

# The Area: Common Heritage of Mankind, Sponsoring States of Convenience and Developing States

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## 1. Introduction

Based on writings of scholars, notably John Mero,<sup>2</sup> and the inspiring speech at the United Nations General Assembly by the then Maltese Ambassador to the United Nations, Arvid Pardo,<sup>3</sup> painting a picture of huge resources in the deep seabed beyond national jurisdiction (the Area) available to be easily picked up, the third United Nations Conference on the Law of the Sea (UNCLOS III) adopted a relatively comprehensive but complex regime dealing with the Area, which was incorporated into Part XI of UNCLOS 1982.<sup>4</sup> As a result of the objections by certain developed States to aspects of Part XI of the UNCLOS, the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (the 1994 Agreement) was negotiated and adopted in 1994. The latter Agreement, which varied some of the provisions of Part XI, was in essence an amending instrument and it paved the way for all the objecting developed States, except the USA, to eventually become Parties to the UNCLOS and the 1994 Agreement.<sup>5</sup> With the introduction of the UNCLOS and the 1994 Agreement on the 16 November 1994 and 28 July 1996 respectively, the International Seabed Authority (ISA), an international organization established under Part XI of the UNCLOS, has been acting on behalf of the States Parties with regard to the Area and the resources therein, which are the Common Heritage of Mankind (CHM), to ‘organize and control activities in the Area, particularly with a view to administering the resources of the Area.’<sup>6</sup> So far the ISA has put together a *Mining Code* comprising of: the Regulations on Prospecting and Exploration for

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<sup>2</sup> J. L. Mero, *The Mineral Resources of the Sea*, Elsevier Publishing, 1968.

<sup>3</sup> UNGA GAOR, 22<sup>nd</sup> Session (1 November 1967), A/C.1/PV.1515.

<sup>4</sup> See Articles 133 to 191 of United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261 (1982) (UNCLOS).

<sup>5</sup> See generally E. D. Brown, ‘The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: Breakthrough to Universality?’, *Marine Policy*, 1995, pp. 5–20. There are currently 167 parties to UNCLOS 1982 and 147 parties to the 1994 Implementation Agreement.

<sup>6</sup> See Articles 136, 137 and 157 of UNCLOS.

Polymetallic Nodules in the Area;<sup>7</sup> the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area;<sup>8</sup> the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area;<sup>9</sup> and the Decision of the Assembly of the International Seabed Authority concerning overhead charges for the administration and supervision of exploration contracts,<sup>10</sup> along with certain recommendations for guidance of the contractors.<sup>11</sup> It is currently working on the Mining Code for Exploitation, which has been described as ‘ultimate regulatory phase in developing the common heritage of mankind.’<sup>12</sup> Also, the ISA has entered into various contracts for exploration of polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts with a number of States, State enterprises and corporations, including developing States.<sup>13</sup>

One of the major concerns of the ISA, at the moment, is to ensure that the marine environment is protected from harmful effects that may occur during mining activities in the Area.<sup>14</sup> In 2011, the ITLOS Seabed Disputes Chambers, at the request of the Council of the ISA, gave its first advisory opinion regarding the responsibilities and obligations of States and their sponsored entities with respects to activities in the Area.<sup>15</sup> One of the

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<sup>7</sup> International Seabed Authority (ISA), Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (adopted 13 July 2000, updated and adopted 25 July 2013).

<sup>8</sup> ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted 7 May 2010).

<sup>9</sup> ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (adopted 27 July 2012).

<sup>10</sup> ISA, Decision of the Assembly of the International Seabed Authority concerning overhead charges for the administration and supervision of exploration, ISBA/19/A/12 (22 October 2012).

<sup>11</sup> See ‘Recommendations for the Guidance of Contractors and Sponsoring States Relating to Training Programmes under Plans of Work for Exploration’, ISBA/19/LTC/14 (12 July 2013); ‘Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area’, ISBA/19/LTC/8 (1 March 2013); ‘Recommendations for the Guidance of Contractors for the Reporting of Actual and Direct Exploration Expenditure’, ISBA/21/LTC/11 (14 April 2015); and ‘Recommendations for the Guidance of Contractors on the Content, Format and Structure of Annual Reports’, ISBA/21/LTC/15 (4 August 2015).

<sup>12</sup> <<https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area>> accessed 1 July 2017.

<sup>13</sup> For the names of the various contractors see <[https://www.isa.org.jm/deep-seabed-minerals-contractors?qt-contractors\\_tabs\\_alt=0#qt-contractors\\_tabs\\_alt](https://www.isa.org.jm/deep-seabed-minerals-contractors?qt-contractors_tabs_alt=0#qt-contractors_tabs_alt)> accessed 1 July 2017.

<sup>14</sup> Article 145 of UNCLOS.

<sup>15</sup> ITLOS Case No.17, Responsibilities and Obligations of States With Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10. For excellent analysis of this Advisory Opinion see D. French, ‘From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber’s 2011 Advisory Opinion’, *International Journal of Marine and Coastal Law*, vol. 26, 2011, pp. 525–568; D. Freestone, ‘Responsibilities and Obligations of State Sponsoring Persons and Entities With Respect to Activities in the Area’, *American Journal of International Law*, vol. 105, 2011, pp. 755–760; D. K. Anton, R. A. Makgill and C. R. Payne, ‘Seabed Mining – Advisory Opinion

issues raised by the chambers was the importance of safeguarding against so-called Sponsoring States of Convenience to protect the marine environment from unregulated or inadequately regulated Deep Seabed Mining (DSM) activities by sponsored contractors. Of course, the chambers expect that most, if not all, of these so-called Sponsoring States of Convenience would probably be from developing States. Therefore, this chapter explores some of the implications of the *Advisory Opinion of the Chambers on developing States*.

## 2. Developing States

The regime of the Area under Part XI of the UNCLOS 1982, as amended by the 1994 Implementation Agreement, is framed in such a way as to encourage developing States to also engage in DSM activities. For instance, it specifically requires that the effective participation of developing States in activities in the Area should be promoted.<sup>16</sup> It also provides a ‘parallel’ or site banking system of mining of the Area that requires a contractor in its application to the ISA for permission to carry out DSM activities to designate a tract in the Area sufficiently large and of appropriate estimated value to allow two mining operations, with the ISA having the first option to pick one of these sites which is reserved or banked (i. e. the reserved areas) for mining activities by the ISA in association with developing States.<sup>17</sup> Thus in different places the UNCLOS, as amended, refers to developing States with a view to make certain concessions to these States.<sup>18</sup> However, it fails to provide any clear guidance or criteria on how States are being classified as developing States. The interim report of the contractor that reviewed the activities under Article 154 had recommended that ‘[c]larification of the definition of ‘developing State’ as applied by the Authority would be helpful to satisfy Articles 148 and 150’, and even suggested that the Council should seek an advisory opinion on the definition of what constitutes developing States for the purposes of the

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on Responsibility and Liability’, *Environmental Policy and Law*, vol. 41, 2011, pp. 60–65; D. K. Anton, ‘The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17)’, *McGill International Journal of Sustainable Development Law & Policy*, vol. 7, 2011–2012, pp. 241–257; Y. Tanaka, ‘Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011’, *Netherlands International Law Review*, vol. 60, 2013, pp. 205–230.

<sup>16</sup> Art. 148 of UNCLOS.

<sup>17</sup> Art. 153 and Art. 8 of Annex III of UNCLOS and Section 1 para. 10 of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (28 July 1994) (1994 Agreement). See E. Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, Springer, 2011, pp. 88, 190–199.

<sup>18</sup> See for instance Art. 140(1), 143(3)(b), 144, 148, 150, 151(10), 152, 155(2), 161(1)(c, d) and (2)(b), 164(1), 173(2)(c) and section 1 para. 5(e), section 3, para. 15(c) and (d), section 4 para. 1(b) and (c), section 7 para. 1.

application of Part XI of the UNCLOS.<sup>19</sup> But, the Review Committee in its comments on the interim report indicated as follows:<sup>20</sup>

A definition of ‘developing State’ for the purposes of applying the provisions of the Convention to such States would certainly be helpful. [However in] the opinion of the Review Committee, it seems doubtful whether the Article 154 Review Process would be the right forum for attempting to elaborate such a definition. Advice on this question might, however, be sought from the United Nations.

In essence, the Review Committee appeared to take the view that determining what exactly the definition of developing State is would fall within the ambit of the United Nations, the foremost high-level political intergovernmental forum. This would appear to indicate that their thinking was that the United Nations is the appropriate setting to engage with this issue, which seems to be more of a political issue rather than a legal one. For instance, we see the General Assembly adopting a resolution recognizing the graduation of countries like Equatorial Guinea and Vanuatu from the least developed country category.<sup>21</sup>

It is worth noting that the ITLOS Seabed Chamber in its unanimous advisory opinion did not endeavor to define what a developing State is, though it embarked on an extensive explanation of the meaning of terms such as responsibility, obligation, sponsorship, activities in the Area etc.<sup>22</sup> Could it be that the Chamber considered this to be outside its advisory opinion remit which is to ‘give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities’?<sup>23</sup> Whilst, undoubtedly, a question seeking an advisory opinion on which States are developing States could certainly be framed into a legal type question by linking it to the relevant provisions of Part XI, it is really difficult to see how the Chamber’s advisory opinion, by the very nebulous nature of the term ‘developing States’, could be based on law.<sup>24</sup> What legal instruments would the Chamber rely on to explain the meaning of the term ‘developing State’ in precise legal terms? Intrinsically, the term ‘developing State’ is not a legal concept, but rather a political one that falls more within the ambit of political economy. Thus, even though the phrase may be referred to in treaties, it would be an uphill task to

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<sup>19</sup> Seascope Consultants Ltd., *Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154. Interim Report*, 15 May 2016. pp. 24, 75, 81, 83, <<https://www.isa.org.jm/sites/default/files/files/documents/isba-22a-crp.3-1.pdf>> accessed 1 July 2017.

<sup>20</sup> ISA, ‘Periodic Review of the International Seabed Authority Pursuant to UNCLOS Article 154’, Interim Report: Comments by the Review Committee, ISBA/22/A/CRP.3(2) (25 May 2016), para. 9, <<https://www.isa.org.jm/sites/default/files/files/documents/isba-22a-crp3-2.pdf>> accessed 1 July 2017.

<sup>21</sup> UNGA Res. 68/18 (9 December 2013).

<sup>22</sup> See ITLOS Case No.17, *Responsibilities and Obligations of States With Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10.

<sup>23</sup> Art. 191 of UNCLOS.

<sup>24</sup> See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (22 July 2010), ICJ Reports 2010, p. 403, para. 25; *Western Sahara*, Advisory Opinion (16 October 1975), ICJ Reports 1975, p. 12, para. 15, referred to by the Chambers.

seek to define such with precision, as can be seen by various attempts enunciated below to determine which precise States are developing States.

There are no universally agreed criteria to determine which States are developing States.<sup>25</sup> For instance, there have been attempts to classify States as developing States based on their less developed industrial base and low human development index (HDI), as well as using the GNP per capita in comparison to other States. For example, the World Bank glossary states that developing countries (or States) are:

[...] countries with low or middle levels of GNP per capita as well as five high-income developing economies – Hong Kong (China), Israel, Kuwait, Singapore, and the United Arab Emirates. These five economies are classified as developing despite their high per capita income because of their economic structure or the official opinion of their governments. Several countries with transition economies are sometimes grouped with developing countries based on their low or middle levels of per capita income, and sometimes with developed countries based on their high industrialization. More than 80 percent of the world's population lives in the more than 100 developing countries.<sup>26</sup>

Furthermore, developing States in international politics may be said to be States that have membership of international political organizations, such as the G-77. This intergovernmental organization, actually made up of 134 States, consisting of a mixed bag of 'developing States' from different parts of the globe, describes itself as 'the largest intergovernmental organization of developing countries in the United Nations which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.'<sup>27</sup> It would appear that membership of such an organization, as the G-77, would confer on such States life-long membership of the developing States' 'club', even if over the years the fortunes of these States improve and they become high per capita income States. This appears to be a case of 'once a developing State, always a developing State.' In essence, there is an assortment of States that constitute developing States with diverse bed-fellows lumped together under this category. The danger of trying to get the international courts to seek to legalize an obviously political concept is that the courts would get embroiled in the politics of States. Thus an attempt to seek an advisory opinion of the Chambers of the ITLOS on the definition of developing States would be ill-advised and result in a legal quagmire.

What, however, is clear from the diversity of developing States is the difficulty in treating all developing States alike with such a wide variety of developing States, from the relatively 'developed' developing States to the 'least developed' developing States.<sup>28</sup> Thus it is difficult to have a one size fits all approach to engage with

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<sup>25</sup> See A. Sullivan and S. M. Sheffrin, *Economics: Principles in Action*, Prentice Hall 2003, p. 471.

<sup>26</sup> <<http://www.worldbank.org/depweb/english/beyond/global/glossary.html>> accessed 1 July 2017.

<sup>27</sup> <<http://www.g77.org/doc/index.html>> accessed 1 July 2017.

<sup>28</sup> Note that this variety of developing States is reflected in the UNCLOS. For instance, Art. 82(4) of UNCLOS referring to the distribution of the benefits and contributions made to the ISA from the outer CS refers to 'the interests and needs of developing States, particularly the least developed and the land-locked among them.' The complexity of fitting such diverse States into the category 'developing' has led the World Bank in its 2016 World

developing States and deep seabed mining. On the one hand, some so-called developing States are already engaged with deep seabed mining activities, either because they have the requisite technology and finance to do so (e.g. China, India and South Korea) or, in spite of not having the requisite technology and finance, have done so through sponsoring foreign Transnational Corporations (TNCs) that have incorporated local subsidiaries within their territory for this purpose (for instance, Island Pacific developing States, such as Nauru and Tonga).<sup>29</sup> On the other hand, there are some developing States (for instance those in Africa) that as yet are not in any way involved in deep seabed mining activities.<sup>30</sup> Despite this obvious difference in deep seabed mining capabilities, all these developing States technically enjoy exactly the same concessions as ‘developing States’ under Part XI of the UNCLOS 1982, as amended. However, it is important to note that despite the numerous concessions to developing States under Part XI, as amended, this does not apply to the responsibility regarding the protection of the marine environment. The ITLOS Seabed Disputes Chamber in its unanimous *Advisory Opinion on the Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, pointed out that:

[...] none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State ‘specifically provides’ for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed.<sup>31</sup>

Thus, as regards the general obligation of protecting the marine environment, the Chamber stated that there could be no preferential treatment given to developing States. That being said, however, the Chamber appeared to soften this position by conceding that its observation did not exclude the possibility that rules setting out direct obligations of the sponsoring State could provide for different treatment for developed and developing sponsoring States. An example provided by the Chamber is the precautionary approach (or principle), which in its view, having been adopted in various treaties and international instruments that reflect its formulation in principle 15 of the Rio Declaration, had ‘initiated a trend towards making this approach part of customary international law.’<sup>32</sup> Principle 15 of the Rio Declaration actually provides that the precautionary approach shall be applied by States ‘according to their capabilities.’<sup>33</sup> In essence, as mentioned by the ITLOS Chamber, this means that ‘the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the

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Development Indicators to avoid using the term ‘developing World’. See S. Sandhu, ‘The World Bank has stopped using the term developing world’, *i News*, May 18, 2016, <<https://inews.co.uk/explainers/iq/no-longer-call-countries-developing/>> accessed 1 July 2017.

<sup>29</sup> <<https://www.isa.org.jm/deep-seabed-minerals-contractors>> accessed 1 July 2017.

<sup>30</sup> See E. Egede, ‘Institutional Gaps in the 2050 Africa’s Integrated Maritime Strategy’, *Journal of Ocean Law & Governance in Africa*, vol. 1, 2016, pp. 1–27, esp. pp. 19–26.

<sup>31</sup> Para. 158; see also para. 156.

<sup>32</sup> Paras 125, 135 and 161.

<sup>33</sup> Para. 161.

developing sponsoring States.<sup>34</sup> It also follows that apart from the differentiated responsibility between developed and developing States as regards the precautionary approach the expectation would be that there would also be a differentiated responsibility in this regard as between least developed developing States and more developed developing States, such as Brazil, China, India, Singapore and South Korea.<sup>35</sup> Albeit, the Chamber was quick to point out that the principle of differentiated responsibility does not apply to the obligation to follow ‘best environmental practices’ as required by the ISA exploration regulation.<sup>36</sup>

### 3. Sponsoring States of Convenience or Nauru-Tonga Model?

The UNCLOS provides that mining activities in the Area can be carried out either directly by States Parties or by entities sponsored by them. The Chamber points out that ‘[t]he notion of “sponsorship” is a key element in the system for the exploration and exploitation of the resources of the Area set out in the Convention.’<sup>37</sup> Article 139 dealing with the responsibility to ensure compliance and liability for any damages indicates that activities in the Area can either be 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’,<sup>38</sup> whereas Article 153 points out that activities in the Area may be carried out by ‘States Parties, State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States’.<sup>39</sup> In Annex III, the UNCLOS is emphatic that applicants, apart from the Enterprise,<sup>40</sup> shall only be qualified to apply to the ISA for approval of plans of work for activities in the Area if they have the nationality of or are effectively controlled by at least one of the States Parties.<sup>41</sup> In essence, this means that for an entity to be qualified to participate in mining activities in the Area it must either have the nationality of at least one State Party or must be effectively controlled by a State Party and in both cases it must be sponsored by such States. Traditionally, under international law, the determination of nationality falls within the domain of States’ domestic jurisdiction. Oppenheim had affirmed this when he asserted: ‘the conferment and deprivation of nationality is a right that International Law recognizes as being within the exclusive competence of States; but it is a right the abuse of which may be a ground for an international claim.’<sup>42</sup> Nationality issues in relation to indi-

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<sup>34</sup> Ibid

<sup>35</sup> P. Sands et al., *Principles of International Environmental Law*, 3rd Edition, Cambridge University Press, 2012, p. 236.

<sup>36</sup> Ibid.

<sup>37</sup> Para. 74.

<sup>38</sup> Article 139(1) of UNCLOS.

<sup>39</sup> Article 153(2) of UNCLOS.

<sup>40</sup> This is obviously subject to the modification in the 1994 Agreement which limits the ability of the Enterprise to engage in mining activities until certain conditions are fulfilled.

<sup>41</sup> Article 4(1) of Annex III of UNCLOS.

<sup>42</sup> L. Oppenheim, *International Law: A Treatise*, Longmans, 1937, p. 280. See *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion (7 February 1923), PCIJ Ser. B No. 4.

viduals are relatively straightforward with complexities usually arising in cases of individuals with dual or multiple nationalities when there is contention amongst each of the national States as to which of them should be the preferred national State of such individual. The *Nottebohm* case declares that the prevailing is to prefer ‘the real and effective nationality’<sup>43</sup> or the State with a ‘genuine connection’<sup>44</sup> with the individual. However, it becomes a bit more complicated in the case of artificial juridical persons which have been given a distinct legal personality by law. The *Barcelona Traction* case, while identifying different ways by which States may confer nationality on these juridical entities, appeared to take the position that the established method in law is that such entities acquired the nationality of the State of incorporation and in whose territory the registered office is located.<sup>45</sup> In its decision in this case the ICJ stated:

In allocating corporate entities to states for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the state under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some states to give a company incorporated under their law diplomatic protection solely when it had its seat (*siège social*) or management or center of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the state concerned. Only then, it has been held, does there exist between the corporation and the state in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one state have had to be weighed against those with another.<sup>46</sup>

The International Law Commission’s (ILC) *Draft Articles on Diplomatic Protection* appears to accept the *Barcelona Traction* Case as generally consistent with customary international law and stated that: ‘For the purposes of the diplomatic protection of a corporation, the State of Nationality means the State under whose law the corporation was incorporated.’<sup>47</sup> Some States are clear in case of DSM activities that artificial entities incorporated in their territory have acquired their nationality. For instance, the *Singapore Deep Sea Mining Act* defines a Singapore company as ‘a company incorporated in Singapore.’<sup>48</sup>

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<sup>43</sup> *Nottebohm* (Liechtenstein v. Guatemala), Judgement Second Phase, ICJ Reports 1955, p. 22.

<sup>44</sup> *Ibid.*, p. 23.

<sup>45</sup> *Barcelona Traction* (Belgium v. Spain), ICJ Reports 1970, p. 43.

<sup>46</sup> *Ibid.*, p. 42.

<sup>47</sup> See Article 9 and ILC Commentary, *Draft Articles on Diplomatic Protection*, ILC Report of the 58th Session, 2006.

<sup>48</sup> Section 2 of *Singapore Deep Sea Mining Act* (adopted 6 March 2015, entered into force 1 April 2015).



However, it must be noted that the ILC identified some possible exceptions to the acquisition of nationality by incorporation in a particular State when there is no evidence of some sort of significant link or connection between the State of incorporation and the corporation itself but rather significant connections with other States, namely situations when the corporation 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. In the latter situation, the other State(s) may be regarded as the State of nationality for the purpose of diplomatic protection.<sup>49</sup> It should be noted that in the case of DSM, State sponsorship may be done either by the State of nationality of the Company or the State that effectively controls such Company or whose nationals have effective control over it.<sup>50</sup> Although the issue of the nationality of corporations may generate some debate in terms of diplomatic protection, the author is doubtful that this would actually be much of a practical problem if a foreign corporation incorporates a company in a developing State for purpose of doing business. Usually the expectation of the developing State will be that such foreign company incorporated under its domestic laws would carry out a substantial amount of business within its territory which therefore would generate some type of economic benefits to such State and its citizens. For example, in the case of deep seabed mining, the Secretariat of the Pacific Community (SPC) in a report prepared in 2012 recognized that there could be huge economic benefits which could accrue to African Caribbean and Pacific (ACP) States that sponsor deep seabed mining exploitation in the Area.<sup>51</sup> The report pointed out that potentially this could benefit ACP States by contributing to its government revenues through taxes and/or royalties, by creating jobs and training opportunities as well as strengthening the domestic private sector, by encouraging foreign investment and the funding of public service improvements, and by contributing to infrastructure development and supporting other economic sectors.<sup>52</sup> Usually, when foreign TNCs incorporate subsidiary companies under the laws of developing States, the government insists on either the government having some shares in the company themselves or its citizens being given the opportunity to invest and acquire shares in the company. For instance, under the Nigerian Maritime Administration and Safety (NIMASA) Act 2007, 'Nigerian Company' is defined for the purposes of the legislation as 'a company incorporated in Nigeria in which Nigerian citizens hold at least 60 per cent of the shares as beneficial owners.'<sup>53</sup>

Discussing circumstances where foreign companies incorporate subsidiaries in developing States, the Seabed Chamber, obviously having in mind the issue of ships and flags of convenience, focuses on the so-called Sponsoring States of Convenience situation. It explains this as a situation where commercial enterprises based in

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<sup>49</sup> See Article 9 and ILC Commentary, Draft Articles on Diplomatic Protection, ILC Report of the 58th Session, 2006.

<sup>50</sup> Art. 153(2) of UNCLOS.

<sup>51</sup> Secretariat of the Pacific Community, 'Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation: Prepared under the SPC-EU EDF10 Deep Sea Minerals Project', <<http://www.smenet.org/docs/public/FinalDeepSeaMineralsProjectReport.pdf>> accessed 1 July 2017.

<sup>52</sup> *Ibid.*, p. 6, para. 4.2.

<sup>53</sup> Section 64 of Nigerian Maritime Administration and Safety Agency Act (entered into force 25 May 2007), Act No. 17, 2007.

developed States setup companies in developing States, thereby acquiring the latter States' nationality and obtaining their sponsorship to mine the Area 'in the hope of being subjected to less burdensome regulations and controls.'<sup>54</sup> The center of attention of the Chamber appears to be on this rather negative perspective of foreign companies establishing subsidiaries in developing States.<sup>55</sup> Whilst this is no doubt a cause for concern, especially with the experiences of how certain TNCs have been guilty of engaging in poor environmental practices when they are involved in mining activities in developing States, including those in Africa, which have lax legislation and regulations,<sup>56</sup> it is important, however, to point out that there may be other motivations, not as sinister as the desire to be Sponsoring States of Convenience, why developing States may consider allowing TNCs to incorporate subsidiaries in their territories to engage in DSM activities in the Area. For one, developing States that do not have the financial and technical capacity may wish indirectly to engage in deep seabed mining activities by working with TNCs that have such a financial and technical capability. After all, Annex III of the UNCLOS and the provisions of the different regulations make it clear that the 'qualification standards shall relate to the financial and technical capabilities of the applicant and his performance under any previous contracts with the Authority.'<sup>57</sup> This model, which could be called the 'Nauru/Tonga model', would appear to be the way forward to get developing States lacking the requisite financial and technical capability to speedily participate in mining activities in the Area and get on the Seabed mining ladder. This model by itself is nothing new, as we see similar arrangements like this reflected in the way developing States mine natural resources within their national jurisdiction. Nauru in its proposal to the ISA requesting that an advisory opinion be obtained from the Seabed Dispute Chamber of the ITLOS puts it this way:

Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment).<sup>58</sup>

A perusal of Nauru's rather detailed proposal shows clearly that the intention was certainly not to be some sort of sponsoring State of convenience akin to the much maligned flags of convenience States in relation to shipping,

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<sup>54</sup> ITLOS Case No. 17, para. 159.

<sup>55</sup> B. N. Metaxas, 'Flags of Convenience', *Marine Policy*, 1981, pp. 52–66.

<sup>56</sup> E. Egede, 'Human Rights and the Environment: Is there a Legally Enforceable Right to a Clean and Healthy Environment for the "Peoples" of the Niger Delta under the Framework of the 1999 Constitution of Nigeria', *Sri Lanka Journal of International Law*, vol. 19, 2007, pp. 51–83.

<sup>57</sup> Art. 4(2) of Annex III of UNCLOS and Regulation 12(1) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area; Regulation 13(1) of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area; Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area; for further information see footnotes 7 to 9.

<sup>58</sup> ISA, Proposal to Seek an Advisory Opinion from the Seabed Disputes Chambers of the International Tribunal for the Law of the Sea on Matters Regarding Sponsoring State Responsibility and Liability (submitted by the delegation of Nauru), ISBA/16/C/6 (5 March 2010).

but rather a desire to be a responsible developing DSM State engaged in the CHM and working with foreign TNCs with the financial and technical capabilities. In its proposal to the ISA, Nauru pointed out that the idea of its sponsorship of Nauru Oceans Resources Inc. was initially premised on the supposition that:

Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). [...] Nauru [thus] considers it crucial that guidance be provided on the interpretation of the relevant section of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn to make an informed decision on whether or not to participate in activities in the Area.<sup>59</sup>

The Nauru/Tonga model must therefore be distinguished from the Sponsored States of convenience model. The idea of the Nauru/Tonga model is to provide a platform for developing States that do not presently have the financial/technical capability to engage with deep seabed mining activities through the use of the time honored practice of encouraging Foreign Direct Investment (FDI) in developing States. Surely, this could be said to be in line with Article 148 of the UNCLOS which states:

The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

For the TNCs, on the other hand, the motivation for incorporating companies in developing States may not necessarily be the desire to avoid burdensome regulations, but rather the incentive pull of access to the reserved areas. The reserved area would obviously be more cost effective because the TNC would not have to submit an application that would cover an area sufficiently large and of sufficient estimated commercial value to allow for two mining operations.<sup>60</sup> As the UNCLOS states:

Any State Party which is a developing State or any natural or juridical person sponsored by it and effectively controlled by it or by other developing State which is a qualified applicant, or any group of the foregoing, may notify the Authority that it wishes to submit a plan of work pursuant to Article 6 of this Annex with respect to a reserved area. The plan of work shall be considered if the Enterprise decides, pursuant to paragraph 1, that it does not intend to carry out activities in that area.<sup>61</sup>

Also Regulation 17 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, for instance, states:

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<sup>59</sup> Ibid., para. 1 and 5.

<sup>60</sup> Art. 8 of Annex III of UNCLOS; see also Section 1 para. 10 of the Annex to the Agreement.

<sup>61</sup> See also Section 2, para. 5 of the Annex to the Agreement.

Any State which is a developing State or any natural or juridical person sponsored by it and effectively controlled by it or by any other developing State, or any group of the foregoing, may notify the Authority that it wishes to submit a plan of work for exploration with respect to a reserved area. The Secretary-General shall forward such notification to the Enterprise, which shall inform the Secretary-General in writing within six months whether or not it intends to carry out activities in that area. If the Enterprise intends to carry out activities in that area, it shall, pursuant to paragraph 4, also inform in writing the contractor whose application for approval of a plan of work for exploration originally included that area.

#### **4. Seabed Chamber Advisory Opinion: Responsibilities and Obligations of Developing States**

It would be recalled that what eventually led to the ITLOS Seabed Chamber's advisory opinion was actually elicited by the proposal of Nauru, a developing State, which eventually led to the Council of the ISA reformulating and seeking the advisory opinion of the Chamber on the following three specific questions:<sup>62</sup>

- What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the implementation of Part XI of UNCLOS 1982?
- What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?
- What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?<sup>63</sup>

The Chamber in answering these questions was clear about the need for equality of treatment between developing and developed sponsoring States under the UNCLOS as regards responsibilities and liabilities with respect to the protection of the marine environment so as not to 'jeopardise uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.'<sup>64</sup> In essence, under the UNCLOS the requirement to take the needs and interests of developing States into consideration (in some regards in Part XI), did not in itself permit a lower standard of protection of the marine environment in the Area.<sup>65</sup> Thus the principle of common but differentiated responsibilities enshrined International Environmental Law was not applicable because it was not specifically stated in the UNCLOS. In response to the questions put before it by the Council, the Chamber identified that all sponsoring States,

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<sup>62</sup> ISA, Proposal to Seek an Advisory Opinion from the Seabed Disputes Chambers of the International Tribunal for the Law of the Sea on Matters Regarding Sponsoring State Responsibility and Liability (submitted by the delegation of Nauru), UN Doc. ISBA/16/C/6 (5 March 2010).

<sup>63</sup> ITLOS Case No. 17, para. 1

<sup>64</sup> *Ibid.*, para. 158, 159.

<sup>65</sup> See Articles 140, 160(f) of UNCLOS.

both developing and developed, have an obligation (responsibility) to ensure that the activities in the Area conducted by entities they have sponsored are in conformity and in compliance with the UNCLOS, the 1994 Agreement and the regulations, rules and procedures of the ISA and direct obligations.<sup>66</sup> The sponsoring State Party also has direct obligations, identified by the Chamber, as obligations that sponsoring States ‘have to comply independently of their obligation to ensure a certain behavior by the sponsored contractor.’<sup>67</sup> The Chamber points out that the most important of these direct obligations are: the obligation to assist the ISA in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the ISA for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.<sup>68</sup> Although the obligations to ensure are different than the direct obligations, the Chamber was quick to point out the linkage between the two since compliance with the direct obligations may be regarded as a relevant factor in meeting the obligation to ensure.

The Chamber pointed out that a violation of the obligations leads to liability. However, it also pointed out that not every violation of an obligation by the sponsored contractor would necessarily lead to the liability of the sponsoring State. In essence, there is no strict liability on the sponsoring State. There had to be a proven causal link between the failure of the sponsoring State to carry out its obligation and the damages caused by the sponsored entity.<sup>69</sup> The obligation is thus one of conduct and not of result amounting to one of ‘due diligence.’<sup>70</sup> This ‘due diligence’ obligation, in essence, requires sponsoring States Parties to ‘make best possible efforts’ to secure the compliance by sponsored entities with their obligations by adopting the appropriate regulatory and administrative measures within their domestic legal system and to take appropriate steps in their enforcement.<sup>71</sup> The obligation is not to ensure that the contractors always carry out their own obligations but for sponsoring States to take these measures within their legal system that are ‘necessary and appropriate’ to ensure that contractors discharge these obligations.<sup>72</sup> Although the Chamber did not give an exhaustive list of what should be done to fulfil this obligation to ensure, as this was outside its remit, it did give some directions in this regard.<sup>73</sup> It identified as essential the need to have appropriate domestic legislation, regulations, and administrative measures, including the establishment of enforcement mechanisms to actively supervise the activities of the sponsored contractors and provide for some sort of coordination between the sponsoring State and the ISA.<sup>74</sup> It pointed out that the existence of the

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<sup>66</sup> Para. 103, 104 and 121.

<sup>67</sup> Para. 121.

<sup>68</sup> Para. 122 and 124–150.

<sup>69</sup> ITLOS Case No., para. 109–110, 172–173, 181 and 189.

<sup>70</sup> The Chambers referred extensively to the ICJ decision in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, ICJ Reports 2010, p. 14.

<sup>71</sup> Para. 242.

<sup>72</sup> *Ibid.*

<sup>73</sup> Para. 227.

<sup>74</sup> Para. 218.

appropriate laws, regulations and administrative measures in the domestic legal system of a sponsoring State is ‘a necessary requirement for compliance with the obligation of due diligence of the sponsoring State and for its exemption from liability.’<sup>75</sup> It indicated that if a Sponsoring State merely enters into a contractual arrangement with the sponsored entity without appropriate domestic legislation regulating DSM, it would not be regarded as complying with its due diligence obligation.<sup>76</sup>

Over the years certain developing States have adopted Deep Seabed Mining legislation, some more detailed than others, especially regarding effective protection of the marine environment against any harmful effects of DSM activities. For example the Singapore Deep Seabed Mining Act 2015 was enacted to regulate activities in the Area by persons sponsored by Singapore; to ensure the effective protection of the marine environment against any harmful effects of those activities and to fulfil Singapore’s obligations under the UNCLOS and the 1994 Agreement with regards to such activities.<sup>77</sup> The legislation indicates a preference for sponsoring Singaporean companies rather than individuals.<sup>78</sup> An individual who is a Singapore citizen may only explore or exploit a resource in the Area if such individual is acting as an employee or agent of a Singapore company that has an existing licence and ISA contract, or a person who has entered into an ISA contract, which remains in force, under the sponsorship of another State, and such individual’s exploration or exploitation activities are within the scope of the licence granted to such Singapore company, that the individual is an employee or agent of, or the existing ISA contract that has been sponsored by such other State.<sup>79</sup> It states a Singaporean company may explore for or exploit a resource in a part of the Area if the company has been granted a licence, which remains in force to do so, and the company has entered into a contract with the ISA. It makes provision for the following consequences: a general prohibition of unilateral deep seabed mining making the contravention of this an offence; a licensing regime whereby a Singaporean company wishing to be sponsored by Singapore had to apply for a licence from the appropriate minister and the conditions for granting a sponsorship certificate; enforcement of the Seabed Disputes Chamber’s decisions; identifies some miscellaneous offences and powers given by the minister to make regulations pursuant to the Act. The legislation requires an entity that wishes to engage in mining activities to first apply for a licence. It is only when the licence has been granted by the appropriate minister that Singapore may sponsor the licensee’s application to the ISA and issue a certificate of sponsorship.<sup>80</sup> The Singaporean legislation is however sparse in engaging with measures to be taken to protect the environment from such mining activities. Reference to protecting the environment is scantily stated in the section of the Act mentioning that one of the purposes of the legislation is ‘to effectively protect the marine environment against any harmful effects of those activities or the cessation of those activities.’<sup>81</sup> The only other reference to protecting the environment from DSM

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<sup>75</sup> Para. 219.

<sup>76</sup> Para. 223–226.

<sup>77</sup> Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (28 July 1994) (1994 Agreement), Section 3.

<sup>78</sup> *Ibid.*, Section 5(1) and 7.

<sup>79</sup> *Ibid.*, Section 5(2).

<sup>80</sup> *Ibid.*, Sections 4, 6–8.

<sup>81</sup> *Ibid.*, Section 3(b).

activities in other parts of the legislation is in relation to the directions of the appropriate minister when a licence expires etc., which mentions that the relevant minister may give directions ‘that specified measures be taken to effectively prevent, contain or minimize any harmful effects to the marine environment.’<sup>82</sup> It however does not explicitly refer to obligations, referred to by the ITLOS Chamber, such as the need to apply a precautionary approach; best environmental practices; the need to take measures to ensure the provision of guarantees in the event of an emergency order by the ISA for protection of the marine environment; the need to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the need to conduct environmental impact assessments. It also does not establish specific institutions, apart from reference to the appropriate minister, with enforcement powers to regulate and monitor domestically the sponsored contractors. Perhaps the idea is for the relevant minister to spell this out in subsequent Regulations which the minister certainly has the powers to make under the Act.<sup>83</sup>

On the other hand, the legislation of Island Pacific States, such as Fiji,<sup>84</sup> Nauru,<sup>85</sup> Tonga<sup>86</sup> and Tuvalu<sup>87</sup> appear to be more detailed, especially as it regards their engagement with measures to ensure the protection of the marine environment as a result of DSM activities. These States have benefited from the Pacific Regional Legislative and Regulatory Framework (RLRF), which was made available by the Secretariat of the Pacific Community (SPC) to guide Pacific Island developing States with regard to preparing the appropriate national legislative and regulatory framework in seabed mining to draft national legislation. The framework which is a rather comprehensive document, put together with the assistance of several interested stakeholders, provides the Pacific Island States with the tools to put together a comprehensive national policy, legal framework and institutional capacity.<sup>88</sup> According to Makgill and Linhares, the ‘Advisory Opinion, therefore, provided strong incentive for Pacific States, entertaining seabed mining activities within their jurisdiction to enact appropriate laws and regulation. Consequently the precautionary approach, best environmental practices, and the EIA have all found expression in a number of subsequent legislative initiatives across the region.’<sup>89</sup>

These legislations are clearer in emphasizing the role of the sponsoring States to exercise effective control over the sponsored person, as well as their responsibilities, especially as it concerns the protection of the

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<sup>82</sup> Ibid., Section 16(2)(b) and 16(4).

<sup>83</sup> Section 24.

<sup>84</sup> Fiji International Seabed Mineral Management Decree, No. 21 of 2013.

<sup>85</sup> Nauru International Seabed Minerals Act, No. 26 of 2015.

<sup>86</sup> Tonga Seabed Minerals Act, No. 10 of 2014.

<sup>87</sup> Tuvalu Seabed Minerals Act, No. 14 of 2014.

<sup>88</sup> See <<http://dsm.gsd.spc.int/>> accessed 1 July 2017; and M. Borrel, ‘Protection and Preservation of the Marine Environment from Seabed Mining Activities on the Continental Shelf: Perspectives from the Pacific Islands Region’, in R. Rayfuse (ed.), *Research Handbook on International Marine Environment Law*, Edward Elgar, 2015, pp. 206–228, esp. pp. 210–211.

<sup>89</sup> R. Makgill and A. P. Linhares, ‘Deep Seabed Mining: Key Obligations in the Emerging Regulation of Exploration and Development in the Pacific’, in R. Warner and S. Kaye (eds.), *Routledge Handbook of Maritime Regulation and Enforcement*, Routledge, 2015, pp. 231–261 (232).

marine environment from DSM activities through the application of the precautionary approach and best environmental practices than that of Singapore.<sup>90</sup> For instance, the Fiji International Seabed Mineral Management Decree states that any person engaged in Seabed Mineral activities whether directly or indirectly shall, amongst other things, be required to ‘apply the Precautionary Approach, and employ best environmental practice in accordance with prevailing international standards in order to avoid, mitigate or remedy adverse effects of Seabed Minerals Activities on the marine environment.’<sup>91</sup> Also, the Seabed Minerals Act 2014 of Tonga is clearer on the responsibility of the sponsored entity with regard to the protection of the environment. For instance it states that: ‘The terms of any environmental conditions arising from an Environmental Impact Assessment conducted in compliance with the EIA Act shall be adopted as part of the terms and conditions of any title held under this Act.’<sup>92</sup> Furthermore, the legislation of these Pacific Island States provide for the establishment of some sort of domestic regulatory and monitoring body to ensure the effective implementation of their respective legislation, including the protection of the environment. An example of this is the Tonga Seabed Minerals Authority, which was created amongst other things to:

- review or obtain a review of Environmental Impact Assessments for Seabed Mineral Activities required under this Act and the EIA Act;
- liaise with the ISA and any other relevant international organization in accordance with the UN Convention of the Law of the Sea to facilitate the lawful conduct of Seabed Minerals Activities or the protection of the Marine Environment;
- seek expert advice on factual matters pertaining to the administration of this Act and concerning the management of the Kingdom’s Seabed Minerals, including but not limited to advice on economic, legal, scientific, and technical matters, and including advice from experts in the management and conservation of the Marine Environment.<sup>93</sup>

The point that obviously comes out in exploring the various domestic legislations of developing States is the need for some kind of consistency in legislation on DSM, especially as it regards the Sponsoring States taking effectual control under domestic legislation to regulate and monitor sponsored entities so as to ensure they adopt the best environmental practices. Clearly, there is a need to pursue some type of harmonization of national legislation of sponsoring States, especially those from developing States. One of the ways to achieve such harmonization that would ensure some consistency and compliance with minimum international standards is through the utilization of model legislation.<sup>94</sup> The ISA could develop model DSM legislation that would contain detailed relevant clauses that would provide the appropriate legal framework for sponsoring States to monitor and regulate their sponsored entities. As pointed out by the ITLOS Chamber, laws and regulations are not in themselves enough to exclude the

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<sup>90</sup> See for instance Section 30 of the Nauru International Seabed Minerals Act, No. 26 of 2015.

<sup>91</sup> Section 32(e).

<sup>92</sup> Section 102.

<sup>93</sup> Section 12.

<sup>94</sup> See G. Kent, ‘Harmonizing Extended Zone Legislation in Southeast Asia’, *Ocean Development & International Law*, vol. 13, 1983, pp. 247–268 (250–254).



sponsoring State's liability but also there is a need for administrative measures, including the establishment of enforcement mechanisms to ensure effective supervision of the sponsored contractors.<sup>95</sup> Thus, apart from such model legislation, there would be a need for the ISA to be involved in capacity building to assist sponsoring States, especially developing States, to develop an effective regulatory/enforcement body composed of well-trained personnel to ensure that sponsored entities comply with minimum international standards, including standards on the protection of the environment. This could be done by requiring States that have sponsored entities to send some of the key personnel of their DSM regulatory bodies for periodic training under the auspices of the ISA, which would be regarded as International Continuing Professional Development (ICPD), to familiarize them with the best international environmental practices in respect of DSM.

##### **5. Now where are African developing States in DSM activities?**

At present Africa is the only region, utilizing the International Seabed Authority regional groupings,<sup>96</sup> which does not have States that have sponsored contractors to engage in DSM activities.<sup>97</sup> The 2050 Africa's Integrated Maritime (AIM) Strategy, a long-term strategy aimed at providing a broad framework for the protection and sustainable exploitation of the African Maritime Domain (AMD), adopted by the African Union in January 2014,<sup>98</sup> failed to specifically consider the Deep Seabed Area beyond National Jurisdiction (the Area) and the resources therein. Neither does it mention the possibility of the Continent engaging with DSM activities in the Area.<sup>99</sup> It is rather astonishing that the AIM Strategy, intended to be a long term strategy, is silent on the Area and DSM activities, especially since Africa played a key role at the Third United Nations Conference on the Law of the Sea (UNCLOS III) in the development of the regime of the deep seabed beyond national jurisdiction (the Area), which was eventually adopted as Part XI of the UNCLOS.<sup>100</sup> Furthermore, there is a strong linkage between the Continental Shelf (CS) and the Area as the outer limits of the CS of certain coastal States are used to delineate the Area.<sup>101</sup> Thus the outer limits of the Continental Shelf of some African States facing either the Indian or the Atlantic Ocean actually act as boundaries for the Area. Consequently, the DSM activities adjacent in the Indian and Atlantic Oceans would have some implications for these States, including environmental impacts. Moreover, certain mineral resources may actually straddle between the Area and the adjacent Continental Shelves of certain African States and thus be of direct interest to these States.<sup>102</sup>

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<sup>95</sup> See para. 218.

<sup>96</sup> See <<https://www.isa.org.jm/regional-groups>> accessed 1 July 2017; these regional groupings are in line with United Nations geographical grouping for election purposes.

<sup>97</sup> <<https://www.isa.org.jm/deep-seabed-minerals-contractors>> accessed 1 July 2017.

<sup>98</sup> <<http://pages.au.int/maritime/documents/2050-aim-strategy-0>> accessed 1 July 2017.

<sup>99</sup> For analysis of this see E. Egede, 'Institutional Gaps in the 2050 Africa's Integrated Maritime Strategy', *Journal of Ocean Law & Governance in Africa*, vol. 1, 2016, pp. 1–27 (19–26).

<sup>100</sup> See Declaration of the Organization of African Unity on the Issues of the Law of the Sea (adopted 19 July 1974), UN Doc. A/CONF.62/33 (1974), esp. para. 18–22.

<sup>101</sup> Article 1(1) (1) of UNCLOS 1982.

<sup>102</sup> Article 142 of UNCLOS 1982.

However, currently there appears to be a growing appetite for Africa to begin to engage with DSM. For instance, the final edition of an African Union document setting out the agenda for 2063, under its Aspiration 1 titled ‘A Prosperous Africa based on inclusive growth and sustainable development’, includes the following:

Africa’s Blue economy which is three times the size of its landmass, shall be a major contributor to continental transformation and growth, advancing knowledge on marine and aquatic biotechnology, the growth of an Africa-wide shipping industry, the development of sea, river and lake transport and fishing; *and exploitation and beneficiation of deep sea mineral and other resources.*<sup>103</sup>

Furthermore, under Aspiration 7 of this document it stated: ‘[w]e aspire that by 2063, Africa shall be: [a] major social, political and economic force in the world, and with her rightful share of the global commons (land, oceans and space) [...]’<sup>104</sup>

A swift way by which African States may participate in DSM is by adopting the Tonga/Nauru model,<sup>105</sup> the approach adopted by certain Pacific States. For instance, Nautilus Minerals Inc., a TNC, incorporated local subsidiaries, namely Nauru Ocean Resources Inc. and Tonga Offshore Mining Limited, in the Republic of Nauru and the Kingdom of Tonga respectively, and the local companies were sponsored by the State where they have been incorporated for work plans for explorations in the part of the Area reserved by the ISA for developing countries.<sup>106</sup> It is suggested that such African States could further explore the option of acquiring some equity interest in such subsidiary corporations and also encouraging their nationals to do so, if they wish.

A key initial measure interested African States would need to put in place is the appropriate domestic legal framework to ensure they exercise effective regulatory oversight over entities they would sponsor to engage in DSM activities, so as to be exempt from liability as a result of its failure to carry out its responsibilities under the UNCLOS and relevant Regulations, as well as to safeguard against being labelled as sponsoring States of Convenience, as elucidated by Advisory Opinion of the ITLOS Chamber. Such legislation should be ‘no less

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<sup>103</sup> Aspiration 1, para. 15 of Agenda 2063: The Africa We Want, September 2015, popular version (Agenda 2063), <[http://agenda2063.au.int/en/sites/default/files/03\\_Agenda2063\\_popular\\_version\\_ENG%2021SEP15-3.pdf](http://agenda2063.au.int/en/sites/default/files/03_Agenda2063_popular_version_ENG%2021SEP15-3.pdf)> accessed 1 July 2017 (emphasized by the author). See also the Framework Document: The Africa We Want of Agenda 2063, September 2015, which at page 103 identifies the need to: ‘[d]evelop capacities to access global commons in areas beyond national jurisdiction and deep seas.’ <<http://agenda2063.au.int/en/sites/default/files/Framework%20Document%20Book.pdf>> accessed 1 July 2017. Also see references at pp. 114, 127 of this Framework Document to Deep Seabed Mining.

<sup>104</sup> Aspiration 7, para. 60 of Agenda 2063.

<sup>105</sup> See however E. Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, Springer, 2011, Chapter 7, where the author proposes different strategic alliances and cooperative efforts that Africa may employ to achieve DSM in the long run. Also, see E. Egede, ‘Institutional Gaps in the 2050 Africa’s Integrated Maritime Strategy’, *Journal of Ocean Law & Governance in Africa*, vol. 1, 2016, pp. 1–27 (24) where the author advocates various interested African States pooling their resources under the auspices of the African Union to put together some type of African Deep Seabed Mining Corporation.

<sup>106</sup> Available at <<http://www.isa.org.jm/files/documents/EN/Press/Press11/SB-17-11.pdf>> accessed 1 July 2017.

effective than international rules, regulations and procedures' such as the UNCLOS and the ISA Mining Codes. Such legislation should also, amongst other things, certify that such States are ensuring that their sponsored contractors are carrying out DSM activities in line with best environmental practice, including adopting the precautionary approach and conducting effective prior environmental impact assessment. It should be noted that the need to adopt the precautionary approach as it regards environmental protection is already reflected in certain treaties adopted by the African Union. For instance, the *Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa*,<sup>107</sup> states in Article 4(f) that:

Each party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions.

While the African Convention on the Conservation of Nature and Natural Resources, as revised in 2003, in Article IV states:<sup>108</sup>

The Parties shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.

Concerning the direct obligation of sponsoring States to ensure that EIAs are conducted, which the ITLOS Chamber found to extend beyond the scope of the ISA regulations and was a direct obligation under the Convention and Customary International Law,<sup>109</sup> there is evidence that African States are already engaging with the issue of the need to conduct EIAs as regard to projects that have environmental implications. A review report by the United

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<sup>107</sup> Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa (adopted 29 January 1991, entered into force 22 April 1998) 30 ILM 773 (1991) (Bamako Convention). This treaty as at 24 October 2016 has been ratified by 25 out of 54 AU members. <[http://www.au.int/en/sites/default/files/treaties/7774-sl-bamako\\_convention.pdf](http://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf)> accessed 1 July 2017.

<sup>108</sup> See African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003) (Maputo Convention). This treaty as at 24 October 2016 had been ratified by 13 out of 54 AU members. <[http://www.au.int/en/sites/default/files/treaties/7782-sl-revised\\_-\\_nature\\_and\\_natural\\_resources\\_1.pdf](http://www.au.int/en/sites/default/files/treaties/7782-sl-revised_-_nature_and_natural_resources_1.pdf)> accessed 1 July 2017.

<sup>109</sup> Paras. 145 and 148 of Maputo Convention.

Nations Economic Commission for Africa (UNECA), as far back as 1995,<sup>110</sup> revealed that out of 23 African States reviewed, 18 of them had an enabling legislation and/or specific legislation on EIA, with ten of these States actually having explicit provisions for public participation. However, the report pointed out certain problems with effective implementation of EIA in Africa such as: the challenge of operationalizing the institutional and regulatory frameworks for EIA; inter-agency collaboration and decentralization; EIA capacity issues; the quality of the EIA studies and review processes; EIA costs and timeframes; public participation; implementation of the Environmental Management Plan (EMP) & follow-up; integration of the EIA system into an overall Environmental Management System (EMS).<sup>111</sup> This therefore indicates the need for any such African State wishing to engage in sponsoring contractors for DSM activities to ensure that not only the appropriate national DSM legislation/regulation is in place, but also that the appropriate regulatory/enforcement bodies, manned by qualified personnel, are established within domestic jurisdiction to undertake the effectual monitoring/regulation of sponsored contractors. The Pacific Regional Legislative and Regulatory Framework (RLRF), subject to adjustments to suit any African specific situation, may be used as a model to assist African States interested in DSM to draft and adopt appropriate national legislation to regulate DSM and to meet obligations under the UNCLOS.

## 6. Conclusion

There is no clear-cut definition of what States fall under the category of developing States under the UNCLOS, as amended by the 1994 Agreement, and the ISA mining Code. The phrase by its nature is a political one that would eschew any effort to come up with a precise legal definition. However, what is clear is that there is a ‘mixed bag’ of developing States out in the world backdrop, with some more developed than others. This is reflected in DSM activities where you have some developing States already engaged with such activities while others are yet, so to speak, to climb onto the DSM ‘ladder’. The Advisory Opinion of the ITLOS Chamber made it clear, however, that while Part XI of the UNCLOS, as amended, gives certain preferential treatment to encourage developing States to participate in DSM activities, no such special treatment was given to such States regarding the general obligation to protect the marine environment from DSM. The Chamber pointed out that the highest environmental standards were required by all States, both developed and developing, with regard to DSM activities to avoid the emergence of the phenomenon of Sponsoring States of Convenience. The Chamber emphasized that it was vital for Sponsoring States, including developing States, to put in place the appropriate legislative and institutional framework to ensure such States effectually regulated and monitored their Sponsored contractors to ensure that

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<sup>110</sup> Economic Commission for Africa (ECA), *Review of the Application of Environmental Impact Assessment in Selected African Countries*, 1995, <[http://www1.uneca.org/Portals/3/documents/EIA\\_book\\_final\\_sm.pdf](http://www1.uneca.org/Portals/3/documents/EIA_book_final_sm.pdf)> accessed 1 July 2017. For example, the Nigeria Environmental Impact Assessment Act No. 86 of 1992 was enacted in response to the outcome of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992. It outlines the goals and objectives of an EIA, the minimum content of an EIA and a list of activities that are not permitted to go ahead until the Agency established under the legislation has been consulted and has given its approval. The main goal of the Act is to ensure environmentally sound and sustainable development projects.

<sup>111</sup> See *ibid.*

they maintain the highest environmental standards in carrying out DSM activities. However, a survey of some of the current DSM legislation reveals a lack of harmonization, with some being more comprehensive than others. Developing States, such as Pacific Island States, involved in DSM activities have a reasonably comprehensive legislative and institutional framework, which is harmonized under the auspices of the SPC, and could provide a good model for other developing States, especially those from Africa, who may wish to engage in DSM. To achieve some level of consistency in legislative and institutional framework this chapter has proposed the need for the ISA to put together a comprehensive model legislation that States interested in DSM may wish to adopt as their national legislation, with necessary adjustments to suit their individual domestic needs, and also for the ISA to put together regular training on best environmental practices, especially for personnel of the DSM regulatory bodies in developing States, so they may be equipped to operationalize said practices in their respective States.

### **Bibliography**

Anton, D. K. 'The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17)', *McGill Int'l J. Sust. Dev. L. & Pol'y*, vol. 7, 2011/2012, pp. 241–257

Anton, D. K., Makgill, R. A. and Payne, C. R., 'Seabed Mining – Advisory Opinion on Responsibility and Liability', *Environmental Policy and Law*, vol. 41, 2011, pp. 60–65

Brown, E. D., 'The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: Breakthrough to Universality?', *Marine Policy*, vol. 19, 1995, pp. 5–20

Egede, E., 'Human Rights and the Environment: Is there a Legally Enforceable Right to a Clean and Healthy Environment for the "Peoples" of the Niger Delta under the framework of the 1999 Constitution of Nigeria', *Sri Lanka Journal of International Law*, vol. 19, 2007, pp. 51–83

Egede, E., *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, Springer, 2011

Egede, E., 'Institutional Gaps in the 2050 Africa's Integrated Maritime Strategy', *Journal of Ocean Law & Governance in Africa*, vol. 1, 2016, pp. 1–27

French, D., 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion', *International Journal of Marine and Coastal Law*, vol. 26, 2011, pp. 525–568

Freestone, D., 'Responsibilities and Obligations of State Sponsoring Persons and Entities With Respect to Activities in the Area', *American Journal of International Law*, vol. 105, 2011, pp. 755–760

Kent, G., 'Harmonizing Extended Zone Legislation in Southeast Asia', *Ocean Development & International Law*, vol. 13, 1983, pp. 247–268

Mero, J. L., *The Mineral Resources of the Sea*, Elsevier Publishing, 1968

Metaxas, B.N., 'Flags of Convenience', *Marine Policy*, vol. 5, 1981, pp. 52–66

Oppenheim, L., *International Law: A Treatise*, Vol. 1, Longmans, 1937

Sullivan, A. and Sheffrin, S. M., *Economics: Principles in Action*, Prentice Hall, 2003

Sands, P. et al., *Principles of International Environmental Law*, 3<sup>rd</sup> Edition, Cambridge University Press, 2012

Rayfuse, R. (ed.), *Research Handbook on International Marine Environment Law*, Edward Elgar, 2015

Tanaka, Y., 'Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011', *Netherlands International Law Review*, vol. 60, 2003, pp. 205–230

Warner, R. and Kaye, S. (eds.), *Routledge Handbook of Maritime Regulation and Enforcement*, Routledge, 2015