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Deep Seabed Mining and the Common Heritage of Mankind Principle: Is Commercial Exploitation Compatible with UNCLOS?

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ABSTRACT

The rapid transition of deep seabed mining from exploration to commercial exploitation has produced deep systemic and doctrinal friction within the law of the sea. At the heart of this conflict lies the tension between the common heritage of mankind (CHM) principle, which designates the international seabed Area as a collective commons to be managed for the benefit of humanity, and the commercial pressures driving private extraction. This tension is exacerbated by the strategic conduct of multinational corporate groups, which exploit the limited regulatory capacity of Small Island Developing States (SIDS) serving as sponsoring states of convenience. Furthermore, the emergence of parallel, unilateral mining routes outside the ambit of UNCLOS threatens the exclusivity of the international regime. Crucially, the maturing standard of environmental due diligence under public international law demands vigilance and scientific certainty before any activity carrying severe or irreversible ecological risk may proceed. This article evaluates the compatibility of commercial deep seabed mining with the CHM principle under Part XI of UNCLOS, focusing on the landmark 2026 filings before the ITLOS Seabed Disputes Chamber and analysing how the corporate unity problem exposes the limitations of formalistic sponsorship regimes.

Keywords: Deep Seabed Mining, Common Heritage of Mankind (CHM), Economic Unity Theory, UNCLOS Part XI

I. INTRODUCTION: DEEP SEABED MINING AT THE CONSTITUTIONAL CROSSROADS

The international legal regime that governs the seabed, ocean floor, and subsoil thereof beyond the limits of national jurisdiction, designated as the “Area” under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), stands at a pivotal regulatory and ontological

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crossroads.¹ At the very centre of this legal architecture lies the principle of the common heritage of mankind (CHM), a norm of international law codified in Part XI of UNCLOS.² This principle establishes a non-ownership commons managed collectively for the benefit of humanity as a whole, particularly prioritising the protection of the marine environment and the equitable redistribution of resources.³ However, the imminent transition from the exploratory phase to commercial exploitation has triggered a major doctrinal and systemic friction.⁴ Steered by large private corporate actors, fuelled by the procedural trigger of the “two-year rule”, and highlighted by the landmark 2026 filings before the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS), the constitutional integrity of UNCLOS has been challenged by the proposed commercial exploitation framework.⁵ Understanding these developments establishes that commercial extraction remains fundamentally incompatible with the CHM principle under the current regime.⁶ Specifically, the manipulation of the structure of sponsoring states by corporate networks (the corporate unity problem) threatens to reduce the protective and communal mandates of UNCLOS to a formalistic façade, undermining the environmental and distributive obligations of the treaty.⁷

¹ Asterios Tsioumanis, Maria Ovalle & Tomilola Akanle Eni-ibukun, *Summary of the First Part of the 30th Annual Session of the International Seabed Authority* (2025), <https://enb.iisd.org/international-seabed-authority-isa-council-30-1-summary>.

² Linlin Sun, *Common Heritage of Mankind and Protection of the Marine Environment*, in *International Environmental Obligations and Liabilities in Deep Seabed Mining* 22 (2023), <https://www.cambridge.org/core/books/international-environmental-obligations-and-liabilities-in-deep-seabed-mining/common-heritage-of-mankind-and-protection-of-the-marine-environment/48E9DE04421C168DB7918F55B9AAC98A>.

³ Sabine Christiansen et al., *Towards a Contemporary Vision for the Global Seafloor: Implementing the Common Heritage of Mankind* (2019), https://www.boell.de/sites/default/files/2019-11/Endf2%20Towards-a-Cont-Vision-f-t-Global-Seafloor_Web.pdf.

⁴ Rozemarijn J. Roland Holst, *Exploiting the Deep Seabed for the Benefit of Humankind: A Universal Ideology for Sustainable Resource Development or a False Necessity?*, 37 *Leiden Journal of International Law* 400 (2024), <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/exploiting-the-deep-seabed-for-the-benefit-of-humankind-a-universal-ideology-for-sustainable-resource-development-or-a-false-necessity/A596EDF1F210A57D3571E34A8743FFBA>.

⁵ Claire Robertson & Eran Sthoeger, *Four Key Takeaways for Deep Sea Mining from the ICJ Advisory Opinion*, *EJIL: Talk!* (Sept. 22, 2025), <https://www.ejiltalk.org/four-key-takeaways-for-deep-sea-mining-from-the-icj-advisory-opinion/>.

⁶ Zachary Douglas et al., *In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction* (2023), <https://www.pew.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf>.

⁷ María Esther Salamanca Aguado, *The “Economic Unity” Theory and the Discretionary Power of the International Seabed Authority to Deny Contract Extensions*, *EJIL: Talk!* (Feb. 12, 2026), <https://www.ejiltalk.org/the-economic-unity-theory-and-the-discretionary-power-of-the-international-seabed-authority-to-deny-contract-extensions/>.

II. DOCTRINAL PILLARS OF PART XI AND THE COMMON HERITAGE OF MANKIND (CHM)

The legal status of the Area is set out in the normative pillars of Section 2 of Part XI.⁸ Article 136 establishes the indispensable foundational rule that the Area and its resources are the common heritage of mankind.⁹ This designation is not merely a philosophical declaration but a legally binding status that governs all subsequent exploration and exploitation activities.¹⁰ This status is operationalised by Article 137(1), which provides:

No State shall claim or exercise sovereignty or sovereign rights over any part of the Area 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 recognised.¹¹

All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Seabed Authority (ISA) is entrusted with the mandate to act.¹² This structure produces a fiduciary relationship in which the ISA serves as trustee of the global commons.¹³

Under Article 140, activities in the Area must be carried out for the “benefit of mankind as a whole”, taking into particular consideration the interests and needs of developing states.¹⁴ This mandate of distributive justice requires the establishment of an equitable mechanism for sharing financial and other economic benefits.¹⁵ The CHM principle also contains an environmental custody obligation.¹⁶ Article 145 obliges the ISA to adopt rules, regulations, and procedures (RRPs) to ensure the “effective protection of the marine environment from harmful effects”.¹⁷ Article 192’s general obligation to protect and preserve the marine environment is structurally connected to this.¹⁸ Doctrinally, these pillars are intrinsically intertwined, and commercial exploitation is incompatible with the CHM principle where it causes irreversible ecological degradation or operates in the absence of a functional, equitable redistribution mechanism.¹⁹

⁸ Sun, *supra* note 2.

⁹ Douglas et al., *supra* note 6.

¹⁰ Aguado, *supra* note 7.

¹¹ Tsioumanis, Ovalle & Eni-ibukun, *supra* note 1.

¹² *Id.*

¹³ Pradeep A. Singh, Aline Jaeckel & Jeff A. Ardron, *A Pause or Moratorium for Deep Seabed Mining in the Area? The Legal Basis, Potential Pathways, and Possible Policy Implications*, 56 Ocean Development & International Law 18 (2025), <https://www.tandfonline.com/doi/pdf/10.1080/00908320.2024.2439877>.

¹⁴ Tsioumanis, Ovalle & Eni-ibukun, *supra* note 1.

¹⁵ *Id.*

¹⁶ Christiansen et al., *supra* note 3.

¹⁷ Douglas et al., *supra* note 6.

¹⁸ *Id.*

¹⁹ *Id.*

III. THE REGULATORY CRUCIBLE: THE TWO-YEAR RULE AND INSTITUTIONAL DEADLOCK

This systemic balance was disrupted when the Republic of Nauru, acting as sponsoring state for Nauru Ocean Resources Inc. (NORI), a wholly owned subsidiary of the Canada-based The Metals Company (TMC), triggered the two-year rule on 25 June 2021.²⁰ As codified in section 1, paragraph 15 of the Annex to the 1994 Implementation Agreement, this rule requires the ISA Council to complete the adoption of exploitation RRPs within two years of a request by a state party.²¹ Where the regulations are not adopted within that timeframe, the Council must consider and provisionally approve any pending application for a plan of work for exploitation.²²

Corporate actors have sought to exploit this regulatory lacuna, arguing that the two-year rule imposes a mandatory obligation on the ISA to permit commercial operations even in the absence of completed regulations.²³ However, a rigorous doctrinal interpretation of the 1994 Agreement reveals that paragraph 15 cannot be read in isolation from the rest of UNCLOS.²⁴ Because the 1994 Agreement and Part XI must be interpreted and applied together as a single instrument, any provisional approval of a plan of work for exploitation must remain consistent with the basic principles of the Convention.²⁵

These principles include the prohibition on the alienation of minerals except in accordance with the rules of the Authority (Article 137) and the mandate to ensure the effective protection of the marine environment (Article 145).²⁶ The procedural mechanism of the two-year rule cannot override the substantive, distributive obligations that constitute the core of the CHM principle.²⁷

IV. PRE-EXPLOITATION LITIGATION: CASES NO. 34 AND 35

The conflict over the transition to the exploitation phase came to a head in May and early June 2026, when ITLOS announced two new proceedings before its Seabed Disputes Chamber.²⁸ Entered as Case No. 34 (*Nauru Ocean Resources Inc. v. International Seabed Authority*) and

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Rozemarijn J. Roland Holst, *Exploiting the Deep Seabed for the Benefit of Humankind: A Universal Ideology for Sustainable Resource Development or a False Necessity?*, 37 *Leiden Journal of International Law* 400 (2024), https://www.researchgate.net/publication/376222686_Exploiting_the_deep_seabed_for_the_benefit_of_humankind_A_universal_ideology_for_sustainable_resource_development_or_a_false_necessity.

²⁴ Aguado, *supra* note 7.

²⁵ Roland Holst, *supra* note 23.

²⁶ Douglas et al., *supra* note 6.

²⁷ *Id.*

²⁸ Robertson & Sthoeger, *supra* note 5.

Case No. 35 (*Tonga Offshore Mining Ltd. v. International Seabed Authority*), these parallel claims represent the first instances of pre-exploitation litigation in the deep seabed mining sector.²⁹ The challenges arise from an ongoing compliance inquiry initiated by the ISA Council in July 2025 under Decision ISBA/30/C/19.³⁰ This inquiry examined potential non-compliance across all 21 exploration contractors.³¹ In March 2026, the Legal and Technical Commission (LTC) reported that NORI and TOML required “specific attention” regarding possible non-compliance with their contract conditions.³²

In their applications to the SDC, filed on 30 May 2026, both contractors requested provisional measures, alleging that the ISA had violated obligations relating to due process, transparency, and non-discrimination under Article 152 of UNCLOS.³³ NORI’s case focused on the imminent expiration, on 22 July 2026, of its fifteen-year contract.³⁴ NORI had applied for a five-year extension on 19 January 2026, but the application remained deferred by the LTC.³⁵ The contractor argued that the ongoing compliance inquiry was being used to delay and prejudge its extension request, creating a risk of procedural contamination.³⁶ TOML, by contrast, focused on the reputational and regulatory harm caused by the inquiry itself, arguing that its designation as a compliance risk prejudiced its standing within the ISA system before any exploitation application could be filed.³⁷

A. Procedural and jurisdictional challenges under Section 5

These filings raise critical procedural and jurisdictional questions under Section 5 of UNCLOS. First, because the compliance inquiry is an active, unfinished administrative process that has not resulted in a final decision, it is questionable whether the contractors’ complaints amount to an admissible “dispute” under Article 187 of UNCLOS. Second, the contractors bypassed the ISA Council, the executive organ that ordered the inquiry, and escalated their concerns to the SDC, a significant procedural leap that may undermine the admissibility of their claims.³⁸

²⁹ *Id.*

³⁰ Aguado, *supra* note 7.

³¹ Lily Hannah, Alberto Pecoraro & Pradeep Singh, *Case Concerning an Inquiry by the International Seabed Authority: Less a Defence of Due Process than an Attempt to Short-Circuit It?*, EJIL: Talk! (June 11, 2026), <https://www.ejiltalk.org/case-concerning-an-inquiry-by-the-international-seabed-authority-less-a-defence-of-due-process-than-an-attempt-to-short-circuit-it/>.

³² *Id.*

³³ *Id.*

³⁴ Aguado, *supra* note 7.

³⁵ *Id.*

³⁶ YINUO KANG, *Pre-Exploitation Litigation: Cases No. 34 and 35 and the Timing of Deep-Sea Mining Governance*, EJIL: Talk! (June 12, 2026), <https://www.ejiltalk.org/pre-exploitation-litigation-cases-no-34-and-35-and-the-timing-of-deep-sea-mining-governance/>.

³⁷ Aguado, *supra* note 7.

³⁸ Hannah, Pecoraro & Singh, *supra* note 31.

Articles 187 to 190 of UNCLOS insulate the ISA's discretionary regulatory functions from SDC intervention. The conduct of a compliance inquiry and the assessment of contract extensions are discretionary regulatory functions vested in the LTC and the Council. The contractors' request for provisional measures to halt the inquiry constitutes an attempt to forestall compliance scrutiny and to micromanage the ISA's internal administration.³⁹

V. THE CORPORATE UNITY PROBLEM AND THE ECONOMIC UNITY THEORY

The litigation in Cases No. 34 and 35 reveals the “corporate unity problem”, a structural challenge in which private groups seek to manipulate nationality and corporate structures in order to operate both inside and outside the UNCLOS framework.⁴⁰ Although NORI is sponsored by Nauru and TOML by Tonga, both are subsidiaries of TMC, a Canada-based mining firm. At the same time, TMC has explored other options, including a unilateral commercial pathway. In April 2025, the United States issued Executive Order 14285, authorising unilateral deep seabed mining under its domestic Deep Seabed Hard Mineral Resources Act of 1980 (DSHMRA). Through another subsidiary, TMC USA, the parent company applied for commercial recovery permits under United States law, targeting the exact geographic areas covered by NORI's exploration contract with the ISA.⁴¹

A. The multilateral versus unilateral dual-track strategy

This parallel strategy threatens the very core of the exclusive nature of the Area's multilateral regime.⁴² Operating a dual-track strategy under both UNCLOS and the competing domestic framework of a non-party state is incompatible with the obligation of good faith under Article 300 of UNCLOS.⁴³ It also violates Article 137(1)'s prohibition against unilateral appropriation and the acquisition of rights outside the multilateral framework.⁴⁴ To preserve the Convention, the ISA must apply the “economic unity” theory.⁴⁵

The theory, derived from comparative jurisprudence such as the Court of Justice of the European Union's judgment in *Sumal*, treats formal corporate separateness as non-dispositive where a parent company and its subsidiaries operate as a single economic unit.⁴⁶ Under Articles 162 and 165, the ISA possesses the discretionary authority to deny exploration contract extensions to

³⁹ Aguado, *supra* note 7.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

contractors whose parent companies act to bypass the multilateral regime, ensuring that compliance is assessed on the basis of economic reality rather than formal legal structures.⁴⁷

VI. SPONSORING STATES OF CONVENIENCE AND THE LIMITS OF SIDS OVERSIGHT

The corporate unity problem is closely tied to the concept of “effective control” under UNCLOS.⁴⁸ Article 153(2)(b) and Annex III, Article 4(3) require that private entities be sponsored by the states of their nationality.⁴⁹ Sponsoring states bear a primary obligation to ensure that sponsored contractors act in compliance with UNCLOS and related rules.⁵⁰

The ISA has traditionally adopted a formalistic, regulatory control model, treating domestic incorporation and the grant of a certificate of sponsorship as sufficient proof of control.⁵¹ This approach has enabled private companies from developed countries to use Small Island Developing States (SIDS) as “sponsoring states of convenience”.⁵²

A. Divergent paradigms of state responsibility and effective control

The discrepancy between the traditional formalistic model and a substantive economic control model manifests across several dimensions.⁵³ Under a formalistic regulatory framework, the primary focus remains on domestic incorporation and formal registration; by contrast, a substantive economic model prioritises actual corporate ownership, the source of capital, and decision-making authority.⁵⁴

i. Formalistic regulatory control versus substantive economic control

The divergence has serious ramifications for SIDS: a formalistic model reduces immediate administrative hurdles but shifts a disproportionate liability onto SIDS, whereas a substantive model mitigates the risks associated with “sponsoring states of convenience” by aligning liability with actual financial capacity.⁵⁵ Moreover, the formalistic paradigm leaves the Area

⁴⁷ *Id.*

⁴⁸ Hannah, Pecoraro & Singh, *supra* note 31.

⁴⁹ *Id.*

⁵⁰ INTERNATIONAL SEABED AUTHORITY, *Rights and Obligations of ISA and the Sponsoring State* (2023), https://www.isa.org.jm/wp-content/uploads/2023/07/DP_Rights_and_Obligations.pdf.

⁵¹ Aguado, *supra* note 7.

⁵² *Id.*

⁵³ Klaas Willaert et al., *Deep Sea Mining Partnerships with Developing States: Favourable Collaborations or Opportunistic Endeavours?*, 36 *The International Journal of Marine and Coastal Law* 199 (2021), https://brill.com/view/journals/estu/36/2/article-p199_1.xml.

⁵⁴ Aguado, *supra* note 7.

⁵⁵ Mikyla Frederick Winter, *Environmental Regulations and the Exploitation of Deep-Seabed Minerals: A New Era for the “Mining Code” of the International Seabed Authority (ISA)?* (Jan. 11, 2025) (World Maritime University), https://commons.wmu.se/cgi/viewcontent.cgi?article=3620&context=all_dissertations.

vulnerable to forum shopping and to parallel, unilateral exploitation routes, whereas the substantive model secures the exclusive authority of the ISA under Part XI.⁵⁶

Under the SDC's 2011 Advisory Opinion, sponsoring states are held to a strict standard of due diligence.⁵⁷ SIDS are thereby exposed to substantial financial liability if their sponsored entities cause environmental damage to the Area.⁵⁸ At paragraph 159 of the 2011 Opinion, the SDC warned that a proliferation of sponsoring states of convenience would undermine the uniform application of the highest standards of environmental protection and threaten the core of the CHM principle.⁵⁹ Although Nauru and Tonga concluded agreements with NORI and TOML in 2025, these agreements do not enhance their regulatory capacity.⁶⁰ Instead, they underscore the commercial pressure placed on SIDS by private contractors, reinforcing the need for an economic control standard to ensure genuine oversight.⁶¹

VII. ENVIRONMENTAL DUE DILIGENCE AND THE EVOLVING LAW OF THE SEA

Commercial exploitation's incompatibility with the CHM principle is revealed by the evolving standard of environmental due diligence under public international law.⁶² On 21 May 2024, ITLOS unanimously delivered its Advisory Opinion on climate change, clarifying the scope of states' environmental obligations under Part XII of UNCLOS.⁶³ The Tribunal confirmed that states are required to take all necessary measures to prevent, reduce, and control pollution of the marine environment from any source.⁶⁴

A. The precautionary approach and fragile ecosystems

Applying a precautionary approach, the Tribunal held that a lack of scientific certainty regarding the precise ecological consequences of an activity cannot justify delaying cost-effective measures to prevent environmental degradation.⁶⁵ Applied to deep seabed mining, these principles reveal a doctrinal deficiency in the current draft exploitation framework.⁶⁶ Scientific

⁵⁶ Aguado, *supra* note 7.

⁵⁷ Winter, *supra* note 55.

⁵⁸ ENVIRONMENTAL JUSTICE FOUNDATION, *Towards the Abyss: How the Rush to Deep-Sea Mining Threatens People and Our Planet* (2023), <https://ejfoundation.org/resources/downloads/EJF-summary-briefing-Deep-sea-Mining-2023.pdf>.

⁵⁹ Winter, *supra* note 55.

⁶⁰ TMC THE METALS COMPANY INC., *Form 8-K* (2025), https://www.sec.gov/Archives/edgar/data/1798562/000110465925056465/tm2516970d1_8k.htm.

⁶¹ Aguado, *supra* note 7.

⁶² Tajra Smajic, *Climate Change and Deep Seabed Mining: Implications of the COSIS Advisory Opinion*, 56 *Ocean Development & International Law* 415 (2025), <https://www.tandfonline.com/doi/pdf/10.1080/00908320.2025.2536544>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

research indicates that commercial extraction would cause irreversible damage, including biodiversity loss and the disruption of benthic ecosystems.⁶⁷

Under Article 194(5), states bear a specific obligation to protect and preserve rare or fragile ecosystems.⁶⁸ To satisfy the due diligence standard articulated in the 2024 Advisory Opinion, states must ensure that no exploitation is authorised until there is concrete and robust scientific evidence that such activities can be conducted without causing significant environmental harm.⁶⁹

VIII. CONCLUSION

A doctrinal analysis of Part XI of UNCLOS, the 2026 ITLOS filings, and the corporate unity problem shows that commercial exploitation under the present framework is incompatible with the common heritage of mankind principle. The 2026 filings by NORI and TOML represent a strategic attempt by private corporate networks to use procedural mechanisms and provisional measures to bypass regulatory oversight and accelerate extraction in a regulatory void.

Through a formalistic interpretation of effective control and the use of SIDS as sponsoring states of convenience, corporate groups such as TMC can bypass the multilateral protections built into Part XI. To preserve the integrity of the law of the sea, the ISA and its member states must reject this formalistic approach, apply the economic unity theory to assess compliance across corporate groups, and implement a precautionary suspension of all commercial extraction. Only by prioritising environmental due diligence and collective oversight can the deep ocean floor be managed for the benefit of humanity as a whole.

⁶⁶ Chiara Macchi, *Corporate Responsibility and Deep Seabed Mining: The Limits of Due Diligence*, 10 Business and Human Rights Journal 122 (2025), <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/corporate-responsibility-and-deep-seabed-mining-the-limits-of-due-diligence/6762B9D5D7E11273D340CA22EA7B0333>.

⁶⁷ Environmental Justice Foundation, *supra* note 58.

⁶⁸ Douglas et al., *supra* note 6.

⁶⁹ *Id.*