# Protection of Foreign-Owned Entities Involved in Deep Seabed Mining—Through International Investment Law vis à vis Investment Arbitration

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**Introduction**

Deep seabed mining (DSM) has become more accessible with the advancement of modern technology. The exploration and exploitation of oil and gas are some of the most common activities on the seabed. In 1873, during the scientific expedition of the HMS Challenger, scientists first discovered polymetallic nodules on the ocean floor. However, due to lack of advanced science and technology, it was not possible for States to explore and exploitate mineral resources found in deep seabed. Again during the International Geophysical Year (1957-58), polymetallic nodules were collected on the Tuamotu Plateau at a depth of some 900 meters. These nodules are a rich source of valuable minerals such as manganese, copper, cobalt, nickel, and others. At that time, DSM activities proved to be commercially lucrative and appeared to be an issue of international interest. Under the auspices of the UN, negotiation began to develop a legal regime concerning DSM. After years of negotiations in 1982, the member States adopted the UN Convention of the Law of the Sea (UNCLOS) which incorporated provisions relating to DSM in part XI. However, UNCLOS came into force in 1994 only after an amendment was made to part XI by an implementation agreement. Since the last decade, DSM activities increased and States have rekindled their interest in DSM. DSM activities which involve significant foreign direct investment[1] (FDI) and technological knowhow, are mostly undertaken by private entities that are required to obtain a license from the predominantly coastal States. Disputes might ensue between the sponsoring State and a foreign-owned mining entity regarding i) implementation of the sponsorship agreement; and ii) revocation of the certificate of sponsorship. The DSM legal regime does not offer a dispute settlement mechanism between the sponsoring State and a foreign investor as the agreement is only valid between the contracting parties. Thus, in this article I will argue that in the absence of a dispute settlement forum for foreign investors, international investment law vis à vis investment arbitration could rescue and protect investment in DSM when the Sponsoring State's

1. *See e.g.*, DeepGreen Mineral Corp. a Canadian entity is the parent company of Nauru Ocean Resources which has been granted an exploration license by the International Seabed Authority in 2011.

activities adversely affects investors' interests.

## I. The Regime of International Seabed Authority & the Area

UNCLOS defines Area under Article 1§ 1(1) as "the seabed ocean floor and subsoil thereof, beyond the limits of national jurisdiction." The Area and its resources are governed by the basic principle of the common heritage of mankind. This principle, as articulated by Article 137, asserts, "[n]o State shall claim or exercise sovereignty . . . over . . . the Area or its resources, nor any State or national or juridical person appropriate any part thereof." All rights in the resources are vested in mankind and any attempt to claim sovereign rights or appropriation of resources shall not be recognised.

In accordance with the common heritage principle, UNCLOS directs the International Seabed Authority (ISA) to act on behalf of the international community for the benefit of mankind. Article 153 § 1 provides that "[a]ctivities in the Area shall be organised, carried out, and controlled by the Authority on behalf of mankind as a whole." The Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS) clarified the term "activities" in the Area to include drilling, dredging, coring, and excavation, disposal, dumping, and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines, and other devices related to such activities. To date, the ISA has entered into thirty contracts for the exploration of minerals in the Area. The entities are mostly States, publicly funded companies, and private entities. For the purposes of this article, we are only concerned with foreign-owned entities (FOE) or entities involved in DSM receiving FDI and will discuss what happens in the absence of a dispute settlement mechanism when a dispute arises between a sponsoring State and a contractor receiving FDI.

## II. Dispute Settlement Mechanism Between Sponsoring State and a Contractor (Foreign-Owned Entity)

Two types of disputes might be envisaged between the sponsoring State and a FOE: (i) those concerning the implementation of the sponsoring agreement; and (ii) those concerning revocation of the certificate of sponsorship. Both conflicts of interest predicted here would potentially adversely affect the investment. With this background information, it must be be noted that the ITLOS Seabed Dispute Chamber promulgated in an advisory opinion that a sponsoring agreement is only valid between a contractor and its Sponsoring State. Since the sponsoring contract does not fall within the purview of the DSM legal regime,[2] there is no dispute settlement mechanism available to an FOE at the international level. But that does not mean there is no such dispute settlement mechanism at the domestic level. Although domestic tribunals are not of much help as an FOE may not

2. This agreement is made under domestic law and there is no requirement of submitting it to the ISA.

prefer domestic tribunals for settling disputes related to FDI, the FOE would wish to go to a more independent and impartial tribunal such as an investment tribunal, be it ad-hoc or institutional such as the International Centre for Settlement of Investment Disputes (ICSID) under the aegis of the World Bank. This begs the question of how these parties can avail the service of these same investment tribunals.

## III. Deep Seabed Mining and the Jurisdiction of Investment Tribunals—How Should the Vacuum be Filled?

There are three possible ways to fill the vacuum and avail FOEs of investment tribunals for settling FDI-related disputes. Option 1, there should be an investment treaty between the host-state and the State of FOE must contain an investment arbitration clause. Option 2, the sponsoring agreement should include an investor-state arbitration clause. Option 3, Sponsoring States must have a national investment legislation which offers investment arbitration. Among these three options, I will only discuss in detail Option 1—a potential investment treaty between the host-state and the State of FOE containing an investment arbitration clause. Of course, an investment treaty will not completely solve the problem. Suppose there is an investment treaty between the disputants. An investment tribunal will hear the dispute only if the adversely affected investor establishes that the tribunal has jurisdiction over the case. To satisfy jurisdiction, the FOE has to prove that their activities in the Area constitute a protected investment under the investment treaty and that the FOE is a national of the sponsoring State. Article 153 § 2(b) of the UNCLOS and Article 4 § 3 of Annex III of UNCLOS require that the sponsored entity should hold the nationality of the sponsoring State. This is important because the ISA only issues exploration licenses to nationals of the sponsoring State. It also implies FOEs are required to incorporate under the laws of the sponsoring State from which they seek sponsorship. Equity participation, shares, stocks, concessions contracts, production and revenue sharing contracts, licences, and other similar rights qualify as assets which are mentioned in many international investment agreements and constitute as investments thereunder. FOEs may seek recourse from the ICSID[3] for settling their disputes. Under Article 25 § (2)(b) of the ICSID Convention, the disputant parties may agree that FOEs shall be treated as foreign investors despite being nationals of the sponsoring State. Thus, to avail on ICSID, the disputant parties must consent to and submit in writing the dispute under the aforementioned Article.

Another difficulty is that Article 137 of the UNCLOS prohibits States from exercising sovereignty over the Area and its resources, and states that any attempt to do so will not be internationally recognized. The ISA has the

3. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, a multilateral treaty which was formulated by the Executive Directors of the World Bank. The objective of the institution is providing an independent, depoliticized, and effective dispute settlement mechanism and promoting international investment.

authority to regulate and govern all the activities in the Area and manage the Area's resources on behalf of mankind under UNCLOS. Thus, the Sponsoring State may argue that DSM activities do not occur within the territory of the sponsoring State and as such do not meet the criteria of a protected investment in the territory of the sponsoring State. In the next section I will illustrate how this challenge can be overcome.

## IV. Doctrine of General Unity of an Investment Operation—The Panacea?

Investment is often a process rather than an instantaneous act. It is not a single event but usually composed of numerous decisions, transactions, and activities which must be treated as a single thread making up the whole investment. Thus, an investment is a complex process with diverse transactions that have separate legal existences but a common economic aim. In international investment law, the doctrine of general unity of an investment operation is well founded. The ICSID tribunal established this principle in its very first case Holiday Inns v. Morocco. In this case, the ICSID tribunal held:

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

In another ICSID case, Ambiente Ufficio S.p.A. and others v. Argentine Republic, the tribunal held that "when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner."

In SGS v. Philippines, the ICSID tribunal interpreted the definition of investment broadly, as the tribunal found that pre-shipment inspections services abroad through liaison offices in the Philippines were a substantial and non-severable aspect of overall service. It further held that there was no distinct or separate investment elsewhere than in the territory of the Philippines because a single integrated process of inspection arranged through a Manila liaison office is unquestionably an investment in the jurisdiction of the Philippines.

After analysing the jurisprudence of the above cases, we can conclude that investment in DSM activities may be legally recognized and qualify as a protected investment under investment treaty between the disputant parties . The general unity of an investment operation has discarded the territoriality principle of investment. As long as DSM activities are related to other economic transactions and are commercially profitable, the territoriality principle would not be a bar for jurisdiction to an investment tribunal.

**Conclusion**

Indeed, DSM activities in the Area will continue to increase in coming years through the expansion of existing activities and the emergence of new undertakings as the deep seabed is enriched with commercially exploitable minerals which are valued in terms of billions of USD. Thus, it is expected that ISA will grant more licenses to States and publicly funded or private entities in years to come. The economically and technologically developed States and their corporations are in a better position to exploit the Area and its resources. Consequently, more inflow of FDI from capital-exporting countries to capital-importing countries is expected. Collaboration with FOEs for cash flow and technology transfer is a common practice for the coastal States(mostly developing). Certainly, with the increasing DSM activities in the Area by a growing number of actors, the number of disputes will also intensify. Since the ISA and the ITLOS Seabed Dispute Chamber do not offer a dispute settlement mechanism for settling disputes between sponsoring States and FOEs, it is international investment law vis à vis investment arbitration that may rescue foreign investors and FOEs with the methods and mechanisms discussed above.