UNIVERSIDADE CATÓLICA PORTUGUESA

The Private Actor and its Sponsoring State(s) in Mineral Exploitation in the Area

Control, Obligations, Liability, Disputes and Investment Protection

Ana Beatriz Monis de Freitas

Master`s in Law

Faculty of Law | School of Porto

2025

UNIVERSIDADE CATÓLICA PORTUGUESA

The Private Actor and its Sponsoring State(s) in Mineral Exploitation in the Area

Control, Obligations, Liability, Disputes and Investment Protection

Ana Beatriz Monis de Freitas

Supervisor: Manuel Fontaine Campos

Master`s in Law

Faculty of Law | School of Porto

2025

To my caring family for supporting all my academic endeavors,
My colleagues for their dear and lasting friendship and
My supervisor, Professor Manuel Fontaine Campos,
For his everlasting patience and wisdom.

A special acknowledgement to
Those in my life who comforted and
Encouraged me during the last two years.

Abstract

This dissertation navigates the relationship between the private actor and its sponsoring State(s) in the context of seabed mining beyond national jurisdiction, while addressing three key questions: (i) what constitutes the private actor in seabed mining (ii), who holds control over the seabed miner and (iii) what happens when the State of sponsorship exercises unlawful or excessive regulatory control over the private actor? Through the analysis of the United Nations Convention on the Law of the Sea, the ISA`s Draft Regulations on Exploitation of Mineral Resources in the Area and the Seabed Disputes Chamber`s 2011 Advisory Opinion, this research explores issues such as the liability for environmental damage and the obligations of the sponsoring State, the meaning of "effective control" over the private actor, the sponsoring State`s environmental regulatory control and the potential disputes between the parties regarding the modification of a sponsorship agreement and the revocation of a sponsorship certificate. To finalize, this dissertation examines the applicability of investment protection in seabed mining.

Keywords: Seabed Mining, Private Actor, Area, Contractor, Sponsoring State, UNCLOS (United Nations Convention on the Law of the Sea), ISA (International Seabed Authority), Liability, Effective Control, Due Diligence, Sponsorship Agreement, Sponsorship Certificate, Seabed Disputes Chamber, Investment Protection.

Resumo

A presente dissertação explora a relação entre o ator privado e o(s) seu(s) Estado(s) patrocinador(es) no contexto da mineração do fundo marinho além da jurisdição nacional, abordando três questões-chave: (i) em que constitui o ator privado na mineração do fundo marinho, (ii) quem detém o controlo sobre a empresa mineira e (iii) o que acontece quando o Estado patrocinador exerce um controlo regulatório ilícito ou excessivo sobre o ator privado? Através da análise da Convenção das Nações Unidas sobre o Direito do Mar, das *ISA`s Draft Regulations on Exploitation of Mineral Resources in the Area* e do Parecer Consultivo de 2011 da Câmara de Disputas do Fundo Marinho, esta pesquisa

explora questões como a responsabilidade por danos ambientais e as obrigações do Estado patrocinador, o significado de "controlo efetivo" sobre o ator privado, o controlo regulatório ambiental do Estado patrocinador e as potenciais disputas entre as partes relativamente à modificação do acordo de patrocínio e à revogação do certificado de patrocínio. Por fim, esta dissertação examina a aplicabilidade da proteção de investimentos na mineração do fundo marinho.

Palavras-chave: Mineração do Fundo Marinho, Ator Privado, Área, Contratante, Estado Patrocinador, CNUDM (Convenção das Nações Unidas sobre o Direito do Mar), AIFM (Autoridade Internacional dos Fundos Marinhos), Responsabilidade, Controlo Efetivo, Devida Diligência, Acordo de Patrocínio, Certificado de Patrocínio, Câmara de Disputas do Fundo Marinho, Proteção de Investimentos.

Table of Contents

Introduction

In the age of the energy transition, metallic mineral deposits found across vast areas of the seabed are increasingly capturing the attention of stakeholders globally[1]. While private entities and developing States often see metallic seabed minerals as a promising economic opportunity and a potential new source for mineral diversification[2], others, such as the European Union and nongovernmental organizations, anticipate significant environmental risks associated with the extraction of the metallic minerals in deep and unexplored marine environments[3]. Currently, the actors involved in seabed mining beyond national jurisdiction do not hold exploitation rights to the minerals, instead, they solely participate in prospecting and exploring the deposits, developing technology and assessing environmental risks[4].

Regardless, foreseeing a race of the States for energy independence and security through the mining of the oceans, on the 7th of February 2024, the European Parliament reaffirmed its support for a moratorium on seabed mining and called on Member States to apply the precautionary approach[5] until further scientific knowledge is presented on the extractive activity[6]. Recently, on March 14th, 2025, the Portuguese parliament passed legislation to halt seabed mining in national waters until 2050, becoming the first European Union Member State to pass binding law adopting the moratorium[7]. It is likely that States will continue to enforce stringent national environmental laws, measures and regulations regarding the exploitation of seabed minerals. As a result, the interests and

---

[1] Becker-Weinberg, Vasco – "Strengthening Environmental Impact Assessment Obligations of Deep Seabed Mining in Areas beyond National Jurisdiction", The International Journal of Marine and Coastal Law, Vol. 39 (August 2024), p. 603, in Link.
[2] *Ibidem.*
[3] *Ibidem.*
[4] DINGWALL, Joanna (2020) – "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 7, pp. 155-156.
[5] MAKGILL *et al.* (2024) – "Implementing the Precautionary Approach for Seabed Mining: A Review of State Practice", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter I.3, p. 52: "The precautionary approach is a central and well-established principle under international environmental law. At its core, it aims to prevent environmental harm by taking early action, even if scientific uncertainty about the risks remains".
[6] Sustainable Ocean Aliance, "European Parliament Calls for a Global Moratorium on the Deep-Sea Mining Industry" (7th of February 2024), in Link, last accessed on the 8th of April 2025.
[7] Oceanographic, "History made: Portugal takes lead in effort to stop deep-sea mining" (18th of March 2025), in Link, last accessed on the 8th of April 2025.

expectations of private actors who hold exploration rights, with the reasonable expectation for future exploitation of the seabed, could be negatively impacted if the State fails to honor the representations and commitments made at time of the agreement with the private entity.

This dissertation shall explore, across VII Chapters, the relationship between the private actor and the State of sponsorship regarding the exploitation of minerals found in the seabed beyond national jurisdiction. For this purpose, it is imperative to examine and establish the legal regime of the private entity who will perform the extractive activity, as well as the regulatory role of the State of sponsorship. Three key questions shall be answered: (i) what constitutes the private actor in seabed mining, (ii) who holds control over the seabed miner and (iii) what happens when the State of sponsorship exercises unlawful or excessive regulatory control over the private actor?

This dissertation has as its object the delimitation of the private actor`s legal regime in mineral exploitation and the role of its State(s) of sponsorship, with special concern given to the themes of responsibility and obligation, liability for damage caused in the context of the exploitative activity, the meaning of "effective control" over the private actor, the sponsoring State`s environmental regulatory control, the disputes between the parties over the modification of the sponsorship agreement and the revocation of the sponsorship certificate and, to finalize, this dissertation shall explore the theme of investment protection in mineral exploitation. The research will follow a linear approach to the themes through law, regulations, custom, doctrine and jurisprudence.

I. The United Nations Convention on the Law of the Sea – General notions, rules and principles of Part XI

For centuries, nations recognized the freedom of the seas[8] as being the principle that governed over all oceans[9]. However, by the 19th century, this idea was challenged by multiple national claims over offshore resources, including the ones at the bottom of the ocean[10]. The great technological advances that had been happening all over the world had transformed humanity`s relationship with the oceans[11].

The Malta's Ambassador to the United Nations, Arvid Pardo, in its speech to the United Nations General Assembly on the 1st of November 1967, urged the nations to recognize the looming conflict that could devastate the oceans and the conflicting legal claims to the seabed[12]. Arvid Pardo envisioned an agency with the necessary powers to administer the seabed resources in the interest of the whole mankind[13]. He further called for an international regime to govern over the seabed beyond national jurisdiction[14].

In 1973, the Third United Nations Conference on the Law of the Sea took place in New York and led to the adoption of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS) on the 10th of December 1982[15]. Currently, the UNCLOS has 170 States Parties, including the European Union which ratified the Convention on the 1st

---

[8] ORAL, Nilüfer (2024) – "The Common Heritage of Mankind under International Law – An overview", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter I.2, p. 34:

> *Back in the days of Hugo Grotius, when he wrote his famous treatise Mare Liberum (Freedom of the Seas) published in 1609, he based his views on the notion that the high seas were a global common with open and unfettered access for all – a res communes. His notion of res communes applied both to access to the navigational routes as well as to the resources of the open sea. According to Grotius, the sea was a common property, in that it was common to all with limitless and inexhaustible resources, and thus could not be under the possession of anyone.*

[9] United Nations - Oceans & Law of the Sea, "The United Nations Convention on the Law of the Sea - A Historical Perspective", in Link, last accessed on the 26th of March 2025.

[10] *Ibidem.*

[11] *Ibidem*, "The United Nations Convention on the Law of the Sea - Third United Nations Conference on the Law of the Sea".

[12] *Ibidem.*

[13] JAECKEL, Aline (2024) – "The Area and the Role of the International Seabed Authority", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter IV.1, p. 157.

[14] United Nations - Oceans & Law of the Sea, "The United Nations Convention on the Law of the Sea - Third United Nations Conference on the Law of the Sea", in Link, last accessed on the 26th of March 2025.

[15] *Ibidem.*

of April 1998[16]. Moreover, the UNCLOS is generally recognized by States as customary international law, therefore, binding them to its rules and principles[17].

The UNCLOS, the multilateral treaty that codifies the standards and principles of international maritime law, is divided into XVII Parts and has IX annexes[18]. Part XI of the UNCLOS was revised by the 1994 Agreement Relating to the Implementation of Part XI (hereinafter the 1994 Implementation Agreement)[19].

Part XI of the UNCLOS, along with the 1994 Implementation Agreement, establishes the legal regime for the "Area"[20], which is defined in Article 1 (1) of the UNCLOS as "(…) the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;". Article 139 (1) of the UNCLOS states that the development of activities in the Area is under the regime in Part XI. According to Article 1 (1) (3) of the UNCLOS, "activities in the Area" are defined as "all activities of exploration for, and exploitation of, the resources of the Area;". In the 2011 Advisory Opinion titled *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (hereinafter* 2011 Advisory Opinion), the Seabed Disputes Chamber noted that "(…) the expression "activities in the Area", in the context of both exploration and exploitation, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface."[21].

Article 153 (1) of the UNCLOS provides that "Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole (…)". This is further expressed in Article 136 of the UNCLOS, "The Area and its resources are the common heritage of mankind". In fact, many articles in the UNCLOS reflect the principle of the common heritage of mankind, having both procedural and substantive elements: "The procedural elements include the Common Management Principle[22] and the Prohibition of

---

[16] United Nations - Oceans & Law of the Sea, "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements", in Link, last accessed on the 26th of March 2025.
[17] DINGWALL, Joanna (2020) – "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 7, p. 145.
[18] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 2, para. 1.
[19] *Ibidem.*
[20] UNCLOS, Article 134.
[21] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area.,* case no. 17, para. 94, in Link.
[22] UNCLOS, Articles 137 (2), 153 (1) and 156 to 185.

Unilateral Mining Activities[23], while the substantive elements include the Benefit-Sharing Principle[24] and the Principle of Marine Environmental Protection[25]"[26].

Article 1 (2) of the UNCLOS defines the "Authority" as meaning the International Seabed Authority (hereinafter ISA). Created in 1994, the ISA holds extensive powers which include regulatory, enforcement, inspection, and oversight[27]. Moreover, even though the UNCLOS and the 1994 Implementation Agreement established the legal regime for the activities in the Area, it is the ISA who is responsible for developing the Mining Code, which will provide the rules and procedures regulating the exploration and exploitation of the minerals in the Area[28]. In fact, since 2014, the ISA has been "(…) in the process of developing the first international regulations for the commercial-scale exploitation of minerals in the Area."[29], titled the Draft Regulations on Exploitation of Mineral resources in the Area[30] (hereinafter Draft Exploitation Regulations).

The technology required for mining in the Area, at the expected depth where the exploitative activities are to occur, entail a great risk, further exacerbated by its potential to cause damage to the marine environment[31]. Having this in consideration, it is probable for disputes to happen between actors[32]. To resolve such disputes, the UNCLOS established the Seabed Disputes Chamber, a specialized Chamber[33] of the International Tribunal for the Law of the Sea[34] (hereinafter ITLOS).

---

[23] UNCLOS, Articles 137 (1).
[24] *Ibidem* 140 (1), 144 and 148.
[25] *Ibidem* 145.
[26] Li, Chuanxuan and Hao Shen – "The compromised international legal regime for deep seabed mining and a possible solution from China's legislative perspective", *Journal of Energy & Natural Resources Law*, Vol. 42, No. 2 (2024), p. 168.
[27] JAECKEL, Aline (2024) – "The Area and the Role of the International Seabed Authority", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter IV.1, p. 158.
[28] ISA, "The Mining Code", in Link, last accessed on the 11th of March 2025.
[29] JAECKEL, Aline (2024) – "The Area and the Role of the International Seabed Authority", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter IV.1, p. 158.
[30] ISA, "The Mining Code – Draft exploitation regulations", in Link, last accessed on the 11th of March 2025.
[31] Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27 September 2017), p. 1, in Link.
[32] *Ibidem,* p. 2.
[33] *Ibidem*, p. 3.
[34] ITLOS, in Link, last accessed on the 26th of March 2025:

> *The International Tribunal for the Law of the Sea (ITLOS) [located in Hamburg] is an independent judicial body established by the 1982 United Nations Convention on the Law of the Sea. It has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.*

I. The Private Actor in Mineral Exploitation in the Area

Exploitative activities in the Area are regulated by the provisions in Part XI of the UNCLOS[35] and shall be organized and controlled by the ISA on behalf of mankind[36]. Considering the administering role of the ISA over the exploitative activities[37], seabed mining in the Area is an activity under its administration. Accordingly, the exploitation of the seabed must be set out in a formal written plan of work in the form of a contract between the ISA and the entity who will conduct them[38]. Indeed, *"*(…) exploitation work in the Area can only be conducted under a contract issued by the ISA, which grants exclusive but temporary rights to the [interested entity] (…)"[39]. The ISA "(…) is empowered to award contracts to State and non-State entities allowing them to collect minerals from the deep seabed in exchange for the payment of royalties and other fees"[40].

As provided by Article 153 (2) (b) of the UNCLOS, regarding the role of non-State actors, seabed mining shall be carried out:

> *in association with the Authority by (...) 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, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.*

This is a "triangular relationship" which involves (i) the contractor, who exploits the minerals, (ii) the sponsoring State of "nationality" or "effective control" and (iii) the ISA, which awards the exploitative contract[41]. As a result, for a private actor to obtain a contract from the ISA and exercise the exploitative activity in the Area, first, it must be sponsored by a State of "nationality" or "effective control"[42]. These prerequisites of "nationality" or "effective control" seek to establish an instrument of control to be used

---

[35] UNCLOS, Article 134 (2).
[36] *Ibidem* 153 (1).
[37] *Ibidem* 157 (1).
[38] *Ibidem* 153 (3).
[39] JAECKEL, Aline (2024) – "The Area and the Role of the International Seabed Authority", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter IV.1, p. 159.
[40] Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27 September 2017), p. 1, in Link.
[41] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 3, in Link.
[42] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 4, in Link.

by the sponsoring State upon the private actor[43]. This contractual relationship based on sponsorship has the purpose of binding the private actor to the domestic law of the sponsoring State[44].

Furthermore, States Parties to the UNCLOS have the obligation to ensure that the activities in the Area, conducted by their sponsored contractors, comply with the provisions in Part XI[45] as well as the regulations set forth by the ISA[46]. Article 139 of the UNCLOS "(…) obliges States Parties (…) to ensure that all activities in the Area are in conformity with the provisions of Part XI, be that the conduct of a State or of actors with its nationality or controlled by it – through sponsorship according to Art 153 (2)(b)"[47]. As a result, the private actor becomes bound by the international legal obligations concerning seabed mining[48].

As of March 2025, the ISA has approved 31 exploration contracts in the Area either to States or to sponsored contractors, each with a duration of 15 years[49].

Initially, it was assumed that most sponsorships would be based on nationality[50], however, that belief has been debunked by the practice under exploration contracts. Developing Pacific Island States have entered into sponsorship agreements with private actors from developed States[51]: "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"[52]. These developing States do not have the necessary

---

[43] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 1084, para. 7.
[44] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 75, in Link.
[45] UNCLOS, Article 139 (1).
[46] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 75, in Link.
[47] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC. p. 969, para. 1.
[48] DINGWALL, Joanna (2020) – "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 7, p. 149.
[49] ISA, "Exploration Contracts – The Beginning", in Link, last accessed on the 25th of March 2025.
[50] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 12: "(...) [the UNCLOS assumed] that only companies of the same nationality as the sponsoring state would be involved in deep-sea mining.", in Link.
[51] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 6, in Link.
[52] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 3, in Link.

financial and technological resources to explore and eventually exploit the resources contained in the Area[53], hence, to take part in such activity, developing States pursuit foreign investment from companies in developed countries[54].

One of the first private actors to have an exploration contract with the ISA, in January 2012, was the Tonga Offshore Mining Limited[55], a wholly owned subsidiary of the Canadian company Nautilus Minerals Inc.[56]. Later, another Canadian company, The Metals Company Inc., established wholly owned subsidiaries in developing countries such as Tonga and Nauru and acquired State sponsorship from those same countries[57]. The interest in these agreements for the developed State`s companies is partly "(…) because of the less stringent regulations, lower costs and simpler procedures for setting up companies in developing countries to apply for mining areas, and in part because it allows them to apply for exploration of reserved areas"[58].

In addition to the incorporation of subsidiaries, there have been joint ventures where private actors are connected to mining in the Area by State-controlled entities[59]. For example, when, while operating in a reserved area[60], the Cook Islands Investment Corporation, a state-owned enterprise sponsored by the Cook Islands, received technical

---

[53] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 3, in Link.

[54] *Ibidem.*

[55] ISA, "Tonga Offshore Mining Limited", in Link**,** last accessed on the 27th of March 2025.

[56] DINGWALL, Joanna (2020) – "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 7, pp. 159-160.

[57] Li, Chuanxuan and Hao Shen – "The compromised international legal regime for deep seabed mining and a possible solution from China's legislative perspective", *Journal of Energy & Natural Resources Law*, Vol. 42, No. 2 (2024), p. 172.

[58] *Ibidem.*

[59] DINGWALL, Joanna (2020) – "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 7, p. 160.

[60] ISA, "Reserved Areas": "Reserved areas are contributed by developed States when they apply to ISA for exploration rights. They are then held in a site bank, reserved for access by developing countries or the Enterprise (UNCLOS, Article 170, Annex IV and 1994 Agreement, Annex, Section 2).", in Link, last accessed on the 4th of April 2025; Zhou, Jiang and Ping Lin – "Study on the interpretation and application of the concept of "effective control" by the ISA", *Frontiers in Marine Science*, Vol. 11 (2024), p. 2, in Link:

> *To ensure adherence to the spirit of the idea of "the common heritage of mankind," the parallel system divides the areas of activities for the development of mineral resources into contract areas and reserved areas. The reserved areas have been designated by considering the special interests of developing countries and making special arrangements in this regard.*

resources from G-TEC Sea Mineral Resources NV, a private company incorporated in Belgium, in exchange for certain benefits[61].

In truth, a lot of contractors sponsored by developing countries are directly or indirectly related to companies incorporated in developed States[62]. Faced with these business practices, in 2016, the ISA Secretariat released a note outlining "new models of business arrangements" and noting "(…) the existence of close associations or collaborations between developing States and their sponsored entities, with the business interests of entities registered in, or owned by nationals of, developed States"[63].

II. The Liability of the Private Actor and its Sponsoring State(s) for Damage arising from the Exploitative Activities in the Area

"Environmental liability law has always had to deal with the environmental damage caused by private parties (…)"[64], this concern is exacerbated by the notion that environmental damage is a transnational problem with no borders and with the potential to affect all humanity[65].

States Parties must fulfil their responsibilities "(…) by exercising their power over entities of their nationality and under their control"[66]. Indeed, the relationship between the private actor and the sponsoring State is created on the basis of (i) nationality, where the contractor must "(…) secure and maintain the sponsorship of the State or States of

---

[61] Li, Chuanxuan and Hao Shen – "The compromised international legal regime for deep seabed mining and a possible solution from China's legislative perspective", *Journal of Energy & Natural Resources Law*, Vol. 42, No. 2 (2024), p. 172.
[62] *Ibidem*.
[63] ISA, *Discussion Paper – Effective Control* (January 2023), para. 2, in Link.
[64] GAILHOFER, Peter *et al. (2023) – "Introduction", in* Peter Gailhofer *et al.* (eds.) *Corporate Liability for Transboundary Environmental Harm – An International and Transnational Perspective*, Switzerland: Springer, Chapter 1, p. 3, in Link.
[65] GAILHOFER, Peter *et al. (2023) – "Introduction", in* Peter Gailhofer *et al.* (eds.) *Corporate Liability for Transboundary Environmental Harm – An International and Transnational Perspective*, Switzerland: Springer, Chapter 1, pp. 3-4, in Link.
[66] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 108, in Link.

which they are nationals."[67] or on the basis of (ii) effective control "If another State or its nationals exercises effective control [over the contractor] (…)"[68].

Article 139 (2) of the UNCLOS assigns liability to the sponsoring State in the case of "(…) damage caused by the failure of a State Party (…) to carry out its responsibilities under this Part (…)"[69]. However, despite the State´s responsibility to ensure effective compliance, if all necessary and appropriate measures have been taken, the State Party cannot be considered liable for damage caused by the sponsored contractor[70].The first part of Article 139 (2) is concerned with the liability that arises from the "causal link" between the breach of the sponsoring State`s obligations and the result of damage caused by the sponsored contractor[71].The sponsoring State`s liability depends on its fault, thus, the liability imposed by Article 139 (2) on the sponsoring State is not strict liability[72]. In addition, the second part of Article 139 (2) exempts the sponsoring State from liability when it has taken all the necessary and appropriate measures[73].

Accordingly, there are two scenarios set out in Article 139 (2): (i) the sponsoring State fails to comply with Part XI of the UNCLOS, resulting in liability for damage or (ii) the damage was caused by a private actor that was adequately controlled by its sponsoring State[74].

The liability of both the sponsoring State and the private actor is based on each individual failure that results in damage[75]. These two forms of liability exist independently and parallel, but it is the private actor who holds the primary liability[76] if any damage arises out of wrongful acts during the exploitative activity[77]. Indeed, the custom in "(…) existing conventions of international law is first to look to a responsible

---

[67] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 77, in Link.

[68] *Ibidem.*

[69] UNCLOS, Article 139 (2).

[70] *Ibidem*.

[71] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 974, para. 15:

> *(...) a causal link between the breach of obligation by the State or international organization and the occurrence of damage is demanded by the wording of Art. 139 (2) 'damage caused'. For the liability of sponsoring States, the causal link must exist between the failure of the State and the damage caused by the sponsored contractor.*

[72] *Ibidem*: "(…) the liability imposed on sponsoring States is not strict liability– in the sense that the State will be held liable for any damage caused by the contractor– but a liability dependent on the fault of the State."

[73] *Ibidem*, p. 974, para. 7.

[74] *Ibidem*, p. 969, para. 1.

[75] *Ibidem*, p. 976, para. 20.

[76] *Ibidem*.

[77] UNCLOS, Annex III, Article 22.

private operator for compensation for harm caused as the result of a wrongful act but not attributable to a State"[78].

Nevertheless, despite the contractor being generally liable for misconduct under national laws implementing Article 4 (4), Annex III of the UNCLOS, in the case that the contractor causes harm without violating his obligations, a liability gap appears, since neither the private actor, nor the sponsoring State, who fulfilled the responsibility of due diligence, have the obligation to repair or compensate for damage[79]. Moreover, even if the contractor is found liable, a liability gap still materializes if the private actor does not have the financial resources to repair or compensate for the damage or does not have the necessary assets within the reach of the sponsoring State[80]. Diversely, when there has been a violation of obligations that caused damage, where the "causal link" between sponsoring State and sponsored contractor is missing, this can result in no attributable damage[81].

Therefore, it becomes imperative to establish the meaning of "effective control" as it is a means to identify the liable entity that controls the private actor and may be capable of repairing or compensating for the caused damage.

---

[78] Xu, Xiangxin and Guifang (Julia) Xue – "The Environmental Compensation Fund: Bridging Liability Gaps in the Deep Seabed Mining Regime", *Coastal Management*, Vol. 49, No. 6 (2021), pp. 559-560.

[79] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 975, para. 19; Xu, Xiangxin and Guifang (Julia) Xue – "The Environmental Compensation Fund: Bridging Liability Gaps in the Deep Seabed Mining Regime", *Coastal Management*, Vol. 49, No. 6 (2021), p. 560:

> *The first gap stems from the lack of definition of the "wrongful act" threshold for contractor's liability. The UNCLOS and the Draft Exploitation Regulations set such a threshold, but no definition provided (MacMaster 2019). Disagreements have been persistent in this regard, as this term could be understood as imposing a non-strict liability for contractors (MacMaster 2019; Feichtner 2020), leading to a scenario that damage occurred, but the contractor is not liable due to failure of the identification of the wrongful act.*

[80] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 975, para. 19; Xu, Xiangxin and Guifang (Julia) Xue – "The Environmental Compensation Fund: Bridging Liability Gaps in the Deep Seabed Mining Regime", *Coastal Management*, Vol. 49, No. 6 (2021), pp. 560-561.

[81] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 975, para. 19.

III. Interpretations of "Effective Control" over the Private Actor – Regulatory v. Economic

In the ISA`s *Discussion Paper: Effective Control*, it is noted that, regarding the used term "effective control" in the provisions within the UNCLOS, commentators identify two models: (i) an economic control model that considers the State where the ultimate economic controller of a corporation is located and (ii) a regulatory control model that considers the State that regulates the corporation[82].

The pursuit of these two different models of control is reflected in the definition of "effective control" in the most recent Consolidated Text of January 10, 2025, of the ISA´s Draft Exploitation Regulations[83] (emphasized in this dissertation):

> *"Effective Control" or "effectively controlled" means a required, substantial and genuine link between Sponsoring State and Contractor, which includes* ***for non-State actors the location of the company's management and beneficial ownership, as well as the ability of the Sponsoring State to ensure the availability of resources of the Contractor*** *for fulfilment of its Exploitation Contract with the Authority and any liability arising therefrom, through the location of such resources in the territory of the Sponsoring State or otherwise.*
> *"Effective Control" or "effectively controlled* ***ALT****" means the substantial and genuine link between Sponsoring State and Contractor, demonstrated by the* ***Contractor being a national of the Sponsoring State and being subject to its effective jurisdiction and regulatory control****.*

The Economic Control Model

The «"Effective Control" or "effectively controlled"» definition presented by the Consolidated Text of the Draft Exploitation Regulations considers a "required, substantial and genuine" link between the private actor and the sponsoring State that is established by (i) the location of the contractor's management, (ii) the location of beneficial ownership and (iii) the location of available resources if any liability arises. This definition aligns with the economic control model, which considers the State where the ultimate economic controller of the private actor is located[84].

---

[82] ISA, *Discussion Paper – Effective Control* (January 2023), para. 9, in Link.
[83] 30th Session of the ISA`s Council - Part I (2025), "Schedule – Use of terms and scope", in *Draft regulations on exploitation of Mineral resources in the Area – Revised Consolidated Text* (10th of January 2025), p. 250, in Link.
[84] ISA, *Discussion Paper – Effective Control* (January 2023), para. 9, in Link.

The Seabed Disputes Chamber`s 2011 Advisory Opinion provides that (emphasized in this dissertation),

> *The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals.* ***If another State or its nationals exercises effective control, the sponsorship of that State is also necessary****.* ***This is provided for in Annex III, article 4, paragraph 3, of the Convention*** *(...)*[85]

Article 4 (3), Annex III to the UNCLOS states that (emphasized in this dissertation):

> *Each applicant shall be sponsored by the State Party of which it is a national unless* ***the applicant has more than one nationality, as in the case of a partnership or consortium of entities from several States****, in which event all States Parties involved shall sponsor the application, or unless* ***the applicant is effectively controlled by another State Party or its nationals****, in which event both States Parties shall sponsor the application.* ***The criteria and procedures for implementation of the sponsorship requirements shall be set forth in the rules, regulations and procedures of the Authority.***

Regulation 5 (3) of the Draft Exploitation Regulations provides that, regarding an application of a private actor for the approval of a plan of work, the following information must be disclosed: (i) "(…) the nationality of the (…) States by which, or by whose nationals, the applicant is effectively controlled;"[86], (ii) "The principal place of business or domicile and, if applicable, the place of registration of the applicant."[87], and (iii) "(…) the necessary financial, technical and operational capability to carry out the proposed Plan of Work (…)"[88].

Following the review of the disclosed information, Regulation 6 (2) of the Draft Exploitation Regulations, regarding the sponsorship certificate, states that "Where an applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State shall issue a certificate of sponsorship". In addition, Regulation 6 (2 bis) further suggests that, when the private actor is "(…) controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality".

---

[85] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 77, in Link.
[86] 30th Session of the ISA`s Council - Part I (2025), *Draft regulations on exploitation of Mineral resources in the Area – Revised Consolidated Text* (10th of January 2025), p. 23, Regulation 5 (3) (b), in Link.
[87] *Ibidem*, Regulation 5 (3) (c).
[88] *Ibidem*, Regulation 5 (3) (e).

Moreover, regarding applications of plans of work presented by a partnership or consortium of entities from more than one State, Regulation 5 (4) of the Draft Exploitation Regulations states that "Each application submitted by a partnership or consortium of entities shall contain the information required by these Regulations in respect of each member of the partnership or Consortium". Accordingly, Regulation 6 (1) of the Draft Exploitation Regulations stipulates that "(…) If the applicant has more than one nationality, as in the case of a partnership or consortium of entities from more than one State, each State involved shall issue a certificate of sponsorship".

To summarize**,** when (i) there is a "(…) partnership or consortium of entities from several States (…)"[89] where the private actor holds multiple nationalities or (ii) "(…) the applicant [holds the nationality of one State but] it is effectively controlled by another State Party or its nationals (…)"[90], the private actor must be sponsored by all the necessary States Parties in order to obtain an exploitation contract from the ISA[91].

The most recent Consolidated Text of the ISA´s Draft Exploitation Regulations reflects the States Parties' concerns regarding the economic control exercised by corporations from developed countries over contractors sponsored by developing countries.

During the 29th Council Session, within the negotiations of the Draft Exploitative Regulations, States Parties such as the Netherlands have suggested that the economic control model could be beneficial to address the liability gaps in the current legal regime[92] (emphasized in this dissertation):

> *In the hypothetical scenario that this* ***Contractor*** *(i.e. the particular company that will be party to the Exploitation Contract)* ***is liable for causing environmental damage during exploitation activities and does not have the financial means to remedy such damage*** *(…) there will be no way for the Authority to collect on that liability. (…)* ***This could be resolved by being able to hold liable the parent companies of Contractors****, which will have more financial means (or even the requisite amount) than their subsidiary Contractors.*[93]

---

[89] UNCLOS, Annex III, Article 4 (3), first part.
[90] *Ibidem*, second part.
[91] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 190, in Link.
[92] 29th Session of the ISA`s Council - Part II (2024), Permanent Mission of the Kingdom of the Netherlands to the ISA, "Non-paper on Parent Company Liability Statements", in Thematic discussions and cross cutting issues – Effective Control, para. 12, in Link.
[93] *Ibidem*, para. 13.

The Permanent Mission of the Kingdom of the Netherlands to the ISA proposed "joint and several liability" in the 2024 *Non-paper on Parent Company Liability Statements*, meaning that "(…) two or more parties will share the legal responsibility for certain conduct and actions". This refers to mining companies from developed States (parent companies) who wholly own subsidiaries in developing countries and obtain State sponsorship from them. In these scenarios, the subsidiary holds sponsorship from the developing country, as well as the liability from potential damage caused during the mining operations, while, on the other hand, the parent company incorporated and managed in a developed State, can have its assets safeguarded from any obligation to make reparations or provide compensation.

The Netherlands considers the ISA competent, in light of Article 137 (2) of the UNCLOS, to require "Parent Company Liability Statements" in exchange for the private actor`s eligibility to receive an exploitation contract[94] and arguments that, by being able to hold liable the parent companies of contractors, the liability gap could be suppressed[95]:

> (…) *adopting Parent Company Liability Statements would provide sufficient legal basis in the regulations and Exploitation Contract to ensure that parent companies of Contractors are jointly and severally liable towards the Authority for damage caused by a Contractor and for which the Contractor is liable*.[96]

The "joint and several liability" structure would entail an economic control model, since, through the disclosure of information about the private actor´s corporate shareholding, it could be revealed "(…) that a developing country company is actually [effectively] controlled by a company established in a developed country, [and consequently] the applicant should be required to obtain sponsorship from both countries"[97]. Accordingly, with the private actor obtaining both a sponsorship from the State of nationality of the subsidiary located in a developing country and obtaining a sponsorship from the State of "effective control", this is, the State where the parent company is located, it would be easier to reach and gather the necessary financial assets to make reparations or provide compensation for damage.

---

[94] 29th Session of the ISA`s Council - Part II (2024), Permanent Mission of the Kingdom of the Netherlands to the ISA, "Non-paper on Parent Company Liability Statements", in Thematic discussions and cross cutting issues – Effective Control, para. 14, in Link.
[95] *Ibidem*, para. 13, last part.
[96] *Ibidem*, para. 3.
[97] Li, Chuanxuan and Hao Shen – "The compromised international legal regime for deep seabed mining and a possible solution from China's legislative perspective", *Journal of Energy & Natural Resources Law*, Vol. 42, No. 2 (2024), p. 183.

Having multiple sponsorships ensures that multiple entities could be held responsible and, therefore, liable for any damage caused by actions or omissions in violation of the obligations provided in Part XI of the UNCLOS. Article 139 (2) of the UNCLOS does not distinguish between single and multiple sponsorship, hence, the International Seabed Chamber "(…) takes the position that, in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority"[98].

The Regulatory Control Model

Interpreting "effective control" as meaning economic control creates a greater openness for joint sponsorship[99]. Nevertheless, there are States Parties which disagree with this interpretation of "effective control", such as the Permanent Mission of the Republic of Nauru to the ISA, that arguments that:

> *Moving from this [effective regulatory control] to an effective economic control test mid-stream would undermine the predictability and certainty of the existing exploration regime. It would also present legal risks for the ISA given the potential impact on sponsored contractors which would be affected by such a change*.[100].

Instead, the regulatory control model presents itself as more straightforward, stable and more beneficial to contractors who already have exploration contracts[101].

As previously mentioned, the Draft Exploitation Regulations presents an alternative definition of «"Effective Control" or "effectively controlled ALT"», that considers "(…) the substantial and genuine link between Sponsoring State and Contractor, demonstrated by the Contractor being a national of the Sponsoring State and being subject to its effective jurisdiction and regulatory control"[102]. Indeed, this alternative definition is the expression

---

[98] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 192, in Link.
[99] Rojas, A. S. and Freedom-Kai Phillips – "Effective Control and Deep Seabed Mining: Toward a Definition", *Liability Issues for Deep Seabed Mining Series*, No. 7 (February 2019), p. 2, in Link.
[100] 29th Session of the ISA`s Council - Part II (April 2024), Permanent Mission of the Republic of Nauru to the ISA, "Non-Paper by Nauro on State Sponsorship of Activities in the Area and the Interpretation of the "Effective Control" Requirements" (April 2024), in Thematic discussions and cross cutting issues – Effective Control, para. 9.4, in Link.
[101] Rojas, A. S. and Freedom-Kai Phillips – "Effective Control and Deep Seabed Mining: Toward a Definition", *Liability Issues for Deep Seabed Mining Series*, No. 7 (February 2019), p. 9, in Link.
[102] 30th Session of the ISA`s Council - Part I (2025), "Schedule – Use of terms and scope", in *Draft regulations on exploitation of Mineral resources in the Area – Revised Consolidated Text* (10th of January 2025), p. 250, in Link.

of the regulatory control model, where the primary criterium is the State of registration or incorporation of the contractor`s company – the sponsoring State is the State of nationality that exercises regulatory jurisdiction over the private actor[103].

The current ISA's interpretation of "effective control" favors the test of regulatory control[104], therefore, when granting exploration contracts to private actors, the ISA has chosen to focus on the location of registration or incorporation of the private actor`s company "(…) meaning that in some cases the test for 'effective control' appears to have been satisfied merely by the entity signing the contract with the ISA having a registered company in the sponsoring State"[105]. This interpretation is reasonable when the State of nationality (the country of registration or incorporation of the contractor`s company) is also the State of economical and operational control, however, when the private actor`s State of nationality differs from the location of economical and operational control, it becomes very difficult for the sponsoring State to exercise true regulatory control[106]:

> *(...) a purely regulatory interpretation would ignore treaty language and disregard the economic reality of new business models as noted by the LTC [Legal and Technical Commission], whereby a contractor is registered in a developing jurisdiction yet remains a wholly owned subsidiary of an experienced mining company in a developed jurisdiction.*[107]

Interpreting "effective control" as only meaning regulatory control weakens the sponsoring State`s compliance and enforcement capabilities over the private actor, thus, creating a disconnection between damage and liability[108]. Furthermore, the regulatory control model greatly reduces the possibility for joint sponsorship, which in turn furthers the liability gap, since the only State who holds liability is the contractor`s State of nationality[109].

---

[103] Robb, Samantha *et al*. – "Effective control and state sponsorship in deep seabed mining", *Marine Pollution Bulletin*, Vol. 209, Part A (December 2024), p. 3, in Link
[104] Zhou, Jiang and Ping Lin – "Study on the interpretation and application of the concept of "effective control" by the ISA", *Frontiers in Marine Science*, Vol. 11 (2024), p. 7, in Link.
[105] Robb, Samantha *et al*. – "Effective control and state sponsorship in deep seabed mining", *Marine Pollution Bulletin*, Vol. 209, Part A (December 2024), p. 3, in Link.
[106] Rojas, A. S. and Freedom-Kai Phillips – "Effective Control and Deep Seabed Mining: Toward a Definition", *Liability Issues for Deep Seabed Mining Series*, No. 7 (February 2019), p. 10, in Link.
[107] *Ibidem.*
[108] Robb, Samantha *et al*. – "Effective control and state sponsorship in deep seabed mining", *Marine Pollution Bulletin*, Vol. 209, Part A (December 2024), pp. 12-13, in Link.
[109] Rojas, A. S. and Freedom-Kai Phillips – "Effective Control and Deep Seabed Mining: Toward a Definition", *Liability Issues for Deep Seabed Mining Series*, No. 7 (February 2019), pp. 2 and 10, in Link.

A Joint Interpretation of "Effective Control"

The ISA`s *Discussion Paper: Effective Control*, in its conclusion, states that "(…) the most cogent interpretation of the phrase "effective control" is that it was designed to cover not only the formal legal position but also the practical position regarding control over a corporation"[110].

An interpretation of "effective control" limited to only regulatory control ignores the main objectives of the UNCLOS as well as the obligations under applicable international law. Therefore, it would be beneficial to adopt a model of "effective control" which both includes a regulatory dimension and addresses the economic reality[111]. This joint interpretation of "effective control" promotes the rationale of Part XI of the UNCLOS and its provisions "(…) that treat 'nationality' and 'effective control' as two distinct means of sponsorship and envision scenarios of co-sponsorship where the state of nationality and effective control differ"[112]. If the ISA`s Mining Code incorporates elements of both interpretations, effectively requiring both the State of nationality of the contractor and the State of its effective controllers to become sponsoring States, it would align with the international and national practices.

IV. Obligation of "Due Diligence" – Laws, Regulations and Administrative Measures for Marine Environmental Protection

Exploitative mining activities have the potential to harm the marine environment[113]. For that reason, when drafting the UNCLOS, the States Parties had the concern to impose on sponsoring States the responsibility of ensuring compliance with obligations regarding

[110] ISA, *Discussion Paper – Effective Control* (January 2023), para. 34, in Link.
[111] Rojas, A. S. and Freedom-Kai Phillips – "Effective Control and Deep Seabed Mining: Toward a Definition", *Liability Issues for Deep Seabed Mining Series*, No. 7 (February 2019), p. 10, in Link.
[112] Robb, Samantha *et al*. – "Effective control and state sponsorship in deep seabed mining", *Marine Pollution Bulletin*, Vol. 209, Part A (December 2024), p. 13, in Link.
[113] PAYNE, Cymie R. (2024) - "State Responsibility for Deep Seabed Mining Obligations", in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter II.2, p. 107; Tilloy, Julio Alberto – "The ITLOS Jurisprudence Regarding the Procedural Obligation to Conduct an Environmental Impact Assessment and Its Significance for Deep Seabed Mining", *The Italian Review of International and Comparative Law*, Vol. 3 (2023), p. 342, in Link.

environmental protection[114]. Thus, the UNCLOS realizes "(…) the notion that the obligation to protect and preserve the marine environment is connected with States` exercise of sovereignty and jurisdiction"[115]. According to Article 139 (1) of the UNCLOS, sponsoring States, whether of nationality or effective control, have the responsibility to ensure that the exploitative activities are carried out in compliance with Part XI of the UNCLOS. Moreover, Article 153 (4) indicates that, in order to ensure such compliance, States Parties shall take all the necessary measures "(…) in accordance with the Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities"[116].

Subsequently, Annex III, Article 4 (4) of the UNCLOS states that (emphasized in this dissertation),

> *The sponsoring State or States shall, pursuant to article 139,* ***have the responsibility to ensure, within their legal systems****, that a contractor sponsored shall carry out activities in the Area* ***in conformity with the terms of its contract and its obligations under this Convention****. A sponsoring State shall not, however, 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****.*

The sponsoring State's obligation "to ensure" is not an obligation to achieve the desirable result of compliance, rather, it is a duty of "due diligence"[117]. This duty entails "(…) 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"[118]. The obligations in Part XII of the UNCLOS regarding environmental protection can be applied to mining activities in the Area[119], which include: (i) the general duty to "(…) protect and preserve de marine environment."[120], (ii) the duty to "(…) take,

---

[114] Zhou, Jiang and Ping Lin – "Study on the interpretation and application of the concept of "effective control" by the ISA", *Frontiers in Marine Science*, Vol. 11 (2024), p. 2, in Link.
[115] Becker-Weinberg, Vasco – "The BBNJ Agreement and the Progressive Development of Environmental Impact Assessment Obligations for Deep Seabed-Mining beyond National Jurisdiction", *China Oceans Law Review*, Vol. 19, No. 3 (2023), p. 137.
[116] UNCLOS, Article 145.
[117] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 110, in Link.
[118] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 8, in Link.
[119] CAMPANELLA, Virginie Tassin *et al.* (2024) – "Rights and Obligations of States on the Continental Shelf and the Area", in V. Tassin Campanella (ed.) *Routledge Handbook of Seabed Mining and the Law of the Sea*, London: Routledge, Chapter II.1, p. 101.
[120] UNCLOS, Article 192.

individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source (…)"[121] and (iii) the duty to "(...) adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken (...) under their authority (...) no less effective than the international rules, regulations and procedures (…)"[122].

Additionally, sponsoring States hold direct obligations, which are not exempt from strict liability[123]. Compliance with the following direct obligations is considered an important factor to fulfill the "due diligence" obligation[124]:

> *(...) the obligation to assist the Authority 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 Authority 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*.[125]

Sponsoring States must implement laws, regulations and administrative measures within their national legal system that are "reasonably appropriate" to ensure compliance by the individuals under their jurisdiction[126]. Additionally, while these rules and measures are not requirements for concluding a contract with the ISA, they are crucial for the sponsoring States who strive to ensure compliance of the obligation of "due diligence"[127]. Nonetheless, once implemented, these national laws and measures may not ensure effective "due diligence" in perpetuity[128]. According to the Seabed Disputes Chamber`s 2011 Advisory Opinion, the "due diligence" obligation is a "variable concept", meaning that it can "(…) change over time as measures considered sufficiently diligent at a certain

---

[121] UNCLOS, Article 194 (1).
[122] *Ibidem* 209 (2).
[123] PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary*. First ed., London: Bloomsbury Publishing PLC, p. 975, para. 18.
[124] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 117, in Link.
[125] *Ibidem*, para. 121.
[126] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 218, in Link.
[127] *Ibidem*, para. 219.
[128] *Ibidem*, para. 222.

moment may become not diligent enough in light (…) of new scientific or technological knowledge."[129] as well as regarding the degree of risk of the activity[130].

According to Article 21 (3), Annex III of the UNCLOS (emphasized in this dissertation),

> *(...) the application by a State Party to contractors sponsored by it (...) of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex* ***shall not be deemed inconsistent with Part XI****.*

As a result, it is imperative to recognize that the UNCLOS establishes the possibility for sponsoring States to apply national environmental laws and regulations to contractors that are stricter than the rules, regulations and procedures that will be set out by the ISA in the Mining Code[131].

V. Disputes between the Private Actor and its Sponsoring State(s) over the Modification of a Sponsorship Agreement or the Revocation of a Sponsorship Certificate

Seabed mining is a capital-intensive economic activity that takes place in unexplored ecosystems with undetermined environmental impacts[132]. There is risk in this venture, not only in the economic sense but also in the environmental level. The unforeseeable results and consequences of commercially exploiting the Area creates a great problem for sponsoring States and contractors. There is regulatory uncertainty when it comes to balancing economic opportunities with the environmental risks[133]. Moreover,

---

[129] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 117, in Link.

[130] CAMPANELLA, Virginie Tassin *et al.* (2024) – "Rights and Obligations of States on the Continental Shelf and the Area", in V. Tassin Campanella (ed.) *Routledge Handbook of Seabed Mining and the Law of the Sea*, London: Routledge, Chapter II.1, p. 102; Xu, Xiangxin *et al.* – "Revisiting the "Responsibility to Ensure": Two-Line Standards of the Sponsoring State's National Legislation on Deep Seabed Mining", *Sustainability* 2023, 15 (10), 8095, p. 4, in Link.

[131] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 232, in Link.

[132] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 4, in Link.

[133] *Ibidem.*

as previously acknowledged in Chapter IV of this dissertation, State regulatory control can go even further than the ISA's standards and obligations.

The sponsoring States` more stringent laws, regulations and administrative measures regarding marine environmental protection could lead to negative impacts on the private actors` economic activity and profitability[134]. Sponsoring States, in an attempt to counteract environmental risks, could unilaterally alter the conditions in sponsorship agreements with contractors or even revoke the sponsorship certificate[135].

Modification of a Sponsorship Agreement

When States sponsor a private actor, it is often that a sponsorship agreement (alternatively referred to as an investment agreement), establishing additional terms, conditions and legal and economic bargains, is signed by the parties as a safeguard[136]. The sponsorship agreement is not included in the international seabed mining regime[137], instead it is adopted under the domestic law of the sponsoring State[138]. The agreement terms reflect the sponsoring State`s national interests for the partnership with the contractor[139], including "(…) employment; training; capacity building; technology transfer; foreign investment; increased tax revenue; and national self-determination"[140].

An example of a sponsorship agreement is the one between Nauro Ocean Resources Inc. (hereinafter NORI) and the State of Nauru, signed on June 5th, 2017[141]. Clause 30 of

---

[134] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 10, in Link.
[135] *Ibidem*; Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 4, in Link.
[136] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 6, in Link.
[137] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 224, in Link.
[138] *Ibidem*, para. 226.
[139] HARRISON, James and Alberto Pecoraro (2024) – "Dispute Settlement Options and Rights of Participation in Deep Seabed Mining Disputes", in V. Tassin Campanella (ed.) *Routledge Handbook of Seabed Mining and the Law of the Sea*, London: Routledge, Chapter V.2, p. 230.
[140] Written Statements – ITLOS, case no. 17 (5th of August 2010) – "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", para. 5, in Link.
[141] *NORI Sponsorship Agreement* (5th of June 2017), by the Republic of Nauru, the Nauru Seabed Minerals Authority and Nauru Ocean Resources Inc., in Link.

the NORI Sponsorship Agreement states that the "(…) Agreement may only be amended by mutual agreement in writing by the Parties". This Clause aims to prevent any unilateral modifications to the referred agreement. Nevertheless, a national law or measure acted by the Republic of Nauro could contradict the settled terms and conditions with NORI without the necessity to directly alter the sponsorship agreement. Hence, Clause 10 of the 2017 NORI Sponsorship Agreement provides that (emphasized in this dissertation),

> *In the event there occurs any change in Nauruan Laws (…) after the date of this Agreement, and if upon NORI's representation it appears that on a reasonable interpretation and application of the law it would have the effect of divesting, decreasing, or in any way limiting, reducing or withholding any rights or benefits accruing to NORI or the NORI Group under this Agreement or under current legislation, then* ***the Parties shall, in good faith, negotiate to modify this Agreement so as to restore the economic rights and benefits of the NORI Group to a level equivalent to or as close as possible to what they would have been if such change had not occurred.***

Regardless, any direct or indirect changes of the sponsorship agreement terms, bargains and conditions are entirely left to the States` policies[142]. Despite the fact that the UNCLOS provides regulatory flexibility to sponsoring States solely in regards to the marine environmental protection[143], and that often sponsorship agreements seek to protect the private actor from any unilateral modifications, States could still be tempted to make alterations based on the notion that "(…) they should benefit from the mineral rent generated by the project to a much greater extent than the actual operation of the contract's fiscal regime allows"[144].

Revocation of a Sponsorship Certificate

Besides altering the sponsorship agreement due to environmental or economical expectations, States could still "(…) fear the environmental impacts of deep sea mining and terminate its sponsorship based on a particularly expansive reading of the precautionary approach"[145]. A sponsorship certificate is the document granted by the

[142] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 8, in Link.
[143] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 7, in Link.
[144] *Ibidem*.
[145] *Ibidem*, p. 8.

sponsoring State to the contractor, serving the purpose of demonstrating their required legal connection (of nationality or effective control)[146]. This document is subsequently presented to the ISA in order for the private actor to acquire and maintain the exploitation contract with the ISA[147]. A certificate of sponsorship is a necessary requirement for the contractor to operate its activity in the Area[148], therefore, the revocation of the certificate results in the immediate termination of the contract with the ISA – without a State to regulate and oversee the private actor, no activity can be conducted in the Area.

Nevertheless, if the Draft Exploitation Regulations follow the ISA`s Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area[149], the revocation of a sponsorship certificate will be manifestly straightforward. Regulation 29 states that,

> *If a State terminates its sponsorship it shall promptly notify the Secretary-General in writing. The sponsoring State should also inform the Secretary-General of the reasons for terminating its sponsorship. Termination of sponsorship shall take effect six months after the date of receipt of the notification by the Secretary-General, unless the notification specifies a later date.*

This exploration regulation simply requires the sponsoring State to notify the ISA in writing about the termination of the sponsorship[150]. There is no mention of the option to respond or to appeal the decision of termination. This translates to an administrative measure rather than an executive one. The lack of a more elaborate procedure with an established legal avenue could lead to sponsoring States falling into the belief that there are no consequences or repercussions to the decision to revoke a certificate of sponsorship. In truth, on the 14th of April, 2022, the State of Tuvalu decide to reverse the sponsoring of a contractor, the Circular Metals Ltd., and unilaterally revoking its sponsorship, after the private actor had already applied for an exploration contract with the ISA[151]. The Foreign Minister of Tuvalu in 2022, Mr. Simon Kofe, explained the

---

[146] Sun, Linlin – "Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective", *Melbourne Journal of International Law*, Vol. 18, No. 1 (July 2017), p. 12, in Link

[147] *Ibidem.*

[148] *Ibidem.*

[149] 19th Session of the ISA`s Council (15-26 July 2013), "Annex - Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area", in *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* (22nd of July 2013), ISBA/19/C/17, in Link.

[150] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 8, in Link.

[151] Srinivasan, Prianka (Reporter of ABC Pacific), "Tuvalu reverses controversial decision to sponsor seabed mining" (13th of April 2022), in Link, last accessed on the 1st of April 2025; Pecoraro, Alberto, "Tuvalu cancels its sponsorship: the role of international law" (2nd of May 2022), Opinion/Editorial in *DSM Observer - Deep Sea Mining News & Resources*, in Link, last accessed on the 1st of April 2025.

decision with the following statement: "I think the part that we can play is to ensure that we set very high standards or the environmental issues that are involved in requirements, which could then hopefully discourage companies from pursuing it, because it'll be very costly"[152].

VI. ITLOS Seabed Disputes Chamber – A Specialized Dispute Settlement Mechanism

When entering into a contract with the ISA, Part XI of the UNCLOS grants private actors substantive rights and duties[153]. It is the ISA`s exploitation contract itself which awards the contractor with a right to exploit and take ownership of common resources as private property. Therefore, the potential disputes between the private actor and the ISA "(…) regarding the performance of a contract or a plan of work, or with respect to claims based on the infringement of any right."[154], shall indeed be settled within the legal framework established by the UNCLOS that guarantees an equal standing with the ISA in litigation[155]. Articles 186 and 187 of the UNCLOS establishes the Seabed Disputes Chamber (hereinafter Chamber), a specialized dispute settlement mechanism of the ITLOS, that exercises jurisdiction over disputes concerning activities in the Area[156]. The Chamber in its 2011 Advisory Opinion described its role as being,

> *(...) a separate judicial body within the [ITLOS] Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.*[157]

The UNCLOS gives "(…) the Chamber extensive, in some respects exclusive, but not exhaustive, jurisdiction over a wide range of potential disputes arising from 'activities

---

[152] Srinivasan, Prianka (Reporter of ABC Pacific), "Tuvalu reverses controversial decision to sponsor seabed mining" (13th of April 2022), in Link, last accessed on the 1st of April 2025.
[153] ROCHA, Armando (2021) – *Private Actors as Participants in International Law – A Critical Analysis of Membership under the Law of the Sea*. First ed., London: Bloomsbury Publishing PLC, p. 108.
[154] *Ibidem.*
[155] *Ibidem.*
[156] Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27th of September 2017), p. 3, in Link.
[157] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 25, in Link.

in the Area'"[158]. Nevertheless, it is interesting to note that the Chamber cannot adjudicate over the ISA`s exercise of its discretionary powers[159].

Article 187 of the UNCLOS outlines six types of disputes relating to activities in the Area for which the Chamber holds jurisdiction, including (i) "disputes between States Parties concerning the interpretation or application [of part XI of the UNCLOS] (…)"[160]; (ii) "disputes between a State Party and the Authority concerning: acts or omissions of the Authority or of a State Party alleged to be [a] violation of [the established rules] (…) [or] alleged to be in excess of jurisdiction or a misuse of power"[161]; (iii) "disputes between parties to a contract (...) concerning: the interpretation or application of a relevant contract or a plan of work; or acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests"[162]; (iv) "disputes between the Authority and a prospective contractor who has been sponsored by a State (...) concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;" and (v) "disputes (...) where it is alleged that the Authority has incurred liability as provided in Annex III, article 22"[163].

Alternatively, at the request of any party involved in a dispute between States Parties about the interpretation or application of part XI of the UNCLOS[164], the dispute can be referred to an ad hoc chamber of the Seabed Disputes Chamber[165] or to a special chamber of the ITLOS, provided that all parties agree[166]. Additionally, concerning disputes between parties over the interpretation or application of an exploitation contract or plan of work[167], they can be submitted by any party to binding commercial arbitration[168]. If there is no provision in the contract between the parties regarding the dispute arbitrational procedure, it shall be in accordance with the Arbitration Rules of the United Nations Commission On International Trade Law[169]. The arbitral tribunals,

[158] Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27th of September 2017), p. 5, in Link.
[159] UNCLOS, Article 189 (a).
[160] *Ibidem* 187 (a).
[161] *Ibidem* (b).
[162] *Ibidem* (c).
[163] UNCLOS, Article 189 (e).
[164] *Ibidem* 187 (a).
[165] *Ibidem* 188 (1) (b).
[166] *Ibidem* (a); Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27th of September 2017), pp. 6-7, in Link.
[167] UNCLOS, Article 187 (c) (i).
[168] *Ibidem* 188 (2) (a).
[169] UNCLOS, Article 188 (2) (a). (c).

however, do not possess jurisdiction to decide any question of interpretation of the UNCLOS[170].

Regarding the private actor in seabed mining, the Chamber holds "(…) a broad jurisdiction over pre-contractual, contractual and tortious liability disputes, the interpretation and application of contracts, the refusal of a contract, or any legal issue arising in the negotiations or enforcement of the contract"[171]. Nevertheless, despite the Chamber`s extensive jurisdiction over potential disputes arising from mineral exploitation in the Area, a lot of potential disputes will fall outside the Chamber`s jurisdiction[172]. The different mechanisms provided by Articles 187 and 188 of the UNCLOS do not seem to apply to disputes between the contractors and their sponsoring States[173] over the modification of a sponsorship agreement or the revocation of a sponsorship certificate[174]. In fact, neither the UNCLOS`s provisions nor the ISA`s regulations qualify the State's ability to revoke or modify a sponsorship[175]. Regardless, it does not mean that there are no legal mechanisms which can settle these disputes, on the contrary[176], "Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State"[177].

---

[170] *Ibidem*.
[171] ROCHA, Armando (2021) – *Private Actors as Participants in International Law – A Critical Analysis of Membership under the Law of the Sea*. First ed., London: Bloomsbury Publishing PLC, p. 109.
[172] Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27th of September 2017), p. 8, in Link.
[173] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 11, in Link.
[174] Sun, Linlin – "Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective", *Melbourne Journal of International Law*, Vol. 18, No. 1 (July 2017), p. 13, in Link.
[175] Pecoraro, Alberto – "Disputes between Deep Seabed Miners and their Sponsoring State: The Role of International Law - What is the Role of Sponsoring States?", in *Kluwer Arbitration Blog* (6th of July 2022), in Link.
[176] *Ibidem.*
[177] ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, para. 230, in Link.

VII. Investment Protection in Mineral Exploitation in the Area[178]

Having considered the specialized dispute settlement mechanism, the Chamber, as well as the other instruments provided by Article 188, it appears that the UNCLOS does not have the necessary jurisdiction to settle disputes between a contractor and its sponsoring State over the modification of a sponsorship agreement or the revocation of a sponsorship certificate. Therefore, it is pertinent to consider other potential methods of dispute settlement to address the issues in question.

International investment law encompasses the rules, principles and standards that regulate the relationship between States and foreign investors[179]. An important element of international investment law is investment treaty arbitration, which aims to settle disputes between foreign investors and the States hosting their assets[180]. Its jurisdiction "(…) is generally based on an offer of consent to arbitration made by the states parties to a[n international investment] treaty"[181], which can be defined as a treaty between two or more States where each State agrees to treat the investors from the other State according to standards of protection such as fair and equitable treatment and protection against direct and indirect expropriation[182].

However, not all sponsoring States have an investment treaty with the contractors' State of nationality[183]. In the absence of the investment treaty mechanism, the private actor must include international investment rules in the governing law clause and standards of protection under international investment law in the sponsorship agreement to safeguard its investment[184]. Under national laws, the legal document that establishes the mineral exploitation in the Area is the certificate of sponsorship, complemented by a

---

[178] Chapter VII of this dissertation is based on the author`s final essay for the seminar of Investment Treaty Arbitration at the *Universidade Católica Portuguesa*, Porto`s Faculty of Law, titled "Investment Protection in Deep-Seabed Mining" (March 2024).
[179] VICENTE, Marta de Sousa Nunes (July 2020) – *O Direito Administrativo dos Negócios: Standards de Proteção do Investimento Estrangeiro*, Doctoral Thesis on Public Law. Coimbra, *Faculdade de Direito da Universidade de Coimbra*, p. 55, in Link.
[180] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 13, in Link.
[181] Schreuer, Christoph – "Jurisdiction and Applicable Law in Investment Treaty Arbitration", *McGill Journal of Dispute Resolution,* Vol. 1, No. 1 (2014), p. 2, in Link.
[182] VICENTE, Marta de Sousa Nunes (July 2020) – *O Direito Administrativo dos Negócios: Standards de Proteção do Investimento Estrangeiro*, Doctoral Thesis on Public Law. Coimbra, *Faculdade de Direito da Universidade de Coimbra*, pp. 55-56, in Link.
[183] Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), p. 8, in Link.
[184] *Ibidem*, p. 9.

sponsorship agreement[185]. This agreement generally restricts "(…) the state's discretion to unilaterally variate, suspend or terminate a sponsorship agreement[186]".

Under customary international law, the revocation of a sponsorship certification (foreign property) on unjustified grounds could constitute an unlawful expropriation deserving of prompt, adequate and effective compensation under an international investment treaty or a sponsorship agreement[187]. Expropriation cannot happen unless "(…) based on grounds or reasons of public utility, security or the national interest (...)"[188] and the investor must be compensated in accordance with national and international law[189]. In the Case of *Waste Management, Inc. v. United Mexican States*, the International Centre for Settlement of Investment Disputes (hereinafter ICSID) suggested that (emphasized in this dissertation),

> *(...)* ***the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary grossly unfair, unjust or idiosyncratic****, is discriminatory and exposes the claimant [foreign investors] to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety(...)* ***In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant [foreign investor]****.*[190]

A crucial element of most investment agreements is the direct right of investors to make a claim against a host State in the case of a breach of protection standards[191]. The private actor could submit a dispute to an arbitral tribunal under the ICSID Convention and, thus, the power of sponsoring States to modify or revoke sponsorship for mineral exploitation in the Area would be constrained by international investment law[192]. If applicable, international investment law could provide additional rights to foreign

---

[185] Pecoraro, Alberto – "Disputes between Deep Seabed Miners and their Sponsoring State: The Role of International Law - What is the Role of Sponsoring States?", in *Kluwer Arbitration Blog* (6 July 2022), in Link.
[186] *Ibidem.*
[187] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 13, in Link.
[188] United Nations Human Rights – Office of the High Commissioner, *General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"*, para. 4, in Link.
[189] *Ibidem.*
[190] ICSID, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30th of April 2004, para. 98, in Link.
[191] HARRISON, James (2019) – "International Investment Law and the Regulation of the Seabed", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 20, pp. 483-484.
[192] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 13, in Link.

investors and execute them against the sponsoring States. This could potentially fill the gap left by the UNCLOS concerning disputes over the modification of a sponsorship agreement or the revocation of a sponsorship certificate[193]. However, this can only apply if (i) "(…) the economic activity of the sponsored entity constitutes an investment in the territory of the sponsoring State (…)"[194] and (ii) "(…) such investment is owned or controlled by a foreign investor"[195].

The Private Miner as a Protected Investor

Under the UNCLOS, the private miner must have the same nationality as its sponsoring State or be controlled by its nationals[196]. This presents an obstacle to the applicability of investment arbitration under the ICSID Convention, as it does not hold jurisdiction over disputes between private nationals and their own State of nationality, on the contrary, it settles disputes between foreign investors and host States.

Article 25 (1) of the ICSID Convention states that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (…) and a national of another Contracting State (…)". Article 25 (2) (b) of the ICSID Convention further clarifies that "National of another Contracting State" means (i) "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration (…)" or (ii) "(…) any juridical person which had the nationality of the Contracting State party to the dispute on that date 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".

There are two ways in which the seabed miner can be considered a protected investor. The first is through the recognition in a sponsorship agreement that an entity with the nationality of the host State should be treated as a foreign investor due to foreign control[197]. The inclusion of ICSID arbitration provisions in the sponsorship agreement can be sufficient to constitute parties' consent to treat a national of the contracting State

[193] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 13, in Link.
[194] *Ibidem.*
[195] *Ibidem.*
[196] UNCLOS, Article 153 (2) (b).
[197] ICSID Convention, Article 25 (2) (b).

as a national of another contracting State[198]. Moreover, when a sponsoring State and a foreign-controlled company of the same nationality enter into an investment agreement that includes an ICSID arbitration clause, it is implied that the parties agree to be subject to the ICSID jurisdiction[199]. The second method for the seabed miner to be considered a protected investor is through the protection afforded to shareholders by international investment law[200]. Despite the UNCLOS restricting sponsorship of private actors to those with the nationality of the sponsoring State (either through the company or its management), it is well established that foreign capital has become increasingly involved in the Area through joint ventures and subsidiaries of companies from developed countries[201]. The entity which exercises effective control over the private actor is often based in a different State from the State of nationality and sponsorship. Participation in the locally incorporated company could be considered an investment and, therefore, foreign shareholders of parent companies could pursue a claim in the ICSID for damages sustained by the company's subsidiaries[202].

Mining Exploitation in the Area as a Protected Investment

As already established, the economic extractive activity at issue takes place in the Area, and "(...) [s]uch areas are clearly not within the territory or maritime zones of a coastal state (...)"[203], instead they are performed beyond national jurisdiction. This represents an apparent barrier to the applicability of international investment law to seabed mining, considering that one of the requirements to apply international investment law to a certain economic activity is that it needs to constitute an investment in the territory of a foreign State. Even though the ICSID Convention does not explicitly require a territorial nexus between the investment and the host State, the Report of the Executive Directors on the ICSID Convention states that the primary purpose of the Convention is

[198] ICSID Convention, Article 25 (2) (b).
[199] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 33, in Link.
[200] *Ibidem.*
[201] *Ibidem*, p. 12.
[202] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 34, in Link.
[203] HARRISON, James (2019) – "International Investment Law and the Regulation of the Seabed", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 20, p. 488.

to "(…) stimulate a larger flow of private international investment into its territories [the country territories] (…)"[204]. In fact, most investment treaties are predicated on state territory regarding their spatial application[205].

The subjective approach theory has been "(…) adopted by ICSID tribunals that seeks to merge consent of the parties with the jurisdictional requirement of ICSID"[206]. Therefore, according to this approach, the jurisdictional requirement of investment is considered to be satisfied when parties consent to the ICSID arbitration in the investment agreement and, thus, give meaning to the notion of investment[207]. In the Report of the Executive Directors on the ICSID Convention, regarding the definition of investment, it is stated that:

> *No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*[208]

It is the parties and not the ICSID Convention, that determine what constitutes an investment when they consent in the investment agreement to submit certain activities to the ICSID's jurisdiction. In the Case of Generation Ukraine Inc. v. Ukraine, the Tribunal accepted that the investor`s "(…) shareholding interest in Heneratsiya *prima facie* constitutes an investment within the meaning of Article I(l)(a)(ii) of the BIT which includes "shares of stock or other interests in a company"[209]. Moreover, according to the Pacific Agreement on Closer Economic Relations Plus states that "(…) an investment may take [the form of] (…): (a) an enterprise; (...) (c) shares, stock and other forms of equity participation in an enterprise; (...) (g) turnkey, construction, management, production and revenue sharing contracts, concessions and other similar contracts; and

---

[204] International Bank for Reconstruction and Development (18th of March 1965), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States - ICSID Convention, Regulations and Rules*, para. 12, in Link.
[205] 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 in the 12th of November 1987 and in force since the 18th of May 1988), Article 1 (3) (b) and 2 (2), in Link.
[206] Muhammad, Nasiruddeen – "Notion of investment under the ICSID Arbitration: A jurisdictional dilemma between subjective and objective approaches", *1st International Conference on Advances in Business, Management and Law*, Vol. 1, No. 1 (2017), p. 128, in Link.
[207] *Ibidem.*
[208] International Bank for Reconstruction and Development (18th of March 1965), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States - ICSID Convention, Regulations and Rules*, para. 27, in Link.
[209] ICSID, Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award of 16th of September 2003, para. 8.5, in Link.

(g) licences, authorisations, permits and similar rights conferred (…)"[210]. Thus, assets in the form of interest in the equity of a company as well as concessions under a contract, all fundamental prerequisites for the success of the undertaking of the economic activity in the Area, can entail an investment in the territory of a State[211]. Regardless if the assets at issue produce effects outside of the State's territory, if a sponsoring State revokes a sponsorship certificate, the seabed 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"[212].

Furthermore, when determining jurisdiction, arbitral tribunals often use the concept of general unity of an investment operation[213]. This doctrine, following the object and purpose of investment treaties, gives arbitral tribunals jurisdiction over integrated economic operations, even if significant parts of the operation happen outside of the host State's territory[214]. In the Case of Inmaris Perestroika v. Ukraine the Tribunal stated that

> *an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself. Here, the benefits of Claimants' investments, considered as an integrated whole, were received by Respondent.*[215]

Jurisprudence has indicated that the "(…) performance of the relevant activity need not take place in the territory of the host State, (…) Neither is a physical transfer of assets into the host State's territory necessary. What matters is that the economic effect of the investment is felt in the host State's territory"[216].

Acknowledging that the seabed mining economic activity may generate funds which are placed at the disposal of the sponsoring State, which includes assets in the form of interest in the equity of a company and concessions under a contract, and that the seabed miner is often a foreign investor or reliant on foreign capital; it is arguable that seabed mining may be awarded investment protection and investment arbitration may be applicable to the disputes between contractors and respective sponsoring States concerning standards of protection.

---

[210] Pacific Agreement on Closer Economic Relations Plus (entered into force on 13th of December 2020), Chapter 9, Article 1, in Link.
[211] Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), p. 15, in Link.
[212] *Ibidem.*
[213] *Ibidem*, p. 20
[214] Schreuer, Christoph – "The Unity of an Investment", *ICSID Reports,* Vol. 19 (2021), p. 3, in Link.
[215] ICSID, Inmaris Perestroika Sailing Maritime Services GMBH v. Ukraine para. 124, ICSID Case No. ARB/08/8, Decision on Jurisdiction of 8th of March 2010, para. 124, in Link.
[216] Schreuer, Christoph – "The Unity of an Investment", *ICSID Reports,* Vol. 19 (2021), pp. 16-17, in Link.

Conclusion

The relationship between the seabed miner and its sponsoring State is a tribulate one. While the seabed miner has concerns over the high-risk investment in the seabed beyond national jurisdiction, the sponsoring State fears the environmental impacts which may arise of the extractive activity and its consequences concerning liability. It is crucial for the private actor and the sponsoring State to find a balance between their interests and concerns through the sponsorship agreement. The private actor must be more transparent while the sponsoring State must grant investment protection.

Bibliography

Legislation and Official Documents

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 in the 12th of November 1987 and in force since the 18th of May 1988), in Link.

ICSID, Inmaris Perestroika Sailing Maritime Services GMBH v. Ukraine para. 124, ICSID Case No. ARB/08/8, Decision on Jurisdiction of 8th of March 2010, para. 124, in Link.

ICSID, Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award of 16th of September 2003, in Link.

ICSID, *Waste Management, Inc. v. United Mexican States, ICSID Case N° ARB(AF)/00/3*, Award of 30th April 2004, in Link.

International Bank for Reconstruction and Development (18th of March 1965), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States - ICSID Convention, Regulations and Rules*, in Link.

International Centre for Settlement of Investment Disputes Convention.

ISA, *Discussion Paper – Effective Control* (January 2023), in Link.

ITLOS Reports (2011), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Seabed Disputes Chamber`s Advisory Opinion, case no. 17, in Link.

Lodge, Michael W. – "The International Seabed Authority and Deep Seabed Disputes", Statement at the Max Planck Institute (27 September 2017), in Link.

NORI Sponsorship Agreement (June 5, 2017), by the Republic of Nauru, the Nauru Seabed Minerals Authority and Nauru Ocean Resources Inc., in Link.

Pacific Agreement on Closer Economic Relations Plus (entered into force on 13th of December 2020), Chapter 9, Article 1, in Link.

United Nations Convention on the Law of the Sea.

United Nations Human Rights – Office of the High Commissioner, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources", in Link.

Written Statements – ITLOS, case no. 17 (5 August 2010) – "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", in Link.

19th Session of the ISA`s Council (15-26 July 2013), "Annex - Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area", in *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* (22 July 2013), ISBA/19/C/17, in Link.

29th Session of the ISA`s Council - Part II (2024), Permanent Mission of the Kingdom of the Netherlands to the ISA, "Non-paper on Parent Company Liability Statements", in Thematic discussions and cross cutting issues – Effective Control, in Link.

29th Session of the ISA`s Council - Part II (2024), Permanent Mission of the Republic of Nauru to the ISA, "Non-Paper by Nauro on State Sponsorship of Activities in the Area and the Interpretation of the "Effective Control" Requirements" (April 2024), in Thematic discussions and cross cutting issues – Effective Control, in Link.

30th Session of the ISA`s Council - Part I (2025), *Draft regulations on exploitation of Mineral resources in the Area – Revised Consolidated Text* (10 January 2025), in Link.

1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

Other Sources

Becker-Weinberg, Vasco – "Strengthening Environmental Impact Assessment Obligations of Deep Seabed Mining in Areas beyond National Jurisdiction", *The International Journal of Marine and Coastal Law*, Vol. 39 (August 2024), pp. 602–614, in Link.

Becker-Weinberg, Vasco – "The BBNJ Agreement and the Progressive Development of Environmental Impact Assessment Obligations for Deep Seabed-Mining beyond National Jurisdiction", *China Oceans Law Review*, Vol. 19, No. 3 (2023), pp. 131-140.

CAMPANELLA, Virginie Tassin et al. (2024) – "Rights and Obligations of States on the Continental Shelf and the Area", in V. Tassin Campanella (ed.) *Routledge Handbook of Seabed Mining and the Law of the Sea*, London: Routledge, Chapter II.1.

DINGWALL, Joanna (2020) – "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 7.

GAILHOFER, Peter et al. (2023) – "Introduction", in Peter Gailhofer et al. (eds.) *Corporate Liability for Transboundary Environmental Harm – An International and Transnational Perspective*, Switzerland: Springer, Chapter 1, in Link.

HARRISON, James (2019) – "International Investment Law and the Regulation of the Seabed", in Catherine Banet (ed.) *The Law of the Seabed – Access, Uses, and Protection of Seabed Resources*, Vol. 90, Netherlands: Brill | Nijhoff, Chapter 20.

HARRISON, James and Alberto Pecoraro (2024) – "Dispute Settlement Options and Rights of Participation in Deep Seabed Mining Disputes", in V. Tassin Campanella (ed.) *Routledge Handbook of Seabed Mining and the Law of the Sea*, London: Routledge, Chapter V.2.

ISA, "Exploration Contracts – The Beginning", in Link, last accessed on the 25th of March 2025.

ISA, "Reserved Areas", in Link, last accessed on the 4th of April 2025.

ISA, “The Mining Code”, in Link, last accessed on the 11th of March 2025.

ISA, “The Mining Code – Draft exploitation regulations”, in Link, last accessed on the 11th of March 2025.

ISA, “The 1st Session of the International Seabed Authority”, in Link, last accessed on the 11th of March 2025.

JAECKEL, Aline (2024) – “The Area and the Role of the International Seabed Authority”, in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter IV.1.

Li, Chuanxuan and Hao Shen – “The compromised international legal regime for deep seabed mining and a possible solution from China’s legislative perspective”, *Journal of Energy & Natural Resources Law*, Vol. 42, No. 2 (2024), 167-184.

MAKGILL et al. (2024) – “Implementing the Precautionary Approach for Seabed Mining: A Review of State Practice”, in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea. London: Routledge*, Chapter I.3.

Muhammad, Nasiruddeen – “Notion of investment under the ICSID Arbitration: A jurisdictional dilemma between subjective and objective approaches”, *1st International Conference on Advances in Business, Management and Law*, Vol. 1, No. 1 (2017), in Link.

Oceanographic, “History made: Portugal takes lead in effort to stop deep-sea mining” (18th March 2025), in Link, last accessed on the 8th of April 2025.

Oral, Nilüfer (2024) – “The Common Heritage of Mankind under International Law – An overview”, in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter I.2.

PAYNE, Cymie R. (2024) - “State Responsibility for Deep Seabed Mining Obligations”, in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*. London: Routledge, Chapter II.2.

Pecoraro, Alberto – "Disputes between Deep Seabed Miners and their Sponsoring State: The Role of International Law - What is the Role of Sponsoring States?", in *Kluwer Arbitration Blog* (6 July 2022), in Link, last accessed on the 8th of April 2025.

Pecoraro, Alberto – "Law of the Sea and Investment Protection in Deep Seabed Mining", *Melbourne Journal of International Law*, Vol. 20 (2019), in Link.

Pecoraro, Alberto, "Tuvalu cancels its sponsorship: the role of international law" (2 May 2022), Opinion/Editorial in *DSM Observer - Deep Sea Mining News & Resources*, in Link, last accessed on the 1st of April 2025.

Pecoraro, Alberto – "UNCLOS and investor claims for deep seabed mining in the Area: an investment law of the sea?", *Glasgow Centre for International Law & Security Working Paper*, No. 5 (November 2020), in Link.

PROELSS, Alexander (ed.) (2017) – *United Nations Convention on the Law of the Sea: A Commentary.* First ed., London: Bloomsbury Publishing PLC.

Rojas, A. S. and Freedom-Kai Phillips – "Effective Control and Deep Seabed Mining: Toward a Definition", *Liability Issues for Deep Seabed Mining Series*, No. 7 (February 2019), in Link.

Schreuer, Christoph – "Jurisdiction and Applicable Law in Investment Treaty Arbitration", *McGill Journal of Dispute Resolution*, Vol. 1, No. 1 (2014), in Link.

Schreuer, Christoph – "The Unity of an Investment", *ICSID Reports,* Vol. 19 (2021), in Link.

Srinivasan, Prianka (Reporter of ABC Pacific), "Tuvalu reverses controversial decision to sponsor seabed mining" (13 April 2022), in Link, last accessed on the 1st of April 2025.

Sun, Linlin – "Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective", *Melbourne Journal of International Law*, Vol. 18, No. 1 (July 2017), in Link. in Link.

Sustainable Ocean Alliance, “European Parliament Calls for a Global Moratorium on the Deep-Sea Mining Industry” (7th February 2024), in Link, last accessed on the 8th of April 2025.

Tilloy, Julio Alberto – “The ITLOS Jurisprudence Regarding the Procedural Obligation to Conduct an Environmental Impact Assessment and Its Significance for Deep Seabed Mining”, *The Italian Review of International and Comparative Law*, Vol. 3 (2023), pp. 325-347, in Link.

United Nations - Oceans & Law of the Sea, “Chronological lists of ratifications of accessions and successions to the Convention and the related Agreements”, in Link, last accessed on the 26th of March 2025.

United Nations - Oceans & Law of the Sea, “The United Nations Convention on the Law of the Sea”, in Link, last accessed on the 26th of March 2025.

VICENTE, Marta de Sousa Nunes (July 2020) – *O Direito Administrativo dos Negócios: Standards de Proteção do Investimento Estrangeiro*, Doctoral Thesis on Public Law. Coimbra, Faculdade de Direito da Universidade de Coimbra, in Link.

Xu, Xiangxin and Guifang (Julia) Xue – “The Environmental Compensation Fund: Bridging Liability Gaps in the Deep Seabed Mining Regime”, *Coastal Management*, Vol. 49, No. 6 (2021), pp. 557-574.

Xu, Xiangxin et al. – “Revisiting the “Responsibility to Ensure”: Two-Line Standards of the Sponsoring State’s National Legislation on Deep Seabed Mining”, *Sustainability 2023*, 15 (10), 8095, in Link.

Zhou, Jiang and Ping Lin – “Study on the interpretation and application of the concept of “effective control” by the ISA”, *Frontiers in Marine Science*, Vol. 11 (2024), in Link.