/3, 27 December 2016) [296].

225 *UNCLOS* (n 5) art 153(2)(b).

226 See, eg, *Czech Republic Seabed Minerals Act* (n 96) art 3; *Singapore DSM Act* (n 96) s 5(1); *Cook Island Seabed Minerals Act* (n 98) s 134(2)(a)(i).

227 See *Anglo American PLC v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/14/1, 18 January 2019) [195] ('*Anglo American v Venezuela*').

might be protected. The first mechanism is the recognition by the parties to a treaty or an investment contract that an entity with the nationality of the host state should be treated as a foreign investor because of external control.[228] The second mechanism is the protection afforded to shareholders by international investment treaties, which a *jurisprudence constante* has interpreted as affording protections for losses incurred by the shareholders as a result of wrongs done to the corporation.[229]

Under art 25(2)(b) of the *ICSID Convention* an entity will 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'.[230] This consent can be included in an investment treaty, as is the case in art I(1)(b)(ii)(B)(ii) of the *Australia–Indonesia BIT*.[231] It may also be stipulated in a contract concluded directly with the investor[232] or even in national legislation.[233] There are two criteria at play in this type of provision: the fact of foreign control and consent by the parties. This latter criterion has been interpreted with flexibility by investment tribunals dealing with contract-based claims: in *Liberian Eastern Timber Corporation (LETCO) v Liberia* ('*LETCO v Liberia*') and *Vacuum Salt Products Ltd v Ghana* the presence of an ICSID dispute settlement clause in the contract was held to constitute an agreement to treat the contracting party as a national of another state.[234] According to the *LETCO v Liberia* tribunal, this was justified because when a contracting state and a foreign-controlled company with the same nationality sign an investment agreement that includes an ICSID arbitration clause, the state 'does so with the knowledge that it will only be subject to ICSID jurisdiction if it has agreed to treat that company as a juridical person of another Contracting State'.[235]

The abovementioned decisions were rendered within the framework of the *ICSID Convention*. This said, the principle of party autonomy suggests that it is

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228 See *ICSID Convention* (n 117) art 25(2)(b). This recognition can also come under the form of a national law: see below n 233.

229 See generally Julien Chaisse and Lisa Zhuoyue Li, 'Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss' (2016) 52(1) *Stanford Journal of International Law* 51.

230 *ICSID Convention* (n 117) art 25(2)(b).

231 *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, signed 17 November 1992, [1993] ATS 19 (entered into force 29 July 1993) art I(1)(b) (definition of 'investor' sub-para (ii)(B)ii) ('*Australia–Indonesia BIT*').

232 For example, in *SOABI v Senegal* (n 176), the tribunal acknowledged that the parties to the contract had explicitly accepted to treat SOABI as a Belgian corporation even though it was incorporated in Senegal: at [30]–[31]. See also *Caratube International Oil Company LLP v Kazakhstan (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/13, 27 September 2017) [599].

233 See, eg, *Loi N° 004/2002 du 21 Février 2002 portant Code des Investissements* [Law N° 004/2002 of 21 February 2002 on the Investment Code] (Democratic Republic of Congo) art 38 <http://droit-afrique.com/upload/doc/rdc/RDC-Code-2002-des-investissements.pdf>, archived at <https://perma.cc/4RCJ-AHF8>.

234 *Vacuum Salt Products Ltd v Ghana (Award)* (ICSID Arbitral Tribunal, Case No ARB/92/1, 16 February 1994) [28], [30], [38]; *Liberian Eastern Timber Corporation (LETCO) v Liberia* (1987) 26 ILM 647, 653 ('*LETCO v Liberia*').

235 *LETCO v Liberia* (n 234) 653.

possible for the parties to an investment contract to consider a foreign-owned subsidiary in the same way as a foreign corporation for the purposes of non-ICSID arbitration.

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: for instance, art 1(a)(ii) of the *UK–Tonga BIT* enumerates 'shares in and stock and debentures of a company and any other form of participation in a company' as part of the protected international investment.[236] 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.[237] Investment treaty case law preponderantly accepts the *locus standi* of foreign shareholders of a parent company claiming for damages sustained by the company's subsidiaries.[238] In certain cases, in the absence of an applicable investment treaty, national investment legislation lays down similar definitions of investment that arguably ground analogous shareholder rights.[239]

Regarding investment treaties, there have been two recurring issues: first, the standing of shareholders to bring claims regarding measures impacting companies in which they have an interest, and secondly, whether that standing extends to the company's contractual rights.[240] In the *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ruling, the International Court of Justice held that'[s]o long as the [local] company is in existence the shareholder has no right to the corporate assets'.[241] However, the same judgment admitted that the situation is different when the shareholder's direct rights are infringed,[242] as stronger protection for shareholders is guaranteed through treaty stipulations.[243]

Since then, investment tribunals have looked into the scope of state consent to their jurisdiction in order to find whether shareholders could invoke an investment treaty for damages sustained by the company in which they had interest.[244] In doing so they have referred to the definition of investment contained in those treaties: this involves the determination of whether the shares held by the shareholders fit into the illustrative list of assets listed in the investment treaty.[245] The reasoning in *RREEF Infrastructure (GP) Ltd v Spain* is one of the more recent illustrations of this approach: the tribunal stated that the *Energy Charter Treaty*'s inclusion of 'shares, stock, or other forms of equity participation in a company' in

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236 *UK–Tonga BIT* (n 27) art 1(a) (definition of 'investment' sub-para (ii)).

237 Christoph Schreuer, 'The Dynamic Evolution of the ICSID System' in Rainer Hofmann and Christian J Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 15, 23.

238 See generally Chaisse and Li (n 229) 69–81.

239 See, eg, *Investment Promotion Act 1992* (Papua New Guinea) s 3 (definition of 'investment').

240 Chaisse and Li (n 229) 69.

241 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 34 [41] ('*Barcelona Traction*').

242 Ibid 36 [47].

243 Ibid 36 [90].

244 See, eg, *Enron v Argentina* (n 156) [42]–[49].

245 See, eg, ibid [42]. See also Dmitry A Pentsov, 'Contractual Joint Ventures in International Investment Arbitration' (2018) 38(3) *Northwestern Journal of International Law and Business* 391, 410, 414, 418.

its definition of investment 'removes any possible doubt concerning the Claimants' *jus standi* in the present case'.[246] In doing so, the tribunal replicated a long succession of arbitral precedent.[247] The use of such an approach is not limited to investment treaty-based arbitration: certain national laws include foreign-held shares in local companies in their definition of foreign investor.[248]

Arbitral case law has consistently upheld jurisdiction over claims related to investments held indirectly by foreign shareholders. Objections arguing that indirect investment was not protected have been rejected when these definitions did not have any explicit differentiation between direct and indirect investment. An example of this would be art 1(a)(ii) of the *UK–Venezuela BIT* defining investment as 'every kind of asset and in particular, though not exclusively, includes … shares in and stock and debentures of a company and any other form of participation in a company'.[249] As stated by the tribunal in *Siemens AG v Argentina*,

> [t]he definition of 'investment' [in the *Germany–Argentina BIT*] is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. … One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies'. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.[250]

This approach has been upheld by other tribunals confronted with similarly worded clauses.[251] In *Anglo American PLC v Venezuela* the tribunal also referred to the wording 'any other form of participation in a company' in the *UK–Venezuela BIT* as a further argument in favour of affording treaty protection to indirect investment.[252]

Treaty protection is granted to majority and minority shareholders: ICSID decisions demonstrate that 'there is no material distinction between majority and

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246 *RREEF Infrastructure (GP) Ltd v Spain (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/13/30, 6 June 2016) [123] ('*RREEF Infrastructure v Spain*'), quoting the *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) art 1(6).

247 In noting that the formula in the *Energy Charter Treaty* 'removes any possible doubt concerning the Claimants' *jus standi*', the tribunal cites numerous supporting cases: *RREEF Infrastructure v Spain* (n 246) [123]. See, eg, *Azurix Corp v Argentina (Decision on the Application for Annulment)* (ICSID Arbitral Tribunal, Case No ARB/01/12, 1 September 2009) [102]; *Suez Sociedad General de Aguas de Barcelona SA v Argentina (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 3 August 2006) [49]–[51].

248 See, eg, *The Foreign Investment Act 2005* (Solomon Islands) s 2 (definition of 'foreign investor').

249 *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments*, signed 15 March 1995, [1996] UKTS 83 (entered into force 1 August 1996) art 1(a) (definition of 'investment' sub-para (ii)) ('*UK–Venezuela BIT*').

250 *Siemens AG v Argentina (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 3 August 2004) [137].

251 See, eg, *Mobil Corporation v Venezuela (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/27, 10 June 2010) [165]; *Arif v Moldova* (n 193) [379].

252 *Anglo American v Venezuela* (n 227) [205].

minority shareholders for jurisdictional purposes', and therefore 'a shareholder having a minority participation in a locally incorporated corporation can submit a claim before an ICSID arbitral tribunal'.[253] Indeed, when defining their protected investment, most treaties do not make any distinction between majority and minority shareholding. For example, in *Lanco International Inc v Argentina*, a case regarding participation in an international consortium managing port facilities under a concession, the tribunal stated:

> [T]he *Argentina–US Treaty* says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share; thus the fact that LANCO holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I of the *Argentina–US Treaty*.[254]

This said, arbitral case law has nuanced this seemingly broad protection. First of all, protection is premised on a certain type of treaty language and is not granted where treaty provisions diverge from that language. For example, in *HICEE BV v Slovakia*, the Dutch claimant had acquired a Slovak company which held shares in various local health insurance subsidiary companies.[255] The relevant provision in the applicable treaty read: 'the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State'.[256] In interpreting this provision, the tribunal relied on the explanatory note submitted to the Dutch parliament as part of the process of that treaty's ratification. The explanatory note documented that Czechoslovakia had wished to exclude sub-subsidiaries from the scope of the agreement, a request to which the Dutch delegation had consented.[257] The tribunal found that this note shed light on the parties' understanding when concluding the treaty and was therefore a valid supplementary material for its interpretation.[258]

A second caveat posed by arbitral jurisprudence is that the formula 'investment of' an investor carries some objective requirements: there must be some activity of investing.[259] This means either the claimant's control over the investment or the transfer of something of value, such as money or know-how by that investor, to another country.[260] In other words, the indirect investor must actually hold an investment in the host country. In *Standard Chartered Bank v Tanzania*,[261] the

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253 Martin J Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes' (2011) 26(1) *ICSID Review* 34, 47–8, citing *Asian Agricultural Products Ltd v Sri Lanka (Award)* (ICSID Arbitral Tribunal, Case No ARB/87/3, 27 June 1990).

254 *Lanco International Inc v Argentina (Preliminary Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/6, 8 December 1998) [10].

255 *HICEE BV v Slovakia (Partial Award)* (Permanent Court of Arbitration, Case No 2009-11, 23 May 2011) ('*HICEE v Slovakia*').

256 *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed 29 April 1991, 2242 UNTS 205 (entered into force 1 October 1992) art 1(a) (definition of 'investments').

257 *HICEE v Slovakia* (n 255) [37]–[38].

258 Ibid [136].

259 *Standard Chartered Bank v Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/12, 2 November 2012) [232].

260 Ibid.

261 Ibid.

Hong Kong subsidiary of the UK-incorporated claimant's corporate group had acquired a loan originally granted by Malaysian lenders to invest in a Tanzanian company for the construction of an electricity generating facility in Tanzania. However, the claim was brought forward by the United Kingdom affiliate of that corporate group. The tribunal held that it lacked jurisdiction: having considered that the treaty's wording required control by the investor over an investment, it found that the claimant did not contribute to or control the loans, or give directions to its Hong Kong subsidiary regarding the loans, and thus the loans could not be considered investments 'of' the claimant.[262]

Thirdly, the protection granted to indirect shareholders only concerns their investment — the assets they hold that fall under the categories included explicitly or implicitly in the relevant investment treaty's definition of investment. Thus, where the relevant investment constitutes shares in a subsidiary, this protection will extend only to those shares. Such protection will cover any state action which led with sufficient directness to loss or damage in respect of the owned shares: the required connection is of a factual nature.[263] However, while the acquisition of shares in a company of a contracting state qualifies as an investment under most investment treaties, that company and its assets typically do not.[264] Consequently, such an investor cannot claim 'that the assets of the company are its property and ask for compensation for interference with these assets', however it can claim 'for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares'.[265] The decision on jurisdiction in *Poštová Banka AS v Greece* illustrates this point well:[266] Istrokapital SE claimed that, as a shareholder in Poštová Banka AS, it made an indirect investment in the government bonds held by the latter and that this constituted an investment protected by the *Cyprus–Greece BIT*.[267] The tribunal held that this claim lay outside of its jurisdiction because Istrokapital SE did not have any right to the bonds held by Poštová Banka AS.[268] The tribunal confirmed that the shareholder could claim for 'actions taken against the assets of the

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262 Ibid [196]–[201], [230]–[232], [254], [257]–[271].

263 See *Gami Investments Inc v Mexico (Final Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 15 November 2004) [33].

264 'It has been repeatedly held by arbitral tribunals that an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares': *ST-AD GmbH (Germany) v Bulgaria (Award on Jurisdiction)* (Permanent Court of Arbitration, Case No 2011-06, 18 July 2013) [278]–[285] ('*ST-AD GmbH v Bulgaria*'), discussing *CMS Gas Transmission Co v Argentina (Decision on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 17 July 2003) [66]–[68]. See also *Impregilo SpA v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [238]–[245]; *Poštová Banka v Greece* (n 199) [228]–[246].

265 *ST-AD GmbH v Bulgaria* (n 264) [282].

266 *Poštová Banka v Greece* (n 199).

267 Ibid [1]–[2], [91], [149]–[152]; *Συμφωνία μεταξύ της Κυβέρνησης της Ελληνικής Δημοκρατίας και της Κυβέρνησης της Κυπριακής Δημοκρατίας για την αμοιβαία προαγωγή και προστασία επενδύσεων* [Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus on the Mutual Promotion and Protection of Investments], signed 30 March 1992 (entered into force 26 February 1993) ('*Cyprus–Greece BIT*') <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1160/cyprus-greece-bit-1992>, archived at <https://perma.cc/ETF7-ZNK7>.

268 *Poštová Banka v Greece* (n 199) [246].

company in which it holds shares, but only to the extent that the shareholder's claims relate to the effect that such actions have on the value of its shares'.[269]

Certainly, states may decide to grant wider protection by allowing foreign shareholders to claim on the basis of rights held by the companies over which they hold shares. In the *Anglo American PLC v Venezuela* case, decided under the *UK–Venezuela BIT*, the tribunal considered that the claimant's indirect participation in the assets of its Venezuelan subsidiary were investments made by the foreign investor and protected by the treaty.[270] The tribunal's interpretation of the definition of investment under the treaty was informed by art 5(2) of the *UK–Venezuela BIT*, according to which:

> Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) [on the prohibition against uncompensated expropriation] of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.[271]

The tribunal considered that the wording of this provision granted investors a right to be compensated for the expropriation of the assets of a local company. Its stipulations were held to reflect the contracting parties' will to permit shareholders to claim the assets of the local company in which they hold shares. According to the tribunal, such a provision, even if referring exclusively to expropriation, 'would not make sense if the assets of the [local] company in which the investor has a shareholding interest were not protected by the Treaty as well as the shares themselves'.[272] The context offered by art 5(2) of the *UK–Venezuela BIT* prompted the tribunal to hold that the treaty's protection of 'other form of participation' included protection of the 'assets of the company whose shares it owns … not only in the case of expropriation but more generally, when those assets are affected by a breach of the State's obligations under the Treaty'.[273] A similar conclusion cannot be as easily inferred from treaties that do not have a provision similar to art 5(2) of the *UK–Venezuela BIT*: the default situation under international law remains one of separation between the shareholder and the company it owns.[274]

It is submitted here that, with due regard for these nuances, international investment law will operate so as to protect the deep-sea mining enterprise in its relations with the sponsoring state. First, international investment law will apply to the relation between the deep-sea miner and its sponsor when the relevant parties have agreed to treat that entity as a foreign investor. This may happen by the means of a treaty, through national legislation or even through an investment contract such as a sponsorship agreement.

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269 Ibid [244], citing *Sergei Paushok v Mongolia (Award on Jurisdiction and Liability)* (UNCITRAL Arbitral Tribunal, 28 April 2011) [202].

270 *Anglo American v Venezuela* (n 227) [213].

271 Ibid [209]–[212]; *UK–Venezuela BIT* (n 249) arts 1(a), 5(2).

272 *Anglo American v Venezuela* (n 227) [210]–[211].

273 Ibid [212].

274 See, eg, *Barcelona Traction* (n 241) 34 [41]; *HICEE v Slovakia* (n 255) [147].

It is worthwhile mentioning that various Pacific Island states are parties to the *ICSID Convention*.[275] For example, Nauru ratified the *ICSID Convention* in April 2016 shortly after the enactment of the *International Seabed Minerals Act 2015*.[276] It is possible that the island state's policymakers considered ICSID arbitration as a suitable forum in case of disputes arising from contractual arrangements with the sponsored entity.[277] As stated above, the ICSID arbitral case law regards contractual clauses that consent to ICSID arbitration as constituting an agreement by the parties to treat the deep-sea miner as a foreign investor, as foreseen by art 25(2)(b) of the *ICSID Convention*.[278] What is more, Tuvalu went even further by consenting in s 126(2)(b) of the *Tuvalu Seabed Minerals Act 2014* to refer disputes with sponsored entities to ICSID arbitration. Alongside with the requirement that sponsored entities be registered in Tuvalu,[279] this acceptance of ICSID jurisdiction may be interpreted as establishing an engagement to treat the deep-sea miner as a foreign investor under art 25(2)(b) of the *ICSID Convention*.

Secondly, the foreign investor holding shares in the sponsored entity may be protected by virtue of the definition of foreign investment contained either in a treaty or in a national statute. This is true where the relevant investment treaty establishes its scope as including 'investments' defined as 'every kind of asset that an investor owns or controls, directly or indirectly', including shares in an enterprise.[280] International investment treaties often provide that a foreign company which incorporates a deep sea mining contractor in a sponsoring state will be in control of the shares of that enterprise and thus be a foreign investor deserving protection under an international investment treaty.[281] Certain national investment laws operate in a similar manner. An interesting example in the Pacific region is Timor-Leste's *Private Investment Law* which protects 'direct or indirect investment', including '[c]apital shares and restricted shares in commercial companies, as well as increases or supplementary inputs of capital'.[282] Interestingly, art 34(2) of the same law provides that disputes between the state and investor regarding the interpretation and application of that law are to be resolved by reconciliation in accordance with Government Decree or the procedure established under an agreement between the parties or an international agreement to which Timor-Leste is a party. However, in the event that this proves

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275 'Database of Member States', *International Centre for Settlement of Investment Disputes* (Web Page, 2019) <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>, archived at <https://perma.cc/S2XS-HYCL>.

276 Ibid; *Nauru Seabed Minerals Act* (n 96).

277 Such an investment contract does not have to be with the sponsored entity itself: it might also be concluded with the foreign owner of that entity. There may exist two investment contracts, respectively with the foreign investor and with the local subsidiary. In that case, the theory of overall economic unity of the investment expressed in *Holiday Inns v Morocco* might come into play, thus expanding the jurisdiction of ICSID tribunals.

278 See above 33–4.

279 *Tuvalu Seabed Minerals Act 2014* s 88(1)(a).

280 See, eg, *PACER Plus* (n 90) ch 9 art 1 (definition of 'investment').

281 See, eg, *Netherlands–Venezuela BIT* (n 106) art 1(b) (definition of 'nationals'); *Germany–India BIT* (n 155) art 1(c) (definition of 'investors'); *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments*, signed 23 August 1995, [1997] ATS 4 (entered into force 11 January 1997) art 1(1)(c) (definition of 'investor'); *Australia–PNG BIT* (n 27) art 2.

282 *Lei do Investimento Privado* [Private Investment Law] (Timor-Leste) Law No 14/2011, art 3(l) (definition of 'investment' sub-para (iii)).

unsuccessful, the dispute is to be resolved by arbitration under the rules of the International Chamber of Commerce.[283]

VIII SOME CONCLUSIONS: COMMON HERITAGE OF MANKIND AND INTERNATIONAL INVESTMENT LAW

Aside from the ISA, the regime created by *UNCLOS* in the Area foresees the intervention of two further actors: the deep-sea miner and the state sponsoring it. Under art 139 of *UNCLOS*, a state which decides to sponsor a deep-sea miner must ensure that activities in the Area are carried out in conformity with *UNCLOS*.[284] In deploying their best efforts to fulfil these responsibilities, sponsoring states will need to adopt measures that are likely to affect the contractors' economic activity. In this regard, scarce scientific knowledge of the deep-sea ecosystem and uncertainties on the environmental impact of deep-sea mining will pose arduous challenges for state regulators. In addition, these activities have proved to be controversial and doubts have been expressed on the appropriateness of both the existing legal framework and deep-sea mining in the Area itself.[285] Hence, it is plausible that sponsoring states may modify their regulation of deep-sea mining in the Area.

However, their freedom to do so will be constrained by the disciplines of international investment law. Sponsoring states may become exposed to claims by foreign investors availing themselves of arbitration clauses contained in investment treaties, investment contracts or national investment laws. Arguably the exploration and exploitation of the Area's mineral resources constitute an investment protected by international investment law: these activities involve such assets as 'shares, stock, and other forms of equity participation in an enterprise', 'production, concession, revenue sharing, and other similar contracts' or 'licences, authorizations, permits, and similar rights conferred pursuant to [a party's] domestic law' which very frequently feature in the definition of investment contained in international investment agreements.[286] Arbitral precedent tells us that a combination of those assets will generally suffice for a finding that there exists an economic contribution having a sufficient duration and involving an

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283 Ibid arts 34(1)–(2). See also *Lei do Investimento Externo* [Foreign Investment Law] (Timor-Leste) Law No 5/2005, art 23(2), which establishes Timor-Leste's consent to ICSID arbitration for disputes with foreign investors holding an investor certificate issued by the state.

284 *UNCLOS* (n 5) art 139.

285 See generally Louisa Casson, *In Deep Water: The Emerging Threat of Deep Sea Mining* (Report, Greenpeace International, June 2019) <https://www.greenpeace.org/international/publication/22578/deep-sea-mining-in-deep-water/>, archived at <https://perma.cc/D9E9-9T4Y>. See also Belgique [Belgium], *Compte rendu intégral avec compte rendu analytique traduit des interventions* [Full Report with Translated Summary Record of Speeches], Chambre des représentants [Chamber of Representatives], 4 July 2013, criv 53, plen 154, 61–4 (Thérèse Snoy et d'Oppuers) <https://www.lachambre.be/doc/PCRI/pdf/53/ip154.pdf>, archived at <https://perma.cc/2G5S-V6B9>.

286 See, eg, *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment*, signed 19 February 2008, TIAS 12-101 (entered into force 1 January 2012) art 1 (definition of 'investment'); *Agreement for the Promotion and Protection of Investments*, United Kingdom–Malaysia, signed 21 May 1981, 1579 UNTS 11 (entered into force 21 October 1988) art 1(a) (definition of 'investment').

investment risk. In addition, international investment law has recognised the right of foreign shareholders to bring claims for measures affecting their company, even if it has the nationality of the host state.

The fact that the extractive activities take place in the Area — which is the common heritage of mankind, where the exercise of sovereign rights is prohibited — is unlikely to exclude the applicability of international investment law in the relations between the deep-sea miner and the sponsoring state. Indeed, arbitral case law has had recourse to a doctrine of economic unity of the investment when evaluating transboundary operations: in the *SGS* cases, various arbitral tribunals refused to subdivide the claimant's activities into services provided abroad and services provided in the host state and to then attribute the claimant's allegation solely in relation to the former category.[287]

The common heritage of mankind may however have an impact at the stage of merits. If contractors bring a claim against their sponsoring state within the framework of investor-state arbitration, they are likely to allege a breach of 'fair and equitable treatment' or of 'expropriation' clauses.[288] In such cases, respondent states will likely attempt to raise *UNCLOS* norms as a form of defence. Fortunately, international investment law possesses some 'entry points' allowing for the invocation of law of the sea norms. For instance, *UNCLOS* obligations might be invoked by states in the context of fair and equitable treatment to prove that there could be no legitimate expectation that the regulatory environment would not change and that expectation 'could only have been of progressively more stringent regulation'.[289] This could be the case where the state modifies its normative framework in order to comply with the new regulations or policies established by the ISA. However, the success of this type of defence will depend on the factual context of the dispute and on the legal framework surrounding the investment: arbitral case law suggests that it is likely to fail where a sponsorship contract included a stabilisation clause.[290]

Finally, in certain cases, the common heritage of mankind principle may influence the quantum of awarded compensation. A relevant precedent is the *Southern Pacific Properties (Middle East) Ltd v Egypt* decision.[291] The dispute concerned a project for the development of a tourist complex, close to the Giza Pyramids, which had been cancelled by decree after the discovery of antiquities in the nearby area.[292] In 1979, the site had become a World Heritage Site under art 11 of the *Convention for the Protection of the World Cultural and Natural Heritage*

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287 See above 20–2.

288 See, eg, *Anglo American v Venezuela* (n 227) [110], [210]–[212], [404]–[413], [443]; *Philip Morris Brands Sàrl v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) [180]–[307], [340], [439]–[440], [483]–[503] ('*Philip Morris v Uruguay*').

289 See *Philip Morris v Uruguay* (n 288) [430].

290 See *Greentech Energy Systems A/S v Italy (Final Award)* (Stockholm Chamber of Commerce, Case No 2015/095, 23 December 2018) [452].

291 *Southern Pacific Properties (Middle East) Ltd v Egypt (Award on the Merits)* (ICSID Arbitral Tribunal, Case No ARB/84/3, 20 May 1992) ('*SPP v Egypt*').

292 Ibid [43], [63]. See also Lorraine de Germiny, 'Considerations before Investing near a UNESCO World Heritage Site' (2013) 10(5) *Transnational Dispute Management* 1, 2.

('*UNESCO World Heritage Convention*').[293] The tribunal found that it could only award damages for profits lost before but not after that date on which the activities at issue had become illegal under both Egyptian and international law. It stated that therefore, 'any profits that might have resulted from such activities are consequently non-compensable'.[294] The pertinence of this case is strengthened by the reference in the *UNESCO World Heritage Convention* to the 'world heritage of mankind as a whole'.[295] It is conceivable that arbitral tribunals will similarly take into account the common heritage of mankind principle when sponsoring states suspend activities that have become unlawful under the regulations of the ISA.

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293 World Heritage Committee, United Nations Educational, Scientific and Cultural Organization, *Report of the Rapporteur on the Third Session of the World Heritage Committee*, 3rd sess, UNESCO Doc CC-79/CONF.003/13 (30 November 1979) 12 [46] <https://whc.unesco.org/en/list/86/documents/>, archived at <https://perma.cc/PU85-GDZ9>; *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) art 11 ('*UNESCO World Heritage Convention*').

294 *SPP v Egypt* (n 291) [190]–[191], [202].

295 *UNESCO World Heritage Convention* (n 293) Preamble para 6.