



SIGNING IT AWAY:  
IMPLICATIONS OF UNCITRAL  
ENFORCEMENT OF TOML RIGHTS  
UNDER THE SPONSORSHIP AGREEMENT



Prepared by Dr Jane Kelsey  
Professor Emeritus, University of Auckland, Aotearoa New Zealand

# **IMPLICATIONS OF UNCITRAL ENFORCEMENT OF TOML RIGHTS UNDER THE SPONSORSHIP AGREEMENT**

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## INTRODUCTION

Deep sea mining is a new and untested premise, one that attracts considerable risks both to the oceans and countries supporting such activities. As we can see from the commercial agreement being entered into, countries are also exposing themselves to the risks of international arbitration in pro-investor courts that can challenge the sovereign decision-making space of governments, shrinking their ability to shape and influence the actions of investors or new mining activities.

This memorandum examines the implications for the Kingdom of Tonga of the investor rights conferred on the Tonga Offshore Mining Ltd (TOML) in the Sponsorship Agreement, rights that are enforceable through arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Rules, with Singapore as the seat of arbitration and as the prevailing law.

## JURISDICTION

Clause 27.1 says the law of Singapore is the governing law and general principles of customary international law apply only to the extent they do not contradict provisions in the Agreement or reduce the rights of TOML under the Agreement.

Under Clause 25.4, the Kingdom of Tonga consents in advance to disputes being resolved through international arbitration under the UNCITRAL Rules, which excludes the jurisdiction of Tongan courts to adjudicate matters under the Agreement. Any variation to the Sponsorship Agreement in relation to dispute settlement requires mutual consent.

Clause 10.1 also disapplies Tongan law to TOML in situations where the domestic law conflicts with TOML's rights under the Sponsorship Agreement. Only the Seabed Minerals Act 2020 prevails where there is a conflict. That is limited to the Act at the time the Sponsorship Agreement is signed. Other provisions in the Agreement would prevent amendments to that Act if they impact adversely on TOML's rights.

Taken together, these provisions effectively grant TOML a permanent waiver from the sovereign authority of the Kingdom of Tonga aside from the existing Act.

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## ANALOGY WITH BILATERAL INVESTMENT TREATIES

The Sponsorship Agreement imports controversial investor protection provisions and investor-state dispute settlement (ISDS) commonly found in bilateral investment treaties (BITs).

These investor rights and arbitration processes belong to the genre of “old generation” BITs. Those are blunt instruments that guarantee extensive investor rights with few (or in this case no) exceptions. Those rights are enforceable extraterritorially through ad hoc private arbitration that lacks fundamental elements of a public legal system:

- The key investor rights provisions in the Sponsorship Agreement are broadly worded and therefore rely on the arbitrators' interpretation and application to the facts of a particular dispute. Arbitration under the UNCITRAL Rules does not have a formal system of precedent, which means that interpretations vary according to the arbitrators hearing the dispute. Nor is there any formal appeal. States therefore cannot predict how an ISDS tribunal will interpret a provision.
- The arbitrators are generally drawn from the legal profession and academia. A number of frequently appointed arbitrators have been criticised as having conflicts

of interest, for example also acting as counsel for investors in disputes. The UNCITRAL Arbitration Rules have no provision relating to conflicts of interest.

- The potential for pro-investor bias is reinforced by Clause 27.1 which says the Sponsorship Agreement overrides general principles of international law (including customary international law) if applying those general principles might reduce TOML's rights under the Agreement. Clause 10.12 also requires that any inconsistency between provisions in the Agreement in relation to expropriation must be interpreted in the way most favourable to TOML.
- Tribunals rarely allow counter-claims or recognition of the investor's contributory fault, either in assessing the state's action or the level of damages, unless that is explicit in the agreement. Similarly, any exceptions, for example for environmental protection or balance of payments crises, need to be explicit and are narrowly interpreted. This Agreement does not contain any such provisions.
- There is no set formula for calculating compensation or damages for a breach of rights under the Agreement. Arbitral awards commonly include an investor's projected loss of future profits (which is necessarily speculative), with compound interest, and at times punitive damages. Damages can be extremely high and potentially crippling for a small island developing state such as Tonga.
- The submission of amicus curiae briefs by Tongan civil society would require the consent of the arbitrators and would be very limited in scope.
- There is no guarantee Tonga would recover all its legal and related costs where it successfully defends a claim, and it would have to pay significant legal costs to TOML if it loses a dispute. Investors such as TOML increasingly mitigate their own costs by using third party funders who secure a share of the proceeds if the dispute succeeds.
- UNCITRAL has Rules on Transparency that require some (limited) disclosures of information relating to a dispute. However, those rules only apply to treaty-based arbitration. These Rules do not apply here because the Sponsorship Agreement is a commercial arrangement between a state and private actor, not a treaty between states. So, there is no requirement for disclosure of the existence of a dispute, let alone transparency over the documentation and process or the outcome, including the existence and size of an award. Clause 16 of the Agreement, relating to Confidentiality, would constrain the release of information on a dispute, even to Tonga's Parliament, without TOML's consent.

Reform to these, and other, elements of ISDS has been the subject of deliberations in UNCITRAL Working Group III since 2017. These remain inconclusive. Clause 25.5 of the Agreement applies the UNCITRAL Arbitration Rules "at present in force"; it is unclear if the "present" refers to when the Agreement is signed, which would preclude any subsequent reforms to address these recognised deficiencies, or the time of a dispute.



A growing number of governments have been withdrawing from BITs because they have been abused by investors and the arbitral process has become internationally discredited. For example, the European Union and several of its member states recently withdrew from the Energy Charter Treaty that provides for ISDS. Australia and Aotearoa New Zealand have policies not to include ISDS in new agreements.

Of particular concern is the mounting number of ISDS challenges to natural resource, energy and climate change measures. The United Nations Conference on Trade and Development (UNCTAD), which monitors investor-state agreements and disputes, reported that over half of ISDS disputes to date relate to natural resources, especially resource extraction. Most of these have been brought under “old generation” BITs whose rules and processes are similar to the Sponsorship Agreement. UNCTAD’S Issues Note #2 in September 2025 summarised the situation thus:

“Investor-State arbitration cases reached 1,401. Most of the cases - about 75% - arose in the past 15 years. About 60% of all ISDS cases involved damages claims of \$100 million and higher, including 143 cases in which investors sought more than \$1 billion. The past decade shows a shift towards higher damages claims and awards.

In 2024, investors initiated 58 arbitrations. More than half of them related to extractive activities and energy supply. About 55% of new cases were brought against developing countries. Developed-country claimants initiated most of the new cases with about 80%.

Six cases in 2024 involved the mining of critical minerals required for the energy transition, such as copper, lithium, titanium and zinc. From 1987 to 2024, at least 139 cases - about 10% of all cases - related to different categories of critical minerals, including 51 cases relating to critical minerals required for the energy transition.”

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## SPECIFIC PROVISIONS OF CONCERN



There are numerous guarantees to TOML that provide potential grounds for the investor to bring an ISDS claim against the Kingdom of Tonga for alleged breaches of the Agreement. These provisions are very broadly worded, which invites contested interpretations, and/or could prevent Tonga from taking necessary action to protect its financial, political and ecological stability.

Clause 3.1 is a highly contestable catchall obligation on Tonga to “do all things reasonably necessary to give effect to TOML having the full benefit of the Sponsorship”.

Clause 10 mirrors the principal investor rights found in old-generation BITs, and goes further in places. Interpretation of these provisions would be a matter for an ISDS tribunal.

Clause 10.5 requires Tonga to afford TOML **“FAIR AND EQUITABLE TREATMENT”**.

This is the most problematic investor protection used in BITs and the one most commonly relied on by investors. In an attempt to rein in pro-investor interpretations, recent agreements often explicitly link it to “customary international law standards”, which still receives variable interpretations. However, the Sponsorship Agreement overrides customary international law where the latter conflicts with its provisions, including the investor’s rights.

Clause 10.5 ties “fair and equitable treatment” to the most pro-investor interpretation that tribunals have given to the phrase. This requires Tonga to:

- a. Ensure a “stable and predictable legal framework”, meaning laws, regulations, policies, decisions of regulatory bodies and even judicial interpretations do not change from the time of the original agreement; and
- b. accord with the investor’s “legitimate expectations”, which can for example be sourced in formal and informal statements made by politicians and government officials.

The effect of this wording is to freeze the investment environment at the time of the Agreement, irrespective of the length of time the investment operates for and changes in climate, environment, economy or security conditions that arise.

**EXPROPRIATION** is the second most common cause of action in ISDS cases after “fair and equitable treatment”. Clause 10.11 says Tonga shall not expropriate or **interfere with TOML’s peaceful enjoyment of its rights**, unless it is given prompt, adequate and effective compensation.

Clause 40 provides an extensive, and open ended, definition of “expropriation”:

- a. “Direct” expropriation is basically nationalisation or the seizing of an investment or its assets, such as licences or equipment.
- b. “Indirect” expropriation, often referred to as “regulatory expropriation”, applies to a measure that has “an equivalent effect” to expropriation. The non-exhaustive list of examples in the clause includes:

“Regulations... that reduce...the economic value or viability of an asset...or a right subject to those regulations”

levying of taxation or the “impairment” of the management of an *investment or asset*; and

“Any measure or series of measures which together are tantamount to expropriation”.

Examples which could also be claimed to breach “fair and equitable treatment “could include:

- a. actions to protect essential security, even in times of conflict (noting there is no national security exception);

- b. requirements that TOML discloses key data relating to its activities (noting that data is explicitly included in the definition of “intellectual property” in Clause 40 and is an asset that is protected in the Agreement);
- c. new environmental requirements to address impacts of TOML’s operations (noting that the “undertaking” relating to environmental impacts is only in the Recital and refers only to “direct impacts” on the environment within the Kingdom);
- d. taxation measures to address tax avoidance strategies adopted by TOML or fund climate remediation (already strictly limited under Clause 9.3 that says the TOML Group will not be subject to or required to pay any other taxes, except those set out in Clause 9 and the Commercial Recovery Payment (CRP));
- e. requirements for a degree of local processing in Tonga, contrary to Recital F (which also expresses a “legitimate expectation” of TOML);
- f. allowing another entity to conduct any of the operations that TOML claims exclusive rights to perform under the Agreement (noting the extensive and non-exhaustive definition of “exploitation” in Clause 40)

Clause 10.6 is equally open-ended. If Tonga changes any law after the Agreement is signed, and TOML says that law would have the effect of limiting, reducing or withholding any rights or benefits it expects under the Agreement, and this interpretation appears reasonable (unclear to whom), TOML can negotiate to change the Agreement. If Tonga fails to agree, TOML can terminate the Agreement.



There are several very broad **NON-DISCRIMINATION** provisions:

Under Clause 10.8, the State cannot do, and authorise, any act or thing, or omit to do something, that discriminates adversely and “unfairly” against TOML in all its corporate forms, if that means TOML cannot have “full” (complete) enjoyment of its rights under the agreement. That precludes any measures that would provide preferences for locals or for other Pacific states over TOML.

Clause 10.9 says other investors cannot be given more favourable treatment “in like situations”. As TOML would have exclusive rights over Polymetallic Nodules, this comparison could apply to Tonga’s treatment of foreign investors in other activities, such as other forms of mining. What constitutes is “like” can be a matter for dispute and interpretation by the arbitrators.

Clause 10.10 requires Tonga to provide TOML “full security and protection”, with the added requirement that this includes “complete and unconditional legal protection”.

“Full security and protection” require the government to quell any protests or other acts of resistance to TOML’s activities, including peaceful actions that might impede their operations.

“Legal protection” would require the government to block legal action being taken to challenge harms TOML has caused, whether under civil or criminal law, and judicial review of state decisions that might impede TOML’s rights under the Agreement. Legal protection could extend to alleged breaches by TOML of international law.

Tonga must permit all bona fide **TRANSFERS OF MONEY AND CURRENCY CONVERSIONS** related to TOML to be made freely and without delay. Unlike most BITs that at least make this subject to IMF rules that allow controls in some circumstances, such as a financial or currency crisis, this appears as an absolute obligation.

Arbitral tribunals have interpreted these provisions broadly and inconsistently, overriding the sovereignty of legislators, courts and other legal decision makers and a country’s international legal obligations.

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## THE CHILLING EFFECT ON EXERCISE OF SOVEREIGNTY

The purpose of ISDS disputes is not just to win the dispute – often that is secondary. The main objective is to deter the government from adopting a measure, or agreeing to reverse a measure the investor opposes. This is known as the chilling effect. It might arise from a direct threat from TOML to bring a dispute, or through internalisation by decision makers when they seek to legislate or exercise governance responsibilities, so as to avoid the potential legal and fiscal risks to Tonga of a dispute.

The uncertainty created by the opaque nature of these rights and obligations, the explicit bias in the Agreement toward pro-investor interpretations, the unpredictability of arbitrators’ rulings, and the absence of exceptions, is a major factor in the “chilling effect”.

In addition, the potential for a temporary suspension under Clause 21 and a threat to terminate under Clause 22, could be utilised by TOML to achieve chilling effect on Tongan government decisions.

Specific provisions are designed to provide TOML with the opportunity to bring that form of pressure on the government, with a view to deterring the adoption of measures that TOML opposes:

Clause 10.2 requires the State to engage in prior and meaningful consultation on new laws required by international law to fulfil its Sponsorship obligations;

Clause 10.3 requires the State to notify TOML of the entry into force of any applicable Tongan Law that is adopted to fulfil Tonga's Sponsorship obligations with sufficient time to allow TOML to "seek dispute resolution between the parties with regards to the application of Tongan Law".



Pacific Network on Globalisation  
9 Marion Street, Suva  
Fiji Islands  
[pang.org.fj](http://pang.org.fj)