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Deep-Sea Mining: A New Frontier for Investment Arbitration

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As the world races toward a greener future, demand for critical materials is surging. In this high-stakes hunt for resources, the deep seabed beyond national jurisdiction (the "Area") is increasingly seen as the next "El Dorado". However, regulations governing its exploitation have yet to be finalized due to mounting environmental concerns, which prompted several stakeholders to call for a moratorium (e.g. NGOs, States, the EU, corporations, arbitration practitioners).

Yet, not all are pressing the brakes. Countries such as India, China, Japan, and Nauru are actively advocating for deep-sea mining's potential. The International Seabed Authority ("ISA"), established under the United Nation Convention of the Law of the Sea ("UNCLOS") and in charge of seabed governance, is moving forward, and has signaled its intent to finalize exploitation regulations by 2025, potentially unlocking a new frontier in resource extraction and a whole new sector for international dispute practitioners.

As this post explores, UNCLOS already allows recourse to international commercial arbitration under Article 188, and investment arbitration could arguably come into play should mining contractors challenge their sponsoring (host) States.

Regulatory Landscape: Balancing Sovereignty and Global Commons

The legal framework for deep-sea mining is rooted in UNCLOS Part XI, which governs the Area—defined as "the seabed and ocean floor and subsoil […] beyond the limits of national jurisdiction." Central to this regime is the "common heritage of mankind" principle (UNCLOS Arts. 136 and 137), preventing any country from claiming sovereignty over any parts of the Area or its resources. Instead, the rights to the Area's wealth are vested in "mankind as a whole".

To bridge the gap between global interests and private exploration, UNCLOS establishes a three-tier system involving (i) the contractor, (ii) a sponsoring State, and (iii) the ISA.

In essence, the contractor first enters a sponsorship agreement with an UNCLOS member State (Annex III, Art. 4) and submits a plan of work to the ISA (UNCLOS Art. 153(3); Annex III, Art. 3(4)). The sponsoring State then provides the ISA with a sponsorship certificate (Regulations on Polymetallic Nodules, Reg. 11) and assumes due diligence obligations to ensure the contractor's compliance with the UNCLOS regime (UNCLOS, Art. 139; Annex III, Art. 4(4)). Finally, the ISA grants an exploration concession.

The responsibilities of the sponsoring State can be narrowed down to a twofold obligation: (1) adopting domestic laws and regulations consistent with UNCLOS and (2) ensuring that the contractors operate within this legal framework (UNCLOS, Arts. 139(1) and 153(4); UNCLOS Annex III, Art. 4(4)). This mechanism ensures that the treaty provisions of UNCLOS become binding on sponsored contractors through national law.

In its 2011 Advisory Opinion the Seabed Disputes Chamber (the "Chamber") clarified that this dual obligation is an obligation "of conduct" rather than "result" (¶110); and requires States to "apply best environmental practices" (¶122).

The real test comes when a sponsoring State decides to suspend or revoke its sponsorship (e.g. Tuvalu). Such actions can have significant consequences for sponsored contractors, potentially jeopardizing their ability to continue operations. While UNCLOS provides a robust dispute resolution system—empowering the Chamber with broad jurisdiction under Article 187 as well as to resort to commercial arbitration under Article 188—one gray area remains: disputes arising from the termination of non-contractual certificates. For instance, the certificate of sponsorship, which is the certificate issued by the sponsoring State to the ISA needed by a contractor to operate, is not of a contractual nature, and therefore, it will arguably not fall within the scope of Article 187.

The Applicability of Investment Law

Deep-sea mining straddles the intersection of international governance, sovereign States, and private investors—raising the critical question: Can investment law fill the gaps left by UNCLOS, offering an alternative dispute resolution mechanism for deep-sea mining investors?

For an investor-State arbitration claim to succeed, under most investment agreements, a deep-sea mining investor must establish jurisdiction by proving that (i) an investment was made (ii) in the territory of the host (sponsoring) State (iii) by a foreign protected investor.

Is Deep-Sea Mining a Protected Investment?

Most investment treaties adopt broad, asset-based definitions of "investment," covering physical assets, shares, IP rights, and financial claims—arguably all integral to deep-sea mining operations.

Under Article 153(2)(b) UNCLOS, activities in the Area are reserved exclusively to "[S]*tate enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals*." This means that foreign corporations *must* incorporate an entity in the sponsoring State.

Additionally, entities entering into agreements with the ISA are also required to pay royalties and administrative fees to their sponsoring State, which also facilitates compliance with the *Salini test* requirements.

The Territorial Dilemma: Does the Investment Occur in the Host State?

Most investment treaties require that the investment occurs "in the territory of" the host State. This poses a significant challenge for seabed mining activities, which largely take place in the Area, a region beyond national jurisdiction governed by the principle of "common heritage of mankind".

Nevertheless, at least two established legal theories may help deep-sea mining investors navigate this hurdle.

First, established case law embraces the theory of the general unity of an investment. According to this theory, when a tribunal is presented with a complex operation, it should look at the economic substance of the operation in a holistic manner and determine whether the core of the operation unfolds in the territory of the host State (e.g. *Ambiente Ufficio v. Argentina*, ¶429; *SGS v. Paraguay*, ¶113). While seabed mining operations primarily unfold in the Area, essential phases such as refining, processing, and marketing would likely occur in the host State's territory. Even if a tribunal will not be persuaded that these latter constitute the core of the operation, a tribunal recently applied the holistic approach to assessing the existence of an investment and ultimately asserted jurisdiction only over parts located within the host State (*Pildegovics v. Norway*, ¶¶258-260, 287).

Second, another line of case law, particularly in relation to intangible assets, suggests that the satisfaction of the "territorial link" depends on whether the investment "accrues to the benefit of the [host] State itself" (e.g. *Inmaris v. Ukraine*, ¶124). This over-expansive interpretation of the territoriality requirement has sparked virulent dissent (see e.g. Partial Dissenting Opinion of Zachary Douglas, in *Kappes and Kappes v. Guatemala*), yet it could be of particular relevance if applied to deep-sea mining operations. Many national seabed mining laws, such as those in the Cook Islands, Fiji, Kiribati, Micronesia, Nauru, Tonga, and Tuvalu permit authorities to establish terms regarding royalties, taxes, sponsorship fees, and other charges—contributions that would likely meet the benefit requirement, thereby fulfilling a territorial link.

Can Deep-Sea Mining Contractors Qualify as Foreign Investors?

Under Article 153(2)(b) UNCLOS, private entities seeking to conduct activities in the Area must be juridical persons with the nationality of their sponsoring State or effectively controlled by that State or its nationals. Likewise, most countries, including Belgium, China, the Czech Republic, Fiji, and Japan, have adopted nationality registration, or residency criteria within their national laws for entities to qualify for sponsorship. While the concept of "effective control" is still under debate and will be a focal point at the upcoming ISA Council sessions, the "nationality" requirement under UNCLOS and national laws may prompt sponsoring States to challenge investment tribunals' jurisdiction based on the "foreign nationality" criterion commonly present in investment treaties. Contractors, however, might counter such challenges through two primary arguments.

First, investment tribunals have interpreted contractual clauses providing investor-State arbitration as evidence of the parties' consent to treat an investor as foreign (*BSG Resources v. Guinea*, ¶287; *LETCO v. Liberia*, ¶16.10). Similarly, in deep-sea mining, agreements or national laws permitting ICSID arbitration may indicate an intent to treat sponsored entities as foreign investors. For example, Micronesia and Tuvalu included in their national law ICSID arbitration provisions for disputes involving sponsored entities, albeit requiring local registration.

Second, even without explicit agreements designating a locally registered entity as foreign, foreign investors may claim investment protection through shareholdings in the sponsored entity. Many investment treaties adopt broad definitions of investment that include shares and stakes in corporations, enabling shareholders to claim indirect or reflective losses if their investment falls under the scope of the relevant BIT.

Conclusions

As already discussed on the Blog (here), UNCLOS Part XI already embeds key investment law principles—such as uniform treatment, reasonableness, and proportionality—but its dispute resolution framework has notable gaps. Whether investment law can step in to bridge these gaps depends largely on the national law of the sponsoring State, the applicable investment treaty, and how a deep-sea mining investor structures its operation.

Deep-sea mining has therefore the potential to mark a new frontier for investment arbitration, as evidenced by the recent *Odyssey v. Mexico* case, concerning a deep-sea mining project within Mexico's jurisdiction. However, investment law's historical resistance to integrate environmental considerations—highlighted in Philippe Sands' dissenting opinion in *Odyssey* (¶¶58-59)—casts doubts on its suitability to address disputes in this space.

In the meantime, exploration contractors formally criticized the ISA for its repeated regulatory delays, calling them "not acceptable and unfair." They argue that, while they fulfil their obligations and incur in significant costs, the ISA's failure to act risks breaching their "legitimate expectations [and] fair and equitable treatment [obligations] as required under UNCLOS and [their] contracts"–echoing classic investment law claims.

The forthcoming ISA regulations will be crucial in shaping these dynamics and determining the role investment arbitration will (or will not) play in this emerging field.

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