

1-31-2021

RESPONSIBILITIES OF STATES SPONSORING PERSONS AND ENTITIES WHO CONDUCT ACTIVITIES IN THE INTERNATIONAL SEABED AREA

Fatma Muthia Kinanti

Faculty of Law Universitas Tanjungpura, Indonesia, fatmamuthia@hukum.untan.ac.id

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Kinanti, Fatma Muthia (2021) "RESPONSIBILITIES OF STATES SPONSORING PERSONS AND ENTITIES WHO CONDUCT ACTIVITIES IN THE INTERNATIONAL SEABED AREA," *Indonesian Journal of International Law*. Vol. 18: No. 2, Article 8.

DOI: 10.17304/ijil.vol18.2.808

Available at: <https://scholarhub.ui.ac.id/ijil/vol18/iss2/8>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

RESPONSIBILITIES OF STATES SPONSORING PERSONS AND ENTITIES WHO CONDUCT ACTIVITIES IN THE INTERNATIONAL SEABED AREA

Fatma Muthia Kinanti

Faculty of Law Universitas Tanjungpura, Indonesia
Correspondence: fatmamuthia@hukum.untan.ac.id

Abstract

The exploitation of seabed has been regulated in the international sea law regime, namely in UNCLOS 1982 and in its modification regulations, the 1994 Implementing Agreement. This regime regulates the sponsorship mechanism whereby companies wishing to carry out activities in the international seabed must cooperate with states participating in UNCLOS 1982. In addition to providing obligations to companies, the international sea law regime also imposes obligations on the sponsoring state. This obligation is related to the steps that the participating states must take to ensure that no violations or damage occur during the project. This article will discuss the legal relationship between the contractor and the sponsoring state, specifically the extent to which the sponsoring state is responsible for the activities of the sponsoring contractor in the ISBA region. To answer this question, the following will be examined: the provisions of the international maritime legal framework, UNCLOS 1982 and related international regulations and examine jurisprudence in related cases, especially in the Advisory Opinion provided by ITLOS in the cases of Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in ISBA (2010). It was found that the international legal framework regulates the state's responsibility to ensure that no violations or damage occur during these activities. The Advisory Opinion then provided specific restrictions on the extent to which the "responsibility to ensure" must be carried out by the state and whether the state may be liable to pay losses due to damage caused by the activities.

Keywords : advisory opinion, Deep Seabed Mining, International Seabed Area.

Submitted : 15 August 2020 | Revised : 29 October 2020 | Accepted : 8 November 2020

I. INTRODUCTION

The discovery of potential mineral resources in the international seabed area (ISBA) was first discovered in the Challenger Expedition in 1873,¹ where large quantities of metal ore was found in the northern Pacific waters.² The international seabed region is located in the high sea area where there is no state sovereignty over it. Difficult access to this area causes a substantial cost

¹ James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011), 115.

² "The International Seabed Authority and Deep Seabed Mining," *United Nations* <https://www.un.org/en/chronicle/article/international-seabed-authority-and-deep-seabed-mining>, accessed on 4 May 2020.

for exploitation effort, which is why exploitation of this region cannot only rely on the state but also to large scale mining companies. Since that discovery, in the period 1970-1980, several mining companies began to look at the economic potential of deep seabed mining.³ Several large mining companies which at the time were domiciled in developed states, began to make large investments to utilize the benefits of the resources in the region.⁴

Provisions related to resource use in the ISBA are listed in 1982 UNCLOS specifically in Chapter XI. In its provisions, UNCLOS 1982 emphasizes the concept of common heritage of mankind in the approach of utilizing the ISBA region. Consequently, the application of this concept means that resource exploitation in the ISBA region cannot be fully economically oriented; it must also pay attention to the norms of togetherness to ensure that its exploitation is fully used for the benefit of humanity.⁵ In its technical implementation, UNCLOS 1982 granted business actors (hereinafter referred to as contractors) who would exploit the ISBA territory through the sponsoring state (which is a participating state of UNCLOS 1982). The Contractors then submit an application to carry out the Deep Seabed Mining project to the International Seabed Authority (ISA).⁶ This provision creates legal relations between the three parties in the conduct of a Deep Seabed Mining project, namely, the contractor as a business actor, the participating state as the sponsoring state and the ISA as the managing authority of the ISBA.

Interactions that occur between these three entities may lead to legal problems in the implementation of activities in the ISBA. The deep seabed mining project is an exploration and exploitation of natural resources that has the potential to cause environmental damage around the site of the activity.⁷ If this incident occurs, there must be a party responsible for recovering the adverse effects caused. The question then arises, who is responsible for this since there are three entities involved in the activity? Furthermore, what is the mechanism for the division of responsibility between the three parties?

In this regard, it is interesting to examine how the legal relations of the

³ G. P. Glasby, "Deep Seabed Mining: Past Failures and Future Prospects," *Marine Georesources & Geotechnology* 20, no. 2 (2002): 161-176.

⁴ *Ibid.*

⁵ Marie Bourrel, Torsten Thiele, Duncan Currie, "The Common of Heritage of Mankind as a Means to Assess and Advance Equity in Deep Sea Mining," *Marine Policy*, (2016): 1-6.

⁶ An international organization formed under the 1982 UNCLOS that manages resource use in the ISBA region.

⁷ IUCN published Issues Brief that explain in brief how deep seabed mining may have impact to the marine biodiversity and ecosystem including disturbance of the seafloor, sediment plumes and pollution. See "Deep-sea Mining, Issues Brief," IUCN, July 2018, <https://www.iucn.org/resources/issues-briefs/deep-sea-mining>, accessed on 14 June 2020.

three entities are arranged in an international legal framework to anticipate problems or disputes in such projects. Some research has been conducted regarding ISBA such as:

- 1) *"Dampak Penerapan Prinsip Common Heritage Of Mankind Di Kawasan Dasar Laut Dan Samudera Yang Berada Di Luar Yurisdiksi Nasional Serta Pemanfaatan Sumber Daya Mineral Di Kawasan Tersebut Berdasarkan Hukum Internasional"* by Davina Oktivana published on the *Jurnal Ilmiah Hukum* Vol. 1 No. 1, 2016 explores the concept of common heritage of mankind as the key point on the exploration and exploitation of ISBA as well as how this concept has been implemented in the legal framework that regulate ISBA.
- 2) *"Is the International Seabed Regime of the LOSC 1982 an Objective Regime Valid Erga Omnes? (Reviewing the Legal Status of Seabed from the Perspective of the Law of Treaties)"* is an Expert Commentary published in *Indonesian Journal of International Law* by Damos Dumoli Agusman argue the principle of erga omnes should be applied to ISBA.
- 3) *"Posisi Amerika Serikat Terhadap Rezim Dasar Laut Internasional Otorita Dasar Laut Internasional"* by Arif Satrio Nugroho published on the *Journal of International Relations*, Volume 2, No. 4, 2016 explained the political aspect of ISBA specifically United State, a country that has not yet ratified the Convention, toward ISBA regime.
- 4) *The Protection of Marine Environment From the Activities in the International Seabed Area and the Responsibility of the Sponsor State* by Driss Ed-Daran and Fatima Ezzohra El Hajraoui published on the *International Journal of Sciences: Basic and Applied Research* Vol 14 No. 1 explored the responsibility of the Sponsor State regarding the protection of marine environment in ISBA. To answer the question, the Authors lay out relevant legal framework regarding state responsibility in ISBA.

This article will explore the concept of the ISBA region in the context of international maritime law and regulations related to exploration and exploitation in this area. Furthermore, this article will discuss the legal relationship between the contractor and the sponsoring state, specifically the extent of the sponsoring state's responsibility for the activities of the sponsored contractor in the ISBA region. To answer this question, this article will examine the provisions of the international maritime legal framework, UNCLOS 1982 and examine jurisprudence in cases related primarily to Advisory Opinion

provided by ITLOS, in the case of Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in ISBA (2010) to gain a more comprehensive and detailed regulation regarding division of responsibilities between sponsoring state and contractor.⁸

II. OVERVIEW ON THE INTERNATIONAL SEABED AREA (ISBA)

In the early 1960s, the discovery and study of manganese nodules found in the ISBA region began to be widely investigated. It was found that these nodules not only contain manganese but are also high in nickel, copper and cobalt. The estimated abundance of mineral resources at ISBA is started to attract the attention of the mining industry who were looking for alternative resources for those minerals.⁹ Some companies began to explore by forming a consortia. In the mid-1970s, some of the largest mining companies in the world began to carry out exploration consisting of: Kennecott Copper, U.S. Steel, Standard Oil, Sun Company, SEDCO, Lockheed, and Tenneco from the U.S.; the International Nickel Corporation (INCO) and Noranda Mines from Canada, Preussag and Metallgesellschaft from Germany; Shell and Boskalis from the Netherlands; Union Minière from Belgium; Rio Tinto Zinc, British Petroleum (BP) and Consolidated Goldfields from the United Kingdom; and Mitsubishi and Sumitomo from Japan.¹⁰

The attention of the mining industry to deep seabed faded when world metal prices decline, since exploration and processing in mining projects in this region require a large capital. In addition, mining companies were concerned about the legal status of ISBA. At that time, deep seabed was considered does not belong to jurisdiction, so the resources contained therein could be freely utilized. However, with the discovery of abundant resources, the possibility of a clash in the future is inevitable.¹¹

The ISBA regime within the framework of international maritime law is arguably new because it was known after UNCLOS 1982 came into effect, precisely on November 16, 1994.¹² Attention began to emerge only

⁸ ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10.

⁹ Luc Cuyvers, et. al., *Deep Seabed Mining: A Rising Environmental Challenge* (Switzerland: IUCN and Gallifrey Foundation, 2018), 2.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² I Wayan Parthiana, *Hukum Laut Internasional dan Hukum Laut Indonesia [International Law of the Sea and Indonesian Law of the Sea]* (Bandung: Penerbit Yrama Widya, 2014), 217.

in the second half of the sixties when the United Nations began to discuss the Amendments to the Geneva Law Convention of the Sea in 1958. When seabed mining activities began to be discussed, problems arose. This was related to the conflict of interests that arose between coastal states and land-locked states and states with high technological capabilities and states with low technological capabilities. Some developing states, such as Congo (Zaire) and Gabon, which at that time were one of the major producers of metal ore, would suffer significant economic losses.¹³ The problem with the exploitation of international seabed areas later became one of the driving factors on conducting the Third Sea Law Conference (UNCLOS III) in 1972 to 1982.

Finally, the regulatory framework related to ISBA was included as one of the Chapters in UNCLOS 1982. Provisions regarding ISBA in a comprehensive manner were finally regulated in Chapter XI UNCLOS 1982. The regulations in this Chapter include General Provisions, Principles in the ISBA Arrangement, SIBA Resource Development, Agency Authority and Dispute Resolution.

Article 1 paragraph 1 of UNCLOS 1982 provides definition of ISBA:¹⁴

“the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”

The ISBA regulation in the 1982 UNCLOS provisions covers the resources contained therein, as regulated in Article 133:

“resources means all solid, liquid or gaseous mineral resources in situ in ISBA or beneath the sea –bed including polymetallic nodules”.

There are two points of emphasis on these provisions. First, the ISBA Region encompasses the seabed and deep ocean floor and the soil beneath. With the emphasis on the definition of resources regulated in Article 133, it is clear that the orientation of the regulation in the ISBA region is on the aspect of resource utilization. Second, the ISBA Region is outside national jurisdiction. To determine which seabed areas are outside the national jurisdiction, it is necessary to first detect the seabed areas that are within the national jurisdiction. As is known, the seabed area included in the national jurisdiction consists of two regimes, namely the territorial seabed, which is the full jurisdiction of the coastal state, and the continental shelf.¹⁵ The Continental Shelf is a natural

¹³ Parthiana, *Hukum Laut*, 224.

¹⁴ United Nations Convention on the Law of the Sea. 1822 UNTS 397 (entered into force 16 November 1994), art. 1, para. 1.

¹⁵ Parthiana, *Hukum Laut*, 219.

extension of the territorial seabed that can be drawn up to 200 nautical miles with a maximum stipulation of 350 nautical miles. The Continental Shelf is the outermost boundary of the seafloor which is under national jurisdiction. For this reason, it can be concluded that the ISBA are areas that are outside a continental shelf of a state.¹⁶

III. OVERVIEW ON STATE RESPONSIBILITIES IN INTERNATIONAL LAW

State responsibility is a principle that states can be held responsible for an inter-state claim based on international law. The basis of these responsibilities is usually related to violations of obligations committed by the state, hence liability can be requested for damage or loss caused by it.¹⁷ In addition, state responsibility is also a consequence of the principle of equality and sovereignty of the state. That state's exercise of freedom and jurisdiction must take into account other state's freedom and jurisdiction.

Until now, there has not been a specific convention governing state responsibility. In 2001, the International Law Commission issued Responsibility of States for Internationally Wrongful Acts which governed the issue of state responsibility.¹⁸ This document outlines international obligations towards States for every internationally wrongful act. Furthermore, the document provide elements of internationally wrongful actions which must consist of an action or omission:

- 1) Is attributable to the State under international law; and
- 2) Constitutes a breach of an international obligation of the State.

In this document it is emphasized that what is included in the actions of the state are those carried out by the organs of a State, whether legislative, executive, judicial or any other functions.¹⁹ Actions carried out by a person

¹⁶ I Wayan Parthiana, *Hukum Laut Internasional dan Hukum Laut Indonesia*, 220.

¹⁷ René Provost, ed., *State Responsibility in International Law* (United States: Routledge, 2001), 20.

¹⁸ Responsibility of States for Internationally Wrongful Acts is a document adopted by ILC, an institution under the United Nations formed with the aim of conducting studies and formulating recommendations in order to develop international law and its codification. For this reason, documents issued by this commission are considered soft law and not legally binding for states. There is still an ongoing debate whether the Act might considered as Customary International Law (CIL) (see: UN, Sixth Committee (Legal) — 71st session, https://www.un.org/en/ga/sixth/71/resp_of_states.shtml, accessed on 12 June 2020). However, The Acts has been widely used by states and judicial bodies to justify their claims or measures.

¹⁹ James R. Crawford, "State Responsibility," in *Max Planck Encyclopedia of Public Interna-*

or an entity which is not an organ of the State can be considered as an act of State, but only when they are empowered by the law of that State to exercise elements of the governmental authority.

The regulation of responsibility of the State is also stated in UNCLOS 1982 in Article 235 (1) which states that “states are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment”. Some experts claim that this provision may also include flag states with regards to their vessels and to coastal states in respect of activities which they permit within their jurisdiction and control. It is seen that the UNCLOS arrangement adds to the scope of responsibility of the State which is not only based on the actions of the public organs, but also includes private entities such as ships.²⁰

IV. ISBA AS COMMON HERITAGE OF MANKIND

There are three legal interpretations in the use of ISBA, vis a vis:

- 1) Exploitation is based on the exploitation capabilities of each state. However, this has led to a debate whether the application of this concept will cause injustice since the coastal and developed states that are more technologically advanced will benefit most.
- 2) ISBA as *res communis*. ISBA can be used by all states but no state can claim the region.²¹
- 3) ISBA as *res nullius*. ISBA ownership is carried out by way of occupation, where the exploited area is owned by the party conducting the exploitation.²²

The three legal interpretations above are then clarified through an international legal framework. The area of the seabed and the land beneath which is regulated in chapter XI of the 1982 law of the sea law is a common shared heritage of humankind which is subject to international rules (common heritage of mankind). This is in accordance with the principles set out in Article 136 UNCLOS governing 1982:

“ISBA and its resources are the common heritage of mankind.”

tional Law, Rüdiger Wolfrum, ed., (Oxford University Press, September 2006).

²⁰ Patricia Birnie, et. al., *International Law & the Environment* (New York: Oxford University Press, 2009), 430.

²¹ More on the role of *res communis* and *res nullis* in the CHM Principle: Scott J. Shackelford, “The Tragedy of the Common Heritage of Mankind,” *Stanford Environmental Law Journal* 27, (2008): 1-57.

²² *Ibid.*

The consequences of the application of this concept to ISBA are as follows:²³

- 1) There is a prohibition on the enforcement of national jurisdiction on ISBA

In accordance with the concept of the common heritage of mankind which emphasizes the interests of humanity as a whole, the legal status of the ISBA region is not under any jurisdiction. Article 137 UNCLOS 1982 regulates as follows:

“No State shall claim or exercise sovereignty or sovereign rights over any part of ISBA or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.”

This is what distinguishes ISBA from other sea areas such as Territorial, Continental Platform, EEZ, and other areas where a state may enforce sovereignty and sovereign rights.

- 2) Activities in ISBA can only be conducted for peaceful purposes

This concept is a consequence of the application of the principle of common heritage of mankind in the ISBA region. Article 141 of UNCLOS 1982 states:

“The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this part.”

- 3) The use of ISBA and its resources must be for the benefit of humanity.

Section XI of UNCLOS on the regulation of ISBA also forms the basis for the establishment of an authority body that carries out the supervision function of activities carried out in this region. In the provisions of UNCLOS, exploitation in international seabed areas can only be done by public or private companies while still holding the principle of common heritage of mankind. Under the management of the International Seabed Authority (ISA), the international seabed area and the land under falls under the status of common heritage of mankind, that is, all the resources in the international seabed area is a shared heritage of mankind. The obligations of participating states

²³ Tullio Scovazzi, “The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed beyond the Limits of National Jurisdiction,” *Agenda Internacional Año XIV*, No. 25, (2007): pp. 11-24.

are to participate in exploitation and exploration in collaboration with other states, international organizations, domestic or foreign companies to manage the international seabed, and as a member of ISBA participate in monitoring activities in international sea areas.

4) The formation of an international organization that acts in the interests of humanity in the use of ISBA

Based on the ISA's agreement, all utilization of the resources contained in ISBA is only for the benefit of all mankind which is managed by an international body and the International Sea-Bed Authority (ISA) so that the management of the seabed area can be managed by states with a developed technology.

Supervision of activities and management of the international seabed by the ISA is carried out based on article 140 UNCLOS 1982 which reads:

“The Authority [ISA] shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis....”

In this regard, private companies intending to carry out activities in the international seabed must go through sponsorship from one of the participating states and sign a contract with the International Seabed Authority (ISA). These companies must also comply with regulations established by the ISA under UNCLOS 1982 and the 1994 Implementing Agreement.²⁴ UNCLOS also regulates the obligations borne by companies that exploit the region to ensure fair distribution of profits to developing states. The distribution of profits is done by withdrawing annual fees from the private company, and the funds are then given to the ISA to be managed. It also regulates the company's obligation to transfer technology to developing states as an implementation of part 5 of the Relating to the Implementation of Part XI Agreement of the Convention.

To anticipate problems that may arise regarding international seabed management, a Sea-Bed Disputes Chamber was formed to be a part of the International Tribunal for the Law of the Sea (ITLOS). The Chamber has jurisdiction over the activities carried out by companies, states and international organizations, as regulated in articles 186-187 UNCLOS 1982. The Chamber's Council must provide an advisory opinion at the request of the

²⁴ The Implementing Agreement of 1994 is a regulation containing modifications of Part XI UNCLOS 1982. This Agreement was adopted on July 28, 1994. It was formulated to achieve global participation in the implementation of the provisions in Part XI of UNCLOS 1982.

assembly or council regarding legal issues arising in the scope of activities in the seabed area as stated in article 191 UNCLOS 1982.

Advisory opinion can be considered as a resolution for disputes in situations where there are not enough cases that can be used as a reference in responding to problems that arise. Although the advisory opinion is not legally binding, it has been accepted in practice by the international community.²⁵ The advisory opinions are carried out by the Seabed Disputes Chamber. This is contained in article 187 of UNCLOS 1982. Point a of article 187 states that the Seabed Dispute Chamber has jurisdiction over disputes between participating states regarding the interpretation or application of part XI of UNCLOS 1982 and 1994 implementing agreement. Procedural arrangements regarding advisory opinions can also be seen in the Rules of the International Tribunal for the Law of the Sea. The procedure for submitting advisory opinion requests from participating states is regulated in section H of The Rules. In carrying out its functions, the Dispute Chamber is guided by the provisions in this section:²⁶

“In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, ..., by the provisions of the Statute and of these Rules applicable in contentious.”

Submitting requests for advisory opinions from participating states related to the activities to the Chamber’s Council and the Authority must contain clear statements related to the questions raised.²⁷ These questions must also be accompanied by related documents that must be attached.²⁸ After these questions are registered with the Dispute Chamber, the Registrar immediately notifies all participating states and intergovernmental organizations to obtain information regarding these questions.²⁹ The participating state will provide the information through a written statement which will be made publicly accessible.

Questions that can be the object of an advisory opinion are those related to the jurisdiction of the Authority in broad terms. These include, among other things, illegal fishing, marine scientific research, pollution in water areas, maritime shipping, maritime piracy and security, maritime claims and liability,

²⁵ Tafsir Malick Ndiaye, “The Advisory Function of the International Tribunal for the Law of the Sea,” *Chinese Journal of International Law*, (2010): 565.

²⁶ Rules of the International Tribunal for the Law of the Sea Art. 130 para. 1.

²⁷ *Ibid.*, Art. 131 para. 1.

²⁸ *Ibid.*

²⁹ *Ibid.*, Art. 133 para. 1, 2, dan 3.

and ship transportation.³⁰

V. RESPONSIBILITIES OF SPONSORING STATES FOR LEGAL ENTITIES CONDUCTING ACTIVITIES IN ISBA

Until now, ISA has signed contracts with 27 contractors.³¹ Five of these contractors are participating states while the rest are mining companies sponsored by participating states. This contract gives rights to these companies to carry out activities in 4 (four) international seabed zones, namely the Clarion-Clipperton fault area, Indian Ocean, Atlantis and the Pacific. The conclusion of this contract allows contractors to explore certain areas in these zones.

Table 1. List of Seabed Mining Contractors Per 2019

<i>Contractor</i>	<i>Date of entry into force of contract</i>	<i>Sponsoring State</i>	<i>General location of the exploration area under contract</i>	<i>Date of expiry of contract</i>
China Minmetals Corporation	May 12, 2017	China	Clarion Clipperton Fracture Zone	May 11, 2032
Cook Islands Investment Corporation	July 15, 2016	Cook Islands	Clarion Clipperton Fracture Zone	July 14, 2031
UK Seabed Resources Ltd	March 29, 2016	United Kingdom of Great Britain and Northern Ireland	Clarion-Clipperton Fracture Zone (II)	March 28, 2031
Ocean Mineral Singapore Pte Ltd.	January 22, 2015	Singapore	Clarion-Clipperton Fracture Zone	January 21, 2030

³⁰ Tafsir Malick Ndiaye, “The Advisory Function of the International Tribunal for the Law of the Sea,” 572.

³¹ “Contractors,” International Seabed Authority, <http://www.isa.org.jm/en/scientific/exploration/contractors>, accessed on 20 August 2019.

<i>Contractor</i>	<i>Date of entry into force of contract</i>	<i>Sponsoring State</i>	<i>General location of the exploration area under contract</i>	<i>Date of expiry of contract</i>
UK Seabed Resources Ltd.	February 8, 2013	United Kingdom of Great Britain and Northern Ireland	Clarion-Cliperton Fracture Zone (I)	February 7, 2028
Global Sea Mineral Resources NV	January 14, 2013	Belgium	Clarion-Cliperton Fracture Zone	January 13, 2028
Marawa Research and Exploration Ltd.	January 19, 2015	Kiribati	Clarion-Cliperton Fracture Zone	January 18, 2030
Tonga Offshore Mining Limited	January 11, 2012	Tonga	Clarion-Cliperton Fracture Zone	January 10, 2027
Nauru Ocean Resources Inc.	July 22, 2011	Nauru	Clarion-Cliperton Fracture Zone	July 21, 2026
Federal Institute for Geosciences and Natural Resources of Germany	July 19, 2006	Germany	Clarion-Cliperton Fracture Zone	July 18, 2021
Government of India	March 25, 2002	India	Indian Ocean	March 24, 2022

<i>Contractor</i>	<i>Date of entry into force of contract</i>	<i>Sponsoring State</i>	<i>General location of the exploration area under contract</i>	<i>Date of expiry of contract</i>
Institut français de recherche pour l'exploitation de la mer	June 20, 2001	France	Clarion-Cliperton Fracture Zone	June 19, 2021
Deep Ocean Resources Development Co. Ltd.	June 20, 2001	Japan	Clarion-Cliperton Fracture Zone	June 19, 2021
China Ocean Mineral Resources Research and Development Association	May 22, 2001	China	Clarion-Cliperton Fracture Zone	May 21, 2021
Government of the Republic of Korea	April 27, 2001	Republic of Korea	Clarion-Cliperton Fracture Zone	April 26, 2021
JSC Yuzhmorgeologiya	March 29, 2001	Russian Federation	Clarion-Cliperton Fracture Zone	March 28, 2021
Interoceanmetal Joint Organization	March 29, 2001	Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia	Clarion-Cliperton Fracture Zone	March 28, 2021
Government of the Republic of Poland	February 12, 2018	February 11, 2033	Mid Atlantic Ridge	February 11, 2033
The Government of India	September 26, 2016	India	Central Indian Ocean	September 25, 2031

<i>Contractor</i>	<i>Date of entry into force of contract</i>	<i>Sponsoring State</i>	<i>General location of the exploration area under contract</i>	<i>Date of expiry of contract</i>
Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany	May 6, 2015	Germany	Central Indian Ocean	May 5, 2030
Institut français de recherche pour l'exploitation de la mer	November 18, 2014	France	Mid-Atlantic Ridge	November 17, 2029
Government of the Republic of Korea	June 24, 2014	Korea	Central Indian Ridge	June 23, 2029
Government of the Russian Federation	October 29, 2012	Russian Federation	Mid-Atlantic Ridge	October 28, 2027
China Ocean Mineral Resources Research and Development Association	November 18, 2011	China	Southwest Indian Ridge	November 17, 2026
The Republic of Korea	March 27, 2018	Republic of Korea	Western Pacific Ocean	March 26, 2033
Companhia De Pesquisa de Recursos Minerais	November 9, 2015	Brazil	Rio Grande Rise, South Atlantic Ocean	November 8, 2030
Ministry of Natural Resources and Environment of the Russian Federation	March 10, 2015	Russian Federation	Magellan Mountains, Pacific Ocean	March 9, 2030

<i>Contractor</i>	<i>Date of entry into force of contract</i>	<i>Sponsoring State</i>	<i>General location of the exploration area under contract</i>	<i>Date of expiry of contract</i>
Japan Oil, Gas and Metals National Corporation (JOG-MEC)	January 27, 2014	Japan	Western Pacific Ocean	January 26, 2029
China Ocean Mineral Resources Research and Development Association (COMRA)	April 29, 2014	China	Western Pacific Ocean	April 28, 2029

Source: <http://www.isa.org.jm>

VI. REGULATION REGARDING STATE RESPONSIBILITIES FOR ACTIVITIES AT ISBA IN UNCLOS 1982 AND IMPLEMENTING AGREEMENT

Obligations and responsibilities of the sponsoring state for activities in international seabed areas carried out by companies are regulated in UNCLOS 1982. The key article on this is in article 139 UNCLOS 1982 paragraph 1 which reads:

“States Parties shall have the responsibility to ensure that activities in ISBA, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in ISBA carried out by such organizations.”
(Emphasis by the author)

Article 153 paragraph 4:

“The Authority shall exercise such control over activities in ISBA as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regula-

tions and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.”

and Annex III, article 4 paragraph 4:

“The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in ISBA 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 responsibilities of the sponsoring states contained in these articles include:

- 1) The effective control of the sponsoring state to the activities carried out on the international seabed by the company.
- 2) To assist the Authority to take actions deemed necessary to ensure compliance with the provisions in article 139.
- 3) To adopt a set of laws and regulations and take administrative actions deemed necessary to ensure the fulfillment of the obligations of related parties under the jurisdiction of the state.

Regarding the limitations of liability and responsibilities of the sponsoring state, the relevant regulations are regulated in article 139 paragraph 2 and article 4 paragraph 4 of Annex III of the Convention:

“Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.” (Emphasis by the author)

This article states that in situations where damage occurs due to the inability of the state or the sponsoring international organization to carry out its obligations as stated in the Convention, this state or organization will be held jointly liable. However, it also explains that this responsibility will be excluded in situations where the state or sponsoring organization is proven to have carried out its obligations. Moreover, this article suggests that the sponsoring state cannot be charged in the event that the contractor fails to fulfill its obligations. This provision emphasizes that the concept of strict liability for the state does not apply to the regime of ISBA.

Article 4 paragraph 4 annex III (the 1994 implementing Agreement), reads:

“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.”

This article states clearly that in the event that a participating state has adopted a set of regulations and laws in its legal system, and has taken administrative measures that guarantee the fulfillment of company obligations, the participating state would also be freed from the demand for fulfillment of accountability. This provision actually has clearly regulated the separation of responsibilities in activities at ISBA between the sponsoring state and the contractor.

V. STATE RESPONSIBILITIES ON THE ACTIVITIES CARRIED OUT IN ISBA IN ITLOS ADVISORY OPINION

One of the signatories of the contract for international seabed mining activities with ISA is Nauru Ocean Resources Inc. (NOCI). This contract has a term of 15 years and covers exploration and exploitation activities in the Clarion-Clipperton Fault area in Pacific waters.³² The exploitation activities cover an area of 74,830 km. In accordance with the ISBA regime regulated in UNCLOS 1982, private companies intending to carry out activities in the territorial waters must go through sponsorship with participating states. In this case, the participating state sponsoring NOCI is Nauru.

³² *Ibid.*

Nauru is a small state located in the northeast of Australia.³³ It has a population of around 10,000 people. The state's economy depends a lot on mining activities, especially Phosphate which was discovered in 1900 and 1907.³⁴



Picture 1. The Geographical Location of the State of Nauru³⁵

Like other developing states, Nauru does not yet have sufficient technical and financial capacity to carry out exploration and exploitation activities in international seabed areas. To effectively participate in utilization of the region, Nauru must collaborate with private mining companies. However, since UNCLOS also imposes a number of obligations on the sponsoring state, as a developing state, Nauru feels it is necessary to provide specific limits on the responsibilities of the sponsoring state in accordance with Part XI regarding ISBA and the Implementing Agreement 1994. This is done to ascertain whether Nauru is able to engage in this activity.

The focus of the question posed by Nauru is how far the definition of

³³ Government of Republic of Nauru, "About Nauru," accessed 15 October 2019, <http://www.naurugov.nr>

³⁴ *Ibid.*

³⁵ HowStuffWorks, "Geography of Nauru," accessed 15 August 2020, <http://geography.howstuff-works.com/oceania-and-australia/geography-of-nauru.htm>

“responsibility to ensure” must be carried out by the sponsoring state. The Dispute Chamber in its explanation states that this responsibility refers to the obligations of the sponsoring state set out in international law. However, in this case, the Dispute Chamber believes that this step will be more effective to carry out if it is clearly stipulated in the national legal framework of the sponsoring state. As mentioned in the second question, violation of this provision will result in liability. However, not all violations will be held accountable by the sponsoring state; the key word here is “*ensure*”, meaning the state can only be held liable when the participating state does not take appropriate steps to “ensure” this violation does not occur.

This is the background of the questions asked by the Nauru state to the International Tribunal for the Law of the Sea in 2010. In this context, the answers to the questions asked by participating states are known as advisory opinions. ITLOS accepted the case and included it in the case list no. 17 with the title “Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in ISBA”.

A. BACKGROUND QUESTION

Nauru Ocean Resources Inc. is a mining company in the sea area that has been awarded a contract by the Authority to carry out exploration activities that are sustainable towards the seabed mineral resources.³⁶ The contract was signed between Mr. Nii Allotey Odunton, Secretary General of the Authority and David Heydon, as Director of Nauru Ocean Resources Inc. The third party comes from the state sponsoring the mining company represented by Michael Aroi, who acts as Foreign Secretary of Nauru.³⁷ The signing of this contract marks the first time an explorer in the international seabed region has originated from developing states. The project covers a total exploration area of 74,830 km in the Clarion-Clipperton Zone in Pacific waters.³⁸ It is located in an area that is included in the international seabed category and is divided into 4 regions.

Nauru Ocean Resource Inc. submitted an activity plan to be approved by the International Seabed Area to exploit the international seabed on April 10, 2008.³⁹ This request was then submitted to the Legal and Technical

³⁶ Nauru Ocean Resources, “About,” accessed on 10 May 2019, <http://www.nauruocanresources.com/>

³⁷ “Seabed Authority And Nauru Ocean Resources Inc Sign Contract For Exploration,” International Seabed Authority, www.isa.org accessed on 11 May 2019

³⁸ *Ibid.*

³⁹ Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in ISBA, 2011.

Commission of the ISA on May 9, 2008.⁴⁰ As previously mentioned, Nauru is a developing state. Like other developing states, in addition to not having the financial capacity to carry out exploration activities, Nauru also felt that it did not yet have sufficient financial capacity to bear the potential legal risks associated with the project. Therefore, on March 1, 2010, the Republic of Nauru sent a proposal document with number ISBA / 16 / C / 6 containing a set of specific questions relating to the responsibilities of the sponsoring state.⁴¹

This question is divided into three points:⁴²

- 1) What are the legal responsibilities and obligations of participating states contained in the Convention relating to the sponsorship of activities in international seabed areas, specifically section XI, and 1994 Implementing Agreement of the Part XI of The UNCLOS 1982?
- 2) How far is the responsibility of the participating state if it fails to comply with the provisions of the Convention, specifically Part XI, and the 1994 Implementing Agreement of Part XI of the UNCLOS 1982?
- 3) What actions are deemed necessary and appropriate that must be taken by the sponsoring state to fulfill the obligations and responsibilities stipulated in the Convention in particular articles 139 and annex III and the 1994 Agreement?

In accordance with the provisions of article 133 of UNCLOS as discussed earlier, shortly after the document was adopted by the Trial Council at its 161st meeting on 6 May 2010, the Registrar made a publication of the documents submitted by Nauru to participating states to obtain further information in the form of written statements. The Registrar also notified the UN Secretary General to get his advisory opinion. The Registrar also invited the intergovernmental organization to participate as an observer, in this case, with the hope of adding important information related to questions raised by Nauru.

At the specified deadline, there were 12 written statements submitted by participating states, namely from the United Kingdom, Nauru, Republic of Korea, Romania, Netherlands, Russian Federation, Mexico, Germany, China, Australia, Chile and the Philippines.⁴³ At the same deadline, a written

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

statement was also submitted by the Authority and two other organizations, namely the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources.⁴⁴ Later, the United Nations Environment Program also submitted a written statement that was deemed necessary to be attached to the case document.

B. COURT DECISION/ADVISORY OPINION

In its decision, The Tribunal explained that to answer the first question, the obligations of the sponsoring state were divided into two types:

- 1) Responsibility to ensure that the contractor complies with the rules mentioned in the contract as well as the regulations contained in the convention and other relevant regulations. This concept is called due diligence. The due diligence obligation requires the sponsoring state to take action in its legal system. This action must include appropriate regulations and administrative measures.
- 2) Direct obligations which the sponsoring state must independently fulfill to ensure the sponsored contractor fulfills its obligations. These direct obligations are described in the advisory opinion decision as follows:
 - a. Obligation to provide assistance to the Authority in accordance with the provisions of article 153 paragraph 4 of the Convention;
 - b. Obligation to enforce the precautionary principle reflected in Principle 15 of the Rio Declaration, Nodules Regulations and the Sulphide Regulations;
 - c. Obligation to enforce the concept of “best environmental practices”;
 - d. Obligation to adopt measures to ensure the provision of guarantees in emergency situations ordered by the Authority for the protection of the marine environment;
 - e. Obligation to provide assistance in compensation

Regarding the second question, the responsibility of the sponsoring state arising from the failure to fulfill its obligations in accordance with the provisions of the Convention and related regulations regulated is as follows. The conditions under which the sponsoring state is obliged to take responsibility are when there is:

- 1) Failure to fulfill obligations under the provisions of the Convention;
- 2) The occurrence of damage.

⁴⁴ *Ibid.*

- 3) To prove that the sponsoring state is obliged to provide accountability in situations of failure or damage, the existence of a causal relationship between the failure of the sponsoring state to meet its obligations and the damage that occurs must be proven and cannot be presumed. The responsibilities imposed on sponsoring states and sponsored contractors are in parallel, and are not in the form of joint responsibility.

In the event that the State has been proven to be liable, it may be subject to compensation. The amount of compensation that must be borne by the sponsoring state must be in accordance with the actual amount of the damage. In the opinion relating to this matter, the Tribunal once again referred to the ILS Articles on State Responsibility that mandate the state to provide full reparation for the damage caused by “the internationally wrongful act”. In this instance, the failure of the State is related to its obligation to comply with international law, i.e., UNCLOS and its 1994 Implementing Agreement. Therefore, it falls within the scope of the Article 1 of the ILS Article.

The Tribunal then explains the relationship of liability between the contractor and sponsoring state. When proceeding, the question then arises whether the contractor and the sponsoring state bear joint and several liability for the compensation. The Tribunal decided that joint and several liability may only occur when “different entities have contributed to the same damage”. Liability arising from the Article 139 part 2 does not fall within this definition, hence the liability between the contractor and sponsoring state must exist in parallel.

The third question relates to the actions deemed necessary by the participating state. In the advisory opinion it is stated that the answer to this question is important. In accordance with the provisions of the Convention, it serves as a guarantee to ensure the contractor will fulfill its obligations and to exclude the sponsoring state from responsibility. The first and second questions have concluded that if the sponsoring state has a set of regulations in line with the provisions of the Convention in its legal system-, the state is excluded from responsibility for the violations and damage that may occur.

Regarding the limitations and scope of the law, regulations and administrative actions are not specifically regulated in the advisory opinion, but rather dependent on the legal system of the participating states. The laws and regulations that are made must be made valid for the duration of the project. It is also regulated in the Convention that these laws, regulations and administrative actions must not be regulated more than the rules adopted by the ISA, other international rules, regulations and procedures. This is done to ensure the protection of the marine environment can be maintained.

VI. CONCLUSION

Exploitation of the ISBA has been regulated in the international sea law regime, namely in UNCLOS 1982 and the 1994 Implementing Agreement. This regime regulates the sponsorship mechanism whereby companies wishing to carry out activities in the international seabed must cooperate with participating states of UNCLOS 1982. In addition to providing obligations to companies, the international sea law regime also imposes obligations on the sponsoring state. This obligation is related to the measures the participating states must take to ensure that no violations or damage occur during the project.

In this case, one of the mining companies that carry out activities in the international seabed is Nauru Ocean Resources Inc. in collaboration with the state of Nauru that conduct deep seabed mining projects in the Clarion-Clipperton fault area. Nauru, as a developing state, wants to get legal certainty regarding the limits of liability that can be imposed on the sponsoring state and what steps must be taken in accordance with the provisions in UNCLOS 1982 and the 1994 Implementing Agreement.

The Advisory Opinion resulting from this case becomes an important provision in the practice of utilizing mineral resources in the international seabed. This provides clarity in terms of the UNCLOS provisions which are still very vague and general in relation to the obligations and responsibilities of the sponsoring state regarding the exploitation of mineral resources in ISBA. By narrowing down the regulations regarding the responsibilities and obligations of the sponsoring state, this Opinion will set a precedent on the resolution of disputes related to this that may occur in the future.

BIBLIOGRAPHY

Journals and Periodicals

- Anton, Donald K., Robert A. Makgill, and Cymie R. Payne. "Seabed Mining: Advisory Opinion on Responsibility and Liability." *Environmental Policy and Law* 41 Issue 2, (2011): 60-65.
- Bourrel, Marie, et. al. "The common of heritage of mankind as a means to assess and advance equity in deep sea mining." *Marine Policy*, (2016),
- Craik, Neil. "Enforcement and Liability Challenges for Environmental, Regulation of Deep Seabed Mining." *Discussion Paper*, no. 4, *Jamaica: International Seabed Authority* (2016).
- Damos Dumoli. Agusman, "Is the International Seabed Regime of the LOSC 1982 an Objective Regime Valid Erga Omnes (Reviewing the Legal Status of Seabed from the Perspective of the Law of Treaties)." *Indonesian Journal of International Law* 4, no. 2 (2007): 423-436.
- Ed-Daran, Driss and Fatima Ezzohra El Hajraoui. "The Protection of Marine Environment from the Activities in the International Seabed Area and the Responsibility of the Sponsor State." *International Journal of Sciences: Basic and Applied Research* 14, no. 1, (2014): 125-135.
- Freestone, David. "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area," *American Journal of International Law* 105, no. 4 (October 2011): 755-760.
- Glasby, G. P. "Deep Seabed Mining: Past Failures and Future Prospects." *Marine Georesources & Geotechnology* 20, no. 2 (2002): 161-176.
- James R. Crawford, "State Responsibility," in *Max Planck Encyclopedia of Public International Law*, Rüdiger Wolfrum, ed., (Oxford University Press, September 2006).
- Ndiaye, Tafsir Malick. "The Advisory Function of the International Tribunal for the Law of the Sea", *Chinese Journal of International Law*, (2010): 565-587.
- Nugroho, Arif Satria, et. al. "Posisi Amerika Serikat Terhadap Rezim Dasar Laut Internasional Otorita Dasar Laut Internasional [US Position on International Seabed Authority]." *Diponegoro Journal of International Relations* 2, no. 4 (2016):132-142.
- Oktivana, Davina. "Dampak Penerapan Prinsip Common Heritage of Mankind Di Kawasan Dasar Laut Dan Samudera Yang Berada Di Luar Yurisdiksi Nasional Serta Pemanfaatan Sumber Daya Mineral Di Kawasan Tersebut Berdasarkan Hukum Internasional [The Implementation of Common Heritage of Mankind in International Seabed Beyond National Jurisdictions and Mineral Exploitation in International Law]." *Jurnal Ilmiah Hukum De Jure* 1, no. 1 (2016): 18-30.
- Scovazzi, Tullio. "The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed beyond the Limits of National Jurisdiction," *Agenda Internacional Año XIV*, no. 25, (2007):11-24.
- Shackelford, Scott J. "The Tragedy of the Common Heritage of Mankind." *Stanford Environmental Law Journal*, Vol. 27, (2008)
- Zhang, Hui. "The Sponsoring State's 'Obligation to Ensure' in the Development of the International Seabed Area". *The International Journal of Marine and Coastal Law* 28, (2013): 681-699.

Books

- Birnie, Patricia, et. al. *International Law & the Environment*. New York: Oxford University Press, 2009.
- Churcill, R.R. and A.V. Lowe, *The Law of the Sea*. Manchester: Juris Publishing, 1999.
- Harrison, James. *Making the Law of the Sea: A Study in the Development of International Law*. New York: Cambridge University Press, 2011.
- Klein, Natalie. *Dispute Settlement in the UN Convention on the Law of the Sea*. New York: Cambridge University Press, 2005.
- Parthiana, I Wayan. *Hukum Laut Internasional dan Hukum Laut Indonesia [International Law of the Sea and Indonesian Law of the Sea]*. Bandung: Penerbit Yrama Widya, 2014.
- Provost, René, ed. *State Responsibility in International Law*. United States: Routledge, 2001.
- Tanaka, Yoshifumi. *The International Law of the Sea*. New York: Cambridge University Press, 2012.

Legal Documents

- United Nations Convention on the Law of the Sea. 1822 UNTS 397 (entered into force 16 November 1994).
- Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.
- ITLOS, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011.

Websites

- Pecoraro, Alberto. "Deep Seabed Mining in the Area: is International Investment Law Relevant?" *EJIL Talk*, 10 Juli 2019, <https://www.ejiltalk.org/deep-seabed-mining-in-the-area-is-international-investment-law-relevant/>, accessed on 21 August 2019.
- Tsioumani, Elsa. "International Seabed Authority Council Discusses Exploitation of Deep Seabed Mineral Resources." *International Institute for Sustainable Development*, 15 March 2018, <https://sdg.iisd.org/news/international-seabed-authority-council-discusses-exploitation-of-deep-seabed-mineral-resources/>, accessed on 20 August 2019.
- "Deep-sea Mining, Issues Brief." *IUCN*, July 2018, <https://www.iucn.org/resources/issues-briefs/deep-sea-mining>, accessed on 14 June 2020.
- "The International Seabed Authority and Deep Seabed Mining." *United Nations*, <https://www.un.org/en/chronicle/article/international-seabed-authority-and-deep-seabed-mining>, accessed on 4 May 2020.
- "Sixth Committee (Legal) — 71st session." *United Nations*, https://www.un.org/en/ga/sixth/71/resp_of_states.shtml, accessed on 12 June 2020.
- "About Nauru," Government of Republic Nauru, <http://www.naurugov.nr/> accessed on 15 October 2019.

