COMMERCIAL ARBITRATION OF DEEP SEABED MINING DISPUTES: A SURVEY ON ITS LEGAL CONTOURS

Artículo

José Enrique Pérez Montes*

Introduction 361
I. The Legal Framework of Deep Seabed Mining 363
A. *The Basic Design of the LOSC and Part XI* 363
B. *The 1994 Agreement's Modification of Part XI* 366
C. *The Principle of the Common Heritage of Humankind* 368
D. *The International Seabed Authority and the Contract's Binding Force* 370
II. The Convention's Seabed Dispute Chamber and the Limits on Commercial Arbitration 373
A. *The LOSC's Dispute Settlement Mechanisms* 373
B. *Deep Seabed Mining Contracts and the Limits on Commercial Arbitration* ... 375
C. *Applying the UNCITRAL Arbitration Rules to the Area's Special Regime* 378
Conclusion 381

Introduction

Deep seabed mining is the process of retrieving mineral deposits from the deep seabed beyond the limits of national jurisdiction for commercial purposes. Activities in the deep seabed are governed through regulations and a system of permits by the International Seabed Authority (hereinafter, ISA" or "Authority"), which is an intergovernmental organization established by the United Nations Convention on the Law of the Sea. To date, no commercial exploitation has ever taken place in it. Nevertheless, exploitation of the deep seabed has increasingly become a burning issue since the ISA had until July 9th, 2023, to finalize the exploitation regulation or the 'Mining Code'.[1] After not meeting the due date mainly due to a lack of scientific and economic assessment, by virtue of a treaty disposition, the Authority is required to begin considering and provisionally approving deep-sea mining contracts without a Mining Code.[2] Without cranking the

* Third year law student at the University of Puerto Rico Law School and Associate Editor-in-Chief of the University of Puerto Rico Law Review.

1 *WWF urges governments to stand firm against corporate pressure and defend the ocean at critical deep-sea mining meeting*, WWF (July 9, 2023), https://wwf.panda.org/wwf_news/?9243966/WWF-urges-govt-to-stand-firm-and-defend-the-ocean.

2 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Aug. 17, 1994, Section 1(15), 1836 U.N.T.S. 3 [hereinafter Implementation Agreement].

doomsday clock, we must forewarn that the consequences of exploitation without proper regulation may be drastic—to say the least—and may not become apparent until the damage is irreparable, considering that scientists estimate that as little as 1.1% of the knowledge needed to draft science-based regulations for deep seabed mining exists.[3]

Against this picture, we must turn to the fact that deep seabed minerals and resources are evermore coveted by commercial forces since modern information-driven economies rely on rare-earth elements for producing almost anything, from computer hardware to cellphones.[4] Moreover, these resources are becoming all the more inexorable to contemporary humanity at an accelerated pace with the increasing efforts of supplanting the old energy models with renewable energy.[5] For example, the minerals found at the deep seabed nodules are particularly essential for powering electronic vehicles. But the deep seabed presents an almost insurmountable barrier to humankind as much of the ocean floor remains unexplored and poorly understood; without the enactment of a science-based Mining Code, sufficient commercial interest in it may halt the development of necessary and sustainable technology for mining, which implies a slower transition towards green energy. Therefore, the success of a sustainable and instrumental-for-the-future commercial activity in the deep seabed will greatly be affected by the exact shape of the regulatory regime governing the exploitation of the Area's resources.

Ultimately, mining of the Earth's deepest waters is not a question of *if*, but of *when*. Although no Mining Code yet exists and no exploitation has officially commenced, the ISA has adopted some Regulations concerning the exploration of the deep seabed and has convened some *exploration* contracts with state and private entities.[6] Given the commerce-oriented goals of the contracting private investors and the current legal framework of the deep seabed which tilts in favor of the free markets, as we will examine below, a call demanding progress towards the exploitation stage is to be expected. In consequence, here we set out to survey the role of commercial arbitration in the deep seabed special regime, for arbitral proceedings provide key features for the development of any market: cost-effective and swift dispute settlement.[7]

Essentially, a deep seabed mining contract (be it an exploration or exploitation contract) is of a mixed nature: on the one hand, it is a commercial contract between the ISA and the contractor which implies an equal footing between the parties, and, on the other hand, it involves the exercise of administrative powers by the ISA which insinuates an un-

---

3 *WWF*, *supra* note 1.

4 *See* Paul A. J. Lusty & Bramley J. Murton, *Deep-Ocean Mineral Deposits: Metal Resources and Windows into Eart Processes*, 14 ELEMENTS 301, 304 (2018) (where it is stated that the habitats and mineral deposits most likely to be mined are: (1) polymetallic nodules from the abyssal plain, (2) the crust of submerged seamounts or mountains that do not reach the ocean surface, and (3) massive seafloor sulfide deposits often associated with hydrothermal vents).

5 *See* Andrew Johnson, *A Deep Dive into Private Governance of Deep-Sea Mining*, 24 VAND. J. ENT. & TECH. L. 595, 600 (2022). *See also* Nils Zimmermann, *Your 2030 Electric Vehicle is Parked on the Bottom of the Ocean*, DEUTSCHE WELLE (May 28, 2020), https://www.dw.com/en/your-2030-electric-vehicle-is-parked-on-the-bottom-of-the-ocean/a-53530969 (footnotes omitted).

6 *The Mining Code*, ISA (last visited Apr. 16, 2024), https://www.isa.org.jm/the-mining-code/.

7 THOMAS E. CARBONNEAU, CASES AND MATERIALS: ARBITRATION LAW AND PRACTICE 3 (2012).

equal footing.[8] This particularity entails a significant limit on the arbitrability of disputes, for depending on what role the Authority plays in the contractual relationship, disputes may be subject to "different settlement mechanisms."[9] To analyze this, "[t]he essential criterion is whether a dispute involves the exercise of administrative powers on the part of the ISA or not."[10] Generally, only when the ISA acts as a party to a contract and not an administrative organ, may the contractual disputes be arbitrable.

Furthermore, we will assess that binding commercial arbitration is ultimately limited to disputes arising from the commercial relationship between the ISA and a contractor regarding the interpretation and application of a contract. That is, a commercial arbitral tribunal has no jurisdiction to decide any question regarding the interpretation of the United Nations Convention on the Law of the Sea. If an award were to depend on such a ruling, then the question ought to be referred to a specialized international tribunal called the Seabed Disputes Chamber to deliver its judgment.

Here, we set out to elucidate the contours of commercial arbitration within seabed mining disputes to ascertain its proper role in the evolution of the deep seabed mining legal framework. To achieve this, first we will examine the legal framework regulating the common areas of the deep seabed, and second, we will scrutinize commercial arbitration as a dispute settlement mechanism according to Articles 187 and 188 of the Law of the Sea Convention. For the sake of developing a viable commercial practice in the depths of the ocean, state and private investors should carefully assess the restrictions on commercial arbitration here discussed.

I. The Legal Framework of Deep Seabed Mining

A. The Basic Design of the LOSC and Part XI

The mining of ocean floors of the high seas, or deep seabed mining, is a commercial practice broadly regulated by Part XI of the 1982 United Nations Convention on the Law of the Sea (hereinafter "LOSC" or "Convention").[11] This Convention comprises 320 articles, nine annexes and an external Implementation Agreement;[12] it represents a key advance towards the strengthening of uniformity in international affairs for it governs nearly all aspects of the Law of the Sea.[13] It directly resulted from the third United Nations Confer-

---

8 Linlin Sun, *Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective*, 18 Melb. J. Int'l L. 71, 81 (2017) (footnotes omitted).

9 *Id.* at 82.

10 *Id.*

11 *See* W. R. Edeson, *Confusion over the Use of "UNCLOS" and References to Other Recent Agreements*, 15 Int'l J. Marine & Coastal L. 413 (2000) (where the author recommends the use of "the Convention" or the "1982 UN Convention" or the "1982 Convention" instead of UNCLOS to avoid any sort of confusion since, for over two decades, "UNCLOS" was used to refer to the United Nations Conferences on the Law of the Sea).

12 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter LOSC].

13 *See* Georgios I. Zekos, *Competition or Conflict in the Dispute Settlement Mechanism of the Law of the Sea Convention*, 56 RHDI 153 (2003) ("The Convention was intended to be a comprehensive code, covering all relevant issues in a single text, and provides authoritative mechanisms for determining questions relating to the interpretation of the treaty guaranteeing the integrity of the text and to control its implementation and devel-

ence on the Law of the Sea, although intergovernmental efforts towards codifying the law of the sea stem back to the 1930 Hague Conference for the Codification of International Law.[14] The LOSC was opened for signature by both States and other entities at Montego Bay, Jamaica on December 10th, 1982,[15] and entered into force on November 16th, 1994, 12 months after the 60th instrument of ratification or accession.[16] Today, the Convention has been ratified by a total of 169 parties, making it one of the most successful international legal instruments to date.[17]

In light of its comprehensiveness, the Convention "has been heralded as a Constitution for the oceans" by its original drafters.[18] It divides the oceans and seas into nine categories: internal waters, territorial seas, archipelagic waters, the economic exclusive zone, the contiguous zone, international straits, the continental shelf, the high seas, and the deep seabed.[19] Additionally, the LOSC created two new institutions important for our purposes: the International Seabed Authority, which is an intergovernmental organization governing activities in the deep seabed and the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which has contentious and advisory jurisdiction relating to activities in the deep seabed.[20] The former functions as the administrative branch for matters regarding the deep seabed while the latter acts as its judicial branch. Furthermore, the Convention succeeded in establishing sophisticated and complex voluntary and compulsory procedures of dispute settlement as we shall discuss below. Finally, the Convention does not admit any reservations; it retains its integrity by configurating itself as a whole-package deal.[21]

In the Convention, the deep seabed is codified as the *Area*, specifically meaning "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."[22] Moreover, it defines "activities in the Area" as "all activities of exploration for, and exploitation of, the resources of the Area."[23] But it should be noted that the LOSC omitted any defi-

---

opment by States parties."); *See also* Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 Eur. J. Int'l L. 353, 370 (1996).

14 *See* Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 Am. J. Int'l L. 447 (1930).

15 United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#:~:text=The%20Convention%20was%20adopted%20by,Jamaica%2C%20on%2010%20December%201982 (last visited Apr. 16, 2024).

16 *The United Nations Convention on the Law of the Sea (A historical perspective)*, Oceans & Law of the Sea United Nations (last visited Apr. 16, 2024), https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

17 United Nations Treaty Collection, *supra* note 15.

18 *See* Mary George, *Reflections on the Teaching of 1982 the Law of Sea Convention*, *in* Legal Education and Legal Traditions: Selected Essays 3, 6 (Myint Zan ed., 2020) (footnote omitted).

19 LOSC, *supra* note 12, arts. 3, 8, 33, 34, 76, 86, 133.

20 *Id.* arts. 156, 186.

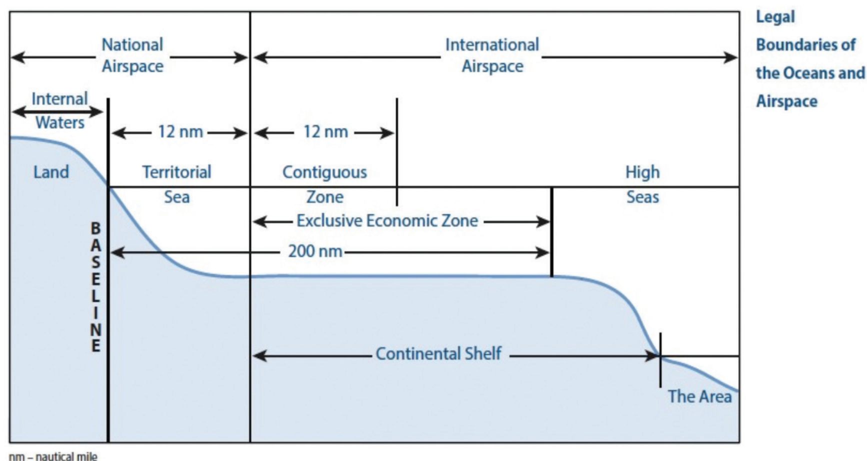
21 *Id.* art. 309.

22 *Id.* art. 1.

23 *Id. See* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 ITLOS Rep. 10, 35-37 [hereinafter 2011 ITLOS Advisory Opinion] ("These activities include [the following]: drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction,

nition of *exploration* and *exploitation*.[24] Additionally, the Convention defines *resources* as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed," referred to as *minerals* when they are recovered from the Area.[25]

Geographically, the Area comprises the whole seabed domain which is not subject to any state or private sovereignty. That is, it is the ocean space which follows the continental shelf in its legal sense, which is the zone right after the territorial sea. The following image is a schematic which includes the categories codified by the Convention:[26]



The ideological story behind Part XI usually starts with Ambassador Pardo of Malta who proposed to the First Committee of the General Assembly that the seabed and the ocean floor be declared a common heritage of [hu]mankind, not subject to national appropriation and reserved exclusively for peaceful purposes, with their resources to be used in the interests of all.[27] Ambassador Pardo's proposal eventually found its way into an official UN declaration, the 1970 *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction* (hereinafter "1970 Declaration"). This international instrument recognized the existence of the

---

operation or maintenance of installations, pipelines and other devices related to such activities," and "the evacuation of water from the minerals and the preliminary separation of material of no commercial interest." But processing and transporting as mentioned in Annex IV, art. 1(1) of LOSC are excluded from "activities in the Area.").

24 *But see, e.g.*, International Seabed Authority [ISBA], *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, at 2, ISBA/16/A/12/Rev.1 (May 7, 2010) (where *exploration* and *exploitation* are defined in the context of polymetallic sulphides).

25 LOSC, *supra* note 12, art. 133.

26 Maritime Zone Schematic (illustration), *in* Law of the Sea: A Policy Primer (2017), following p.11, https://sites.tufts.edu/lawofthesea/files/2017/07/LawoftheSeaPrimer.pdf.

27 *See* U.N. GAOR, 22nd Sess., First Committee 1515th mtg., U.N. Doc. A/C.1/PV1515 (Nov. 1, 1967). *See also* Michael W. Lodge, *The Common Heritage of Mankind*, 27 Int'l J. Marine & Coastal L. 733, 734 (2012) (footnote omitted) ("Ambassador Pardo was in many ways merely reflecting the spirit of the times in an era where there was intense interest in the materialization of common interests in common resources through global regimes.").

deep seabed and affirmed that it "shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of [hu]mankind as a whole."[28] Significantly, the 1970 Declaration in its first provision expressed that the deep seabed as well as its resources are the "common heritage of [hu]mankind."[29] Decidedly, the LOSC set out to develop the principles embodied in the 1970 Declaration as it is plainly laid out in its Preamble, where the State Parties to the Convention stated their *desire* to "develop the principles embodied in resolution 2749 (XXV) of 17 December 1970."[30]

B. The 1994 Agreement's Modification of Part XI

Although the deep seabed mining regime is set out in Part XI of the Convention and elaborated upon in Annex III, which details the application process and conditions for deep seabed mining, the legal framework is significantly modified by the 1994 Agreement on the Implementation of Part XI of LOSC (hereinafter "1994 Agreement" or "Implementation Agreement"). Article 4 of the Implementation Agreement states that "[a]fter the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement."[31] The converse is also true: "[n]o State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the Convention."[32] Moreover, the provisions of Part XI and the 1994 Agreement are to be interpreted and applied harmonically as a single instrument, but in the event of incompatibility, the latter ought to be controlling.[33] This means that the 1994 Agreement has an *erga omnes* effect once an entity has become bound to it, preventing any parallel regime of deep seabed mining.

The Implementation Agreement contains some substantive provisions which significantly steer away from Pardo's vision.[34] First, it disabled the provisions contained in Annex III, Article 5, of the Convention,[35] that is, the 1994 Agreement vetoed the mandatory transfer of technology provision of the Convention.[36] Instead, "[t]he emphasis is now put on the promotion of international co-operation with respect to the transfer of technology."[37] Second, it annulled the provisions of Article 151 and Annex III, Article 6, of the Convention concerning production limitations.[38] The LOSC's cap on production provisions

---

28 G.A. Res. 2749 (XXV), The Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (Dec. 17, 1970).

29 *Id.*

30 LOSC, *supra* note 12, Preamble.

31 Implementation Agreement, *supra* note 2, art. 4(1).

32 *Id.* art. 4(2).

33 *Id.* art. 2(1).

34 John E. Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, 40 DENV. J. INT'L & POL'Y 447, 464 (2011).

35 Implementation Agreement, *supra* note 2, Annex, Section 5.

36 L.D.M. Nelson, *The New Deep Sea-Bed Mining* Regime, 10 INT'L J. MARINE & COASTAL L. 189, 198 (1995).

37 *Id.*

38 Implementation Agreement, *supra* note 2, Annex, Section 6.

have been dismantled by the Implementation Agreement, expressing that the production policy and "[d]evelopment of the resources of the Area shall take place in accordance with sound commercial principles."[39] Finally, "[t]he [1994] Agreement has set aside the whole complex body of rules contained in the Convention relating to the financial terms of contracts. Instead it sets out a series of general principles which would in the future provide the basis of detailed rules on the matter."[40] For example, under the Convention, a private contractor was obliged to pay an annual fee of U.S. $1 million "from the date of entry into force of the contract."[41] However, under the 1994 Agreement, the "annual fixed fee shall be payable from the date of commencement of commercial production."[42] Among other dispositions,[43] it may be argued that the Implementation Agreement diverted the deep sea mining regime towards a commercially-oriented and free market path, for in the end, major concessions were made in order to accommodate the interests of industrialized countries that had yet to accept the Convention.[44]

LOSC's sharing-of-benefit feature was undoubtedly diluted by the 1994 Agreement. Importantly, regarding its major concession, the 1994 Agreement long buried the mandatory transfer of technology provision, since as Professor Shackelford argues:

> [T]echnological progress directly catalyzes the evolution of governance over the commons. Prior to the introduction of technology that would allow resources in the remote areas of the Arctic, Antarctic, the deep seabed and space to be exploited, sovereign nations were content to proceed under a CHM [common heritage of humankind] regime where "all mankind" had possession of these international commons. However, now that technology has developed to provide access to much of these resources, developed nations are no longer content to proceed under a traditional CHM model, but instead are exerting pressure to institute sovereign property rights over these territories.[45]

The emphasis on international co-operation over the concrete mandatory of technology transfer, implies that "sharing the benefits may have a cultural or scientific meaning and not necessarily a material one."[46] Although creditable, the *international co-operation*

---

39 *Id.*

40 Nelson, *supra* note 36, at 200.

41 LOSC, *supra* note 12, Annex III, art. 13(3).

42 Implementation Agreement, *supra* note 2, Annex, Section 8.

43 For an abridged summary of the modifications, *see* Michael C. Wood, *International Seabed Authority: The First four Years*, 3 Max Planck Y.B. U. N. L. 173 (1999).

44 *See* Moritaka Hayashi, *The 1994 Agreement for the Universalization of the Law of the Sea Convention*, 27 Ocean Dev. & Int'l L. 31 (1996) (footnote omitted) ("The Agreement marked the culmination of 4 years of informal consultations conducted by the secretary-general on several issues relating to the deep seabed mining provisions of the Convention that had prevented a number of states, particularly industrialized states, from ratifying or acceding to the Convention. The consultations were held with the specific aim of finding a way out of the deadlock between those states which had supported the Convention's Part XI provisions and those which had expressed serious difficulties with them.").

45 Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 Stan. Envtl. L. J. 109, 167 (2009) (emphasis added).

46 Alexandre Kiss, *Conserving the Common Heritage of Mankind*, 59 Rev. Jur. UPR 773, 776 (1990).

emphasis is in no way meaningful in accordance with the 1970 Declaration or the fundamental principles of the Convention. For if developing countries do not possess the necessary technology to access and exploit deep seabed resources, then the only benefit accrued for them will be a theoretical one.

Notwithstanding, certain developed countries remain hostile to the principles of the Convention regarding deep seabed mining regardless of all the negotiation efforts which led up to the Implementation Agreement. For example, the United States' accession to the LOSC has never been achieved.[47] The United States, under the Reagan administration, strongly objected to the legal framework governing activities in the deep seabed, for it deemed it antagonistic to free enterprise and thereby contrary to the interest of developed countries with free-market economies, reinforcing the Senate's decision to indefinitely steer away from the Convention.[48] Thus, the United States ended up enacting their own *Deep Seabed Hard Mineral Resources Act* in order to regulate the exploration and exploitation of the Area by its own citizens;[49] markedly, although no exploitation license has ever been emitted by the authorized federal agency to do so, the Act constitutes a clear challenge against the international efforts to collectively manage what is common to all mankind.

C. The Principle of the Common Heritage of Humankind

One of the key features of the LOSC is its recognition that the seabed and its natural resources are subject to the domain of the common heritage of [hu]mankind.[50] With the development of the legal framework set out in Part XI of the Convention, this recognition has been given full legal meaning as the Principle of the Common Heritage of [Hu]mankind (hereinafter "CH Principle" or "CHH"). Moreover, even though this principle had already been incorporated in various international instruments,[51] only the LOSC Part XI's inception offers its most complete formulation.

The indispensable dispositions of the CH Principle are expressed through Articles 137-141 of the Convention. To wit, Article 137 states that:

> 1. *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 ap-*

---

47 *See generally* John E. Noyes, *The Law of the Sea Convention and the United States of America*, 47 Rev. BDI 15 (2014). *See also* Shackelford, *supra* note 45, at 129 (2009) (footnote omitted) (Instead of ratifying the Convention, the "U.S. Congress has . . . passed the Deep Seabed Mining Act stating that three conditions had to be met before United States acquiescence to [LOSC]: (1) non-discriminatory access to mineral resources, (2) a legal definition to [the common heritage of [hu]mankind], and (3) environmental protection.").

48 Shackelford, *supra* note 45, at 148 (The United States' approach to the exploitation of common heritage resources is "in contradiction to the classic [CH Principle] approach and is a primary impediment to a truly *de facto* rather than *de jure* [CH Principle].").

49 Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473.

50 LOSC, *supra* note 12, art. 136.

51 *See, e.g.*, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979, 34 U.N.T.S. 68 ("The moon and its natural resources are the common heritage of mankind.").

> *propriate any part thereof*. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
>
> 2. *All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act*. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority. [52]

If the rights to the resources of the Area are vested in humankind, then the benefits derived from their exploitation ought to be shared by all. The Convention expresses its adherence to the sharing-of-benefits element when it states that "*[t]he Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area* through any appropriate mechanism, *on a non-discriminatory basis*."[53] Additionally, it reserves the Area for the *exclusive* use of "peaceful purposes."[54] That is, activities in the Area shall be linked solely to non-military commercial and scientific activities. Furthermore, the LOSC does not admit any amendments to the essential elements of the principle nor its derogation by stating that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of [hu]mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof."[55]

In sum, the CH Principle applies to the spaces and resources deemed to be common to all humankind. It is a trans-spatial and trans-temporal concept which confers legitimacy to *humankind* as an actor in the law of the sea. Conclusively, the CHH significantly diverges from the conventional principles of the freedom of the high seas and the principle of sovereignty.

Despite its transcendence, there remains no universal definition of the CH Principle among legal scholars or policymakers. Nevertheless, as set out by Scott J. Shackelford, most of its conceptions share at least five primary points, which are:

> First, there can be no private or public appropriation of the commons. Second, representatives from all nations must manage resources since a commons area is considered to belong to everyone. Third, all nations must actively share in the benefits acquired from exploitation of the resources from the common heritage region. Fourth, there can be no weaponry or military installations established in commons areas. Fifth, the commons should be preserved for the benefit of future generations.[56]

---

52 LOSC, *supra* note 12, art. 137 (emphasis added).

53 *Id.* art. 140 (emphasis added).

54 *Id.* art. 141. It should be made clear, however, that "peaceful purposes" refers to, more than anything, "non-aggression":

> Whilst this treaty prohibits the use of specified weapons in a specified environment, Article 141 of the Convention, as read with Article 301, is generally understood as prohibiting the use of the seabed for aggressive activities in the sense of Article 2 of the UN Charter rather than a complete prohibition on all military activities.

Michael W. Lodge, *supra* note 27, at 736 (footnote omitted).

55 LOSC, *supra* note 12, art. 311(6).

56 Shackelford, *supra* note 45, at 111 (footnotes omitted). *Cf.* Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, *supra* note 34, at 450-51 (Features often associated with the common heritage principle

Moreover, although the 1994 Agreement's modifications did not change the Area's legal status as the common heritage of humankind, leaving the traditional elements of the CH Principle in place,[57] it "changed the [CH Principle] into a market-based concept fully compatible with private economic activity."[58] By abolishing the mandatory transfer of technology in aid of developing countries and the production limit, the Implementation Agreement clearly endeavors towards the free-market economy, prioritizing commercialization over the CH Principle's other elements.[59] The benefit-sharing element of the CH Principle steers towards the *redistribution* of the Area's resources among private actors and state economies rather than in benefit of humankind as a whole.[60]

D. *The International Seabed Authority and the Contract's Binding Force*

The International Seabed Authority is the autonomous international organization charged with overseeing and administering the exploration and exploitation of mineral resources and all other 'activities' in the deep seabed of the Area on behalf of the international community. The ISA is established in Article 156 of the LOSC, providing for a compulsory membership to it of all State Parties to the Convention,[61] but did not come into existence until 1994 when the LOSC entered into force. It comprises three principal administrative organs: an Assembly, a Council, and a Secretariat. It also features an operational organ: the Enterprise, which has yet to commence any operation.[62] The Assembly, which consists of all the members of the Authority, is the supreme organ of the Authority and it is entitled to establish general policies on any matter within the competence of the Authority. Meanwhile, the Council is the executive organ of the ISA, and the Secretariat is its administrative muscle.

On the one hand, the ISA's jurisdiction is strictly limited to the seabed and subsoil of the Area (limitation *ratione loci*), i.e., its jurisdiction shall not "affect the legal status of the waters superjacent to the Area or that of the air space above those waters."[63] On the other hand, the Authority's jurisdiction is limited to matters regarding the overseeing and

---

are: "[1] a prohibition of acquisition of, or exercise of sovereignty over, the area or resources in question; [2] the vesting of rights to the resources in question in humankind as a whole; [3] reservation of the area in question for peaceful purposes; [4] protection of the natural environment; [5] an equitable sharing of benefits associated with the exploitation of the resources in question, paying particular attention to the interests and needs of developing states; and [6] governance via a common management regime.").

57 Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, *supra* note 34, at 464-465 (footnote omitted).

58 Shackelford, *supra* note 45, at 128 (footnote omitted).

59 *See* Aline L. Jaeckel, The International Seabed Authority and the Precautionary Principle 82 (2017) (footnote omitted); *See also* Ram Prakash Anand, Studies in International Law and History: An Asian Perspective 180-81 (2004).

60 *See* Lakshman Guruswamy, *International Environmental Law: Boundaries, Landmarks, and Realities*, 10 Nat. Res. & Env't 43, 48 (1995).

61 LOSC, *supra* note 12, art. 156.

62 *Organs of the International Seabed Authority*, ISA, https://www.isa.org.jm/organs/ (last visited Apr. 3, 2024). *See* Edwin Egede et al., A Study Related to Issues on the Operationalization of the Enterprise (2019) (where the legal, technical and financial implication of operationalizing the Enterprise are discussed).

63 LOSC, *supra* note 12, art. 135.

administration of the 'activities in the Area' (limitation *ratione materiae*), i.e., "[t]he powers and functions of the Authority shall be those expressly conferred upon it by [LOSC]."[64] It is noteworthy that, in its *ratione materiae* jurisdiction, the ISA has both legislative *and* enforcement authority over the Area. As such, the ISA is responsible for regulating the Area *and* ensuring compliance with its regulations.[65] Plainly, no State, juridical, or natural entity may engage in activities in the Area without submitting unto the Authority's jurisdiction.

To date, the ISA has issued three sets of regulations relating to exploration for three particular minerals (nodules, sulfides and cobalt-rich crusts), together with some environmental guidelines.[66] Notwithstanding, a complete elaboration and adoption of regulations for the exploitation of seabed minerals in the Area—what is commonly referred to as a "Mining Code"—is still lacking.[67] As of February 2024, the ISA holds 31 exploration contracts with a total of 22 contractors, 4 of which are state entities while the rest are private entities.[68]

According to Article 153 of the Convention, exploration and exploitation activities in the deep seabed can be carried out by private actors.[69] However, they must comply with two baseline requirements: first, they must be either nationals of a State Party or effectively controlled by it or its nationals; second, they must be sponsored by such states.[70] "The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention . . . are complied with by entities that are subjects of domestic legal systems."[71] In this way—and since only the State Parties are subject to the LOSC's dispositions—State Parties "shall assist the Authority," and "[contribute] to the realization of the

---

64 *Id.* art. 157(2).

65 *See Id.* Annex III, art. 17(1) ("The Authority shall adopt and uniformly apply rules, regulations and procedures in accordance with article 160, paragraph 2(f)(ii), and article 162, paragraph 2(o)(ii), for the exercise of its functions as set forth in Part XI."). Likewise:

> The Authority shall have the right to take at any time any measures provided for under this Part to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract. The Authority shall have the right to inspect all installations in the Area used in connection with activities in the Area.

Id. art. 153(5).

66 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (13 July 2000, amended in 2013) ISBA/19/LTC/8; Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (7 May 2010) ISBA/16/A/12; Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area (27 July 2012) ISBA/18/A/11; Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts arising from Exploration for Marine Minerals in the Area (1 March 2013) ISBA/19/LTC/8 [hereinafter collectively "ISA Exploration Regulations"].

67 *See* Pradeep Singh, *A "Deadline" Expires: Quo Vadis, International Seabed Authority?*, RIFS (2023) (where the author examines the political reality in which the ISA finds itself following the expiry of the "two-year rule" deadline on July 9, 2023, after in mid-2021 the Republic of Nauru invoked the compulsory procedure of Section 1, paragraph 15 of the 1994 Implementation Agreement which imposed on the ISA the duty of completely elaborating and adopting its "Mining Code.").

68 *Exploration Contracts*, ISA, https://www.isa.org.jm/exploration-contracts/ (last visited Apr. 16, 2024).

69 LOSC, *supra* note 12, art. 153(2)(b).

70 *Id.*

71 2011 ITLOS Advisory Opinion, *supra* note 23, at 32, ¶ 75.

common interest of all States in the proper application of the principle of the common heritage of [hu]mankind" by complying with all the obligations set forth in Part XI.[72] By extension, the sponsored private actors ought to comply with Part XI's responsibilities and obligations, and conduct their business in accordance with the "principle of the common heritage of [hu]mankind."[73]

Chiefly, this is achieved by virtue of the exploration or exploitation contract, for the contractor becomes *directly* bound to various international legal obligations concerning deep seabed mining through the standard clauses, which incorporate the substance of the Convention's provisions regarding the Area and the regulations set forth by ISA into the contractual agreement.[74]

To illustrate this, let us look at the Seabed Disputes Chamber's first judicial act, the Advisory Opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. Here, the Chamber discussed at length the responsibilities of States when they sponsor activities in the deep seabed beyond national jurisdiction. In the Advisory Opinion, the Chamber stated that sponsoring States have an obligation 'to ensure' the compliance of its sponsored contractors with the Convention and the ISA's regulations.[75] This means that, to escape liability, sponsoring States must adopt the appropriate domestic laws and regulations and take administrative measures which are reasonably suitable for ensuring compliance.[76] Accordingly, the Chamber delineated specific obligations which factor into the appropriate due diligence required for the State to satisfy its obligation 'to ensure'.[77] Among these, the Chamber stated that both

---

72 *Id.* at 33, ¶ 76.

73 The LOSC stipulates there are penalties for noncompliance:

> 1. A contractor's rights under the contract may be suspended or terminated only in the following cases: (a) if, in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and willful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority; or (b) if the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him.

LOSC, *supra* note 12, Annex III, art. 18.

74 Markos Karavias, Corporate Obligations under International Law 124 (2013) (footnote omitted).

75 The Chamber stated the following:

> The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.

2011 ITLOS Advisory Opinion, *supra* note 23, at 41, ¶ 110.

76 LOSC, *supra* note 12, Annex III, art. 4(4).

77 The Chamber mentioned the following:

> Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority 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 Authority 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.

2011 ITLOS Advisory Opinion, *supra* note 23, at 44, ¶ 122.

the ISA and the sponsoring States ought to adopt the precautionary principle or approach reflected in Principle 15 of the 1992 Rio Declaration on Environment and Development, which expresses that "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[78]

Correspondingly, the Sulphides Regulation, in setting out a standard clause for exploration contracts, provides that "[t]he Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and [the] best environmental practices."[79] This standard clause mirrors the Principle 15 of the Rio Declaration, thus, transforming the non-binding principle into a binding contractual obligation between the ISA and the sponsored party.[80] Therefore, even though a private actor may not be an international agent, it is vested with similar responsibilities and obligations towards the deep seabed. The illustrated contractual clause presents a dilemma to the arbitrator which may have to resolve a contractual dispute between a private contractor and the ISA, for it hinges between what is arbitrable and that which is not, as we explore below.

II. The Convention's Seabed Dispute Chamber and the Limits on Commercial Arbitration

A. *The LOSC's Dispute Settlement Mechanisms*

To preserve its interpretative integrity, the Convention establishes unique procedures for international dispute settlement. The LOSC devotes Part XV to the settlement of disputes; this part encompasses general principles and prophylactic conciliatory methods, and voluntary and compulsory procedures for dispute settlement regarding controversies arising out of any provision of the Convention.[81] Additionally, dispute settlement procedures are also embodied in Annex V (Conciliation), Annex VI (International Tribunal for the Law of the Sea), Annex VII (Arbitration), and Annex VIII (Special Arbitration).[82] Pertinently, Section 5 of Part XI encapsulates the special regime for resolving conflicts related to activities in the Area.[83]

---

78 *Id.* at 45, ¶¶ 126-27 (*citing* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992)). *See* Duncan 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*, 26 Int'l J. Marine & Coastal L. 525 (2011) (where the author argues how the Advisory Opinion makes way towards a strengthened legal framework on sustainable development).

79 Int'l Seabed Auth. [ISA], *Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area*, Annex IV, § 5.1, ISBA/18/A/11 (Jul. 27, 2012).

80 2011 ITLOS Advisory Opinion, *supra* note 23, at 45, ¶ 125.

81 LOSC, *supra* note 12, arts. 279-85.

82 *Id.* Annexes V-VIII.

83 *Id.* pt. XI, § 5, arts. 186-90.

Articles 279 and 280 of Part XV set out two general principles governing international dispute settlement which overall apply to Part XI disputes.[84] First, the principle of peaceful settlement of international disputes mandates the peaceful resolution of any dispute involving the interpretation or application of the Convention.[85] Second, the principle of free choice of means in dispute settlement upholds the right of any State parties to agree at any time to settle a dispute between them concerning the interpretation or application of the Convention.[86] In other words, parties to the Convention are at liberty to select any means they prefer to peacefully resolve disputes. Compulsory mechanisms come into play only when, and if, parties are unable to independently resolve a conflict through their chosen means.[87]

In Section 5 of Part XI of the Convention, a specialized dispute settlement regime is outlined, specifically designed to address the unique characteristics of the Area and its resources.[88] Namely, for matters involving the Area, the compulsory and voluntary mechanisms are provided by Part XI and not by Part XV.[89] Moreover, Part XI's Article 186 establishes the Seabed Disputes Chamber (hereinafter "SDC"), which is a court with conflict-resolving and advisory faculties over matters of the Area.[90] The SDC has jurisdiction over the disputes which are specifically provided by the Convention.[91]

In sum, there are at least five clear dispute resolution pathways under Part XI:

> (a) [D]isputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto; (b) disputes between a State Party and the Authority concerning: (i) acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power; (c) disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning: (i) the interpretation or application of a relevant contract or a plan of work; or (ii) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests; (d) disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the

---

84 *Id.* art. 285 ("This section applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part. If an entity other than a State Party is a party to such a dispute, this section applies *mutatis mutandis*." (emphasis added)).

85 *Id.* art. 279.

86 *Id.* art. 280.

87 *See* Zekos, *supra* note 13, at 157.

88 LOSC, *supra* note 12, arts. 186-91.

89 *Id.*

90 *Id.* art. 186.

91 *Id.* art. 187.

> refusal of a contract or a legal issue arising in the negotiation of the contract, and (e) disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22.[92]

Furthermore, Article 187 declares, in an open-ended manner, that the SDC shall have jurisdiction over "any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention."[93]

B. Deep Seabed Mining Contracts and the Limits on Commercial Arbitration

Here, the pathway which most interests us is the third one, specifically the disputes between parties to a mining contract respecting the interpretation or application of a relevant contract or plan of work. That is, here we are not concerned with disputes arising out of the acts or omissions of a party to the contract relating to activities in the Area and directly affecting the legitimate interests of the other party, for these disputes are not necessarily contractual in nature. To that end, Article 187 states that the SDC shall have jurisdiction over the following:

> (c) [D]isputes *between parties to a contract*, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), *concerning*: (i) *the interpretation or application of a relevant contract or a plan of work*.[94]

To wit, the general rule is that the SDC has jurisdiction over any controversy arising out of the interpretation or application of a contract between State Parties, the ISA, the Enterprise, state enterprises and state-sponsored natural or juridical persons. But the SDC does not have exclusive jurisdiction over the highlighted pathway, since Article 188(2)(a) anticipates that parties may agree to submit the contractual disputes laid out in Article 187(c)(i) to binding commercial arbitration.[95] Specifically, the LOSC states that: "[d]isputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree."[96] That is, any dispute between parties to a contract, being States Parties, the Authority, state enterprises, and natural or juridical persons regarding the interpretation or application of a relevant contract or a plan of work may be submitted to binding commercial arbitration through either the enforcement of an arbitration clause inserted in the exploration or exploitation contract, or at the request of any party to the dispute, presumably following the emergence of the issue.

---

92 *Id.*

93 *Id.* art. 187(f).

94 *Id.* art. 187(c)(i) (emphasis added).

95 *Id.* art. 188(2)(a).

96 *Id.*

The introduction of a commercial arbitration mechanism by the LOSC to resolve disputes of this nature stems from the characterization of mining contracts, both exploratory and exploitative, as commercial contracts.[97] As Sun explains, this may be understood from Article 188(2)(c) where the *UNCITRAL Arbitration Rules* (hereinafter "UNCITRAL Rules") "are prescribed as the default commercial arbitration procedure".[98] The latest Resolution adopted by the General Assembly concerning the UNCITRAL Rules reminds us that these serve to further the harmonization of the law of international trade, that is, the UNCITRAL Rules are tailored for the settlement of disputes arising in the context of international commercial relations.[99] Ultimately, in the context of this commercial relationship, the ISA and the contractor are "on an equal footing, just as parties to a contract in the field of international trade law."[100]

Notwithstanding the equal footing in the commercial relationship, there is a looming aspect of the nature of the deep seabed mining contracts which affects the contractor-ISA relationship. As we have already examined above, the mining contract also requires an administrative relationship between the ISA as a regulator of the activities in the Area and the private contractor. Forcefully, "[t]his relationship is on an unequal footing because it involves the [unilateral] exercise of administrative powers by the ISA."[101] Section 4 of the LOSC grants the Authority of broad administrative powers, which in turn are incorporated into the mining contracts.[102] For example, "[the ISA has the power to] issue emergency orders, which may include orders for the suspension or adjustment of operations."[103] The contractor, as expressed by the standard clauses in the *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, "shall comply with emergency orders issued by the Council and immediate measures of a temporary nature issued by the Secretary-General . . . which may include orders to the Contractor to immediately suspend or adjust any activities in the exploration area."[104] Disputes arising out of this administrative relationship shall not be subject to commercial arbitration; rather, pursuant to Article 187(c)(ii), they shall be subject to the exclusive jurisdiction of the SDC.[105]

As illustrated, mining contracts possess a mixed nature and dispute resolution mechanisms hinge on precisely which of its natures is at stake. If commercial arbitration is permitted solely when disputes between parties arise from the interpretation or application of a mining contract or plan of work—i.e., when conflicts emerge between the ISA and the contractor regarding their commercial relationship—how do we distinguish a commercial

---

97 Sun, *supra* note 8, at 81 (discussing mechanisms for settlement of disputes over the implementation of contracts).

98 *Id.*; *see* LOSC, *supra* note 12, art.188(2)(c).

99 G.A. Res. 76/108 (Dec. 17, 2021).

100 Sun, *supra* note 8, at 81.

101 *Id.*

102 LOSC, *supra* note 12, arts. 156-85.

103 *Id.* art. 162(2)(w).

104 Int'l Seabed Auth. Assembly, *Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, at sec. 6.3, ISBA/16/A/12/REV.1 (Nov. 15, 2010).

105 LOSC, *supra* note 12, art. 187.

relationship from an administrative relationship? To this already intricate relationship, we must add a third element: the sponsor State. Let us recall that, for a private natural o juridical person to convene with the ISA for performing deep seabed mining activities, the person must first obtain sponsorship from a State.[106] Only then will the private actor be able to apply to the Authority seeking to conduct either exploration or exploitation activities. The application takes the form of a work plan which may be approved by the ISA upon the recommendation of the Legal and Technical Commission.[107] Once approved, the plan becomes a contract or license between the Authority and the private entity. Thus, private actors must form a dual relationship: on the one hand they must seek state sponsorship, while on the other hand, they must contract with the ISA to undertake any kind of operation in the Area. Now, it is significant that the LOSC contains no dispute resolution mechanism for sponsoring state-sponsored party disputes. It may be argued that the SDC's jurisdiction should not extend to the sponsoring state-sponsored party relationship because it is fundamentally domestic in character.

Furthermore, the LOSC delineates an important limit to the arbitration of a dispute concerning the interpretation or application of a relevant contract or a plan of work by stating that "[a] commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of this Convention."[108] Expressly, the commercial arbitral tribunal only has jurisdiction to decide disputes regarding the interpretation and application of a *contract* or *plan of work*, but not to decide disputes which require the elucidation of the LOSC. When a single dispute requires dual investigative approaches, the question relating to the interpretation of the Convention "shall be referred to the [SDC] for a ruling."[109] Accordingly, if in the beginning or during the course of the commercial arbitration either party, to the dispute or the tribunal, determines that the decision depends upon an SDC ruling, the arbitral tribunal shall refer the question to it at the request of either party or *proprio motu*, and then proceed to render its award in conformity with such ruling.[110] Thus, if a legal question arises before or after the commencement of the arbitral proceedings, which requires the interpretation of the Convention, the arbitral tribunal must suspend its process.[111]

This may be an important limit that the parties may want to consider since the referral may come at the cost of time. Arbitration is generally desirable because it is a less expensive and a less time-consuming process, making it the ideal conflict-resolution procedure for commercial activity, but in deep seabed activities, commercial arbitration may prove to be wanting. Commercial arbitration may only be used for resolving contractual matters, and never for questions hinging on the LOSC's interpretation. It may be argued that

---

106 *Id.* art. 153(2)(b).

107 *Id.* art 153(3).

108 *Id.* art. 188(2)(a).

109 *Id.*

110 *Id.* art. 188(2)(b).

111 *Id.* art. 188(2). *See also Id.* Annex III, art. 13(15) (establishing, that a contractor may submit to binding commercial arbitration any dispute over the interpretation or application of the financial terms of a contract between the party and the Authority).

underlying this limit are two fundamental axioms: first, the SDC is considered the only expert on the Convention, and second, a uniform interpretative body is preferred over a proliferation of interpretations over different forums.

For example, any dispute touching upon the provisions of the LOSC which define and mandate the application of the CH Principle unto the Area are to be resolved by the SDC. This is desirable since the modifications of the 1994 Agreement left more questions than answers regarding the nature and application of the CHH. It is unclear how the Implementation Agreement's focus on commercial activity and 'redistribution' of the Area's resources is to be balanced with the non-derogable central tenet of the CH Principle; that is, the Area belongs to all and, if exploited, should be done so for the benefit of all. Legal disputes which address the sustainability of commercial activity of the Area and how it should be rationally and reasonably exploited—an important question considering that the Implementation Agreement abolished the cap on production—is a question better left to the SDC, a body capable of declaring uniform and universal guidelines for the exploitation of the deep seabed.

Thus, the limit on commercial arbitration poses a question of balance: how much of the deep seabed mining activities ought to be arbitrable if the legal framework of the Area and its underlying CH Principle must evolve towards conditioning an environmentally coherent and sustainable commercial activity? Consistently, an arbitral tribunal should refer any dispute hinging on the interpretation of the CH Principle to the SDC. In this sense, the limit on commercial arbitration of Article 188(2) is akin to the traditional 'public policy exception to arbitration', which means that certain subject-matters are inarbitrable because the interest of the public weighs heavily.[112] For instance, consider the standard clause of exploration contracts of the Sulphides Regulation we examined earlier, which states that: "[t]he Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and best environmental practices."[113] If a controversy were to arise out of the violation of this clause, the arbitrators should consider if the nature of this violation calls upon an interpretation of the precautionary approach and best environmental practices implied in the Convention. If the violation calls upon such interpretative assessment, the arbitral tribunal must refer the dispute to the SDC for a ruling before granting any sort of award.

C. *Applying the UNCITRAL Arbitration Rules to the Area's Special Regime*

The Convention states that the standard rules for a commercial arbitration ought to be the *UNCITRAL Arbitration Rules*.[114] These were initially adopted in 1976 by the United Nations Commission on International Trade Law for the settlement of a broad range of dis-

---

112 Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 515 (1988) ("Public policy can be raised by a party to an international contract containing an arbitration clause either as an objection to enforcement of the contract in its entirety or the arbitration clause specifically.").

113 Int'l Seabed Auth. Assembly, *supra* note 104, Annex IV, sec. 5.1.

114 LOSC, *supra* note 12, art. 188(2).

putes, "including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions."[115] But these rules may be varied either by the parties to the contract in the arbitration clause or by the ISA's regulations.[116] The LOSC expressly authorizes the ISA to prescribe other arbitration rules, regulations and procedures as it sees fit, which may also be varied by the parties to the contract if they so desire.[117]

Here, it is of significance to point out that the UNCITRAL Rules deviate from the general principle of dispute resolution conveyed in Article 279 of the Convention, which aims at the peaceful resolution of conflicts involving the interpretation or application of the LOSC as we examined above.[118] The principle of peaceful settlement of disputes aligns ideally with controversies between state parties and international entities, but not between private actors or between international entities and private actors encompassing commercial practices. In the context of commercial relationships, the UNCITRAL Rules' ultimate purpose is to deliver results in a speedy manner, providing a "fair and efficient process for resolving the parties' dispute."[119]

Remarkably, the ISA Regulations on Prospecting and Exploration and the Exploitation Regulations Draft do not include an arbitration clause within their Standard Clauses for Contracts. In fact, none of the ISA Regulations include an arbitration clause under their settlement of disputes clause. They all use the same language, *viz.*, disputes between the parties concerning the interpretation or application of the contract shall be settled according to Part XI, Section 5, of the Convention.[120] Given that this is a generality, it is expected that parties may want to select binding commercial arbitration to resolve any contractual dispute instead of submitting such matters to the SDC. To that end, the UNCITRAL Rules provide the following model arbitration clause:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.
>
> Note. Parties should consider adding:

---

115 United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last visited Apr. 16, 2024).

116 LOSC, *supra* note 12, art. 188(2).

117 The LOSC states that:

> In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree.

Id. But see Sun, *supra* note 8, at 75 n.20 ("However, since the entry into force of the *Convention* in 1994, the 1976 *UNCITRAL Arbitration Rules* have been revised twice (in 2010 and 2013). This raises the question: which version of the *Rules* should be applied?").

118 LOSC, *supra* note 12, art. 279.

119 G.A. Res. 76/108, art. 17 (Dec. 9, 2021).

120 *See, e.g.*, Int'l Seabed Authority [ISBA], *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, at 46, ISBA/19/C/WP.1 (Apr. 17, 2013).

(a) The appointing authority shall be . . . [name of institution or person];
(b) The number of arbitrators shall be . . . [one or three];
(c) The place of arbitration shall be . . . [town and country];
(d) The language to be used in the arbitral proceedings shall be.[121]

Now, while one of the most alluring features of commercial arbitration is its confidentiality, meaning that the parties need not worry about non-disputing party intervention, Part XI's special regime makes an exception to this tenet. Specifically, Article 190 of the LOSC states that "[i]f a natural or juridical person is a party to a dispute referred to in article 187, the sponsoring State shall be given notice thereof and shall have the right to participate in the proceedings by submitting written or oral statements."[122] That is, if a private actor were to become a party to a commercial arbitration as described above, then the sponsoring State would gain a right to intervene in the proceedings. This is yet another element which makes Part XI's dispute settlement mechanisms unique, for the UNCITRAL Rules do not convey such language, rather they state that "[t]he arbitral tribunal *may*, at the request of any party, *allow* one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement."[123]

Additionally, although Article 23 of the UNCITRAL Arbitration Rules incorporate the *kompetenz-kompetenz* doctrine, which grants the arbitral tribunal with the authority "to decide on its own authority to rule" when confronted with a jurisdictional challenge,[124] by stating that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction."[125] As we examined earlier, the arbitral tribunal must refer any dispute involving the interpretation of the Convention to the SDC. Article 188 of the LOSC makes any such disputes inexorably barred to commercial arbitration by employing the word *shall* instead of *may* if the arbitral tribunal determines that such is the case.[126] Adequately, Article 23 of the UNCITRAL Rules states that the "arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court,"[127] must equally be tempered to the Convention's disclosure that only after the SDC's ruling shall the arbitral tribunal proceed to render its award in conformity with it.[128]

Therefore, although parties may want to arbitrate contractual disputes given its celerity and efficiency rather than submitting them to the Seabed Disputes Chamber, private contractors should be aware of the limits here highlighted which make the Area a specially regulated regime. Any variation on the arbitration rules is expected to yield the same re-

121 G.A. Res. 76/108, at 30 (Dec. 9, 2021).

122 LOSC, *supra* note 12, art. 190(1).

123 G.A. Res. 76/108, art. 17 (Dec. 9, 2021) (emphasis added); *see also* G.A. Res. 76/108, art. 4 (Dec. 9, 2021) ("After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ('third person(s)'), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.").

124 Carbonneau, *supra* note 7, at 31.

125 G.A. Res. 76/108, at 17 (Dec. 9, 2021).

126 LOSC, *supra* note 12, art. 190.

127 G.A. Res. 76/108, at 18 (Dec. 9, 2021).

128 LOSC, *supra* note 12, art. 188.

sults as to the limits here examined, for they are 'statutory limits' which restrict the arbitrability of disputes as such.

Conclusion

In sum, the private contractor lies in the middle of three marked relationships: (1) the sponsoring state-sponsored party relationship; (2) the commercial relationship between the contractor and the ISA, and (3) the administrative relationship between the contractor and the ISA. Considering the 1994 Agreement changed the outlook of the CH Principle, diluting it into a market-based concept compatible with the free market economies of industrialized countries, once commercial activity begins in the deep seabed, jurists may need to address the question here posited: if commercial arbitration is permitted solely when conflicts emerge between the ISA and the contractor regarding their commercial relationship, then how do we distinguish the commercial relationship from the administrative one? In turn, it may be argued that ultimately this question hinges on the conceptual configuration of the CH Principle: how much will the *interest of humankind* weigh on the limits of deep seabed mining commercial activity and the parameters of reasonable production? Here, we can safely assume that the greater the weight of the 'interest of humankind' on the deep seabed, the less arbitrable controversies will become.

The deep seabed is framed by a special legal regime which has its clear effects on the arbitrability of disputes and on the commercial arbitration process itself. Article 188 of the Convention limits commercial arbitration to disputes regarding the application or interpretation of a contract or plan of work between the ISA and the state or private entity. That is, binding commercial arbitration is only possible for disputes arising out of the commercial relationship between the ISA and the private contractor, but not their administrative relationship. In this way, the LOSC safeguards the uniformity of the evolution of the CH Principle and the deep seabed legal regime in general. The Convention creates a special adjudicatory body to decide questions on the matter, the Seabed Disputes Chamber.

Nonetheless, when deep seabed mining eventually becomes legally and commercially viable, the environmental protectionist element of the CH Principle ought to be balanced with the commercially-oriented redistribution element envisioned in the 1994 Agreement. The abolition of the technology transfer mandate and the cap on production undoubtedly steers the seabed legal framework towards the interests of the free-market economy. But as we have already stated above, regardless of the 1994 Agreement's modifications, a commercial arbitral tribunal has no jurisdiction to decide a question on the interpretation of the Convention. Therefore, although a private contractor may become directly bound to the CH Principle's tenets and other international legal obligations through its contract, binding commercial arbitration may not be an available alternate dispute resolution mechanism to resolve a question concerning a violation of the former.

We expect the SDC to be bombarded with legal questions concerning the balance between the conservation and redistribution of the Area's resources and the sustainability and reasonability of unhinged exploitation. Although these issues may not warrant commercial arbitration, one thing is certain: binding commercial arbitration may prove to be a useful tool for expeditious conflict resolution between the ISA and the contracting

parties regarding issues of application or interpretation of a contract or its financial terms. In the end, we may not know the real contours of what is commercially arbitrable between a private contractor and the ISA since distinguishing the commercial from the administrative relationship has proven to be a difficult task, but nevertheless, we can safely assert that commercial arbitration may prove to be a powerful tool for swift conflict-resolution in instances where prompt damage-mitigation is of essence.