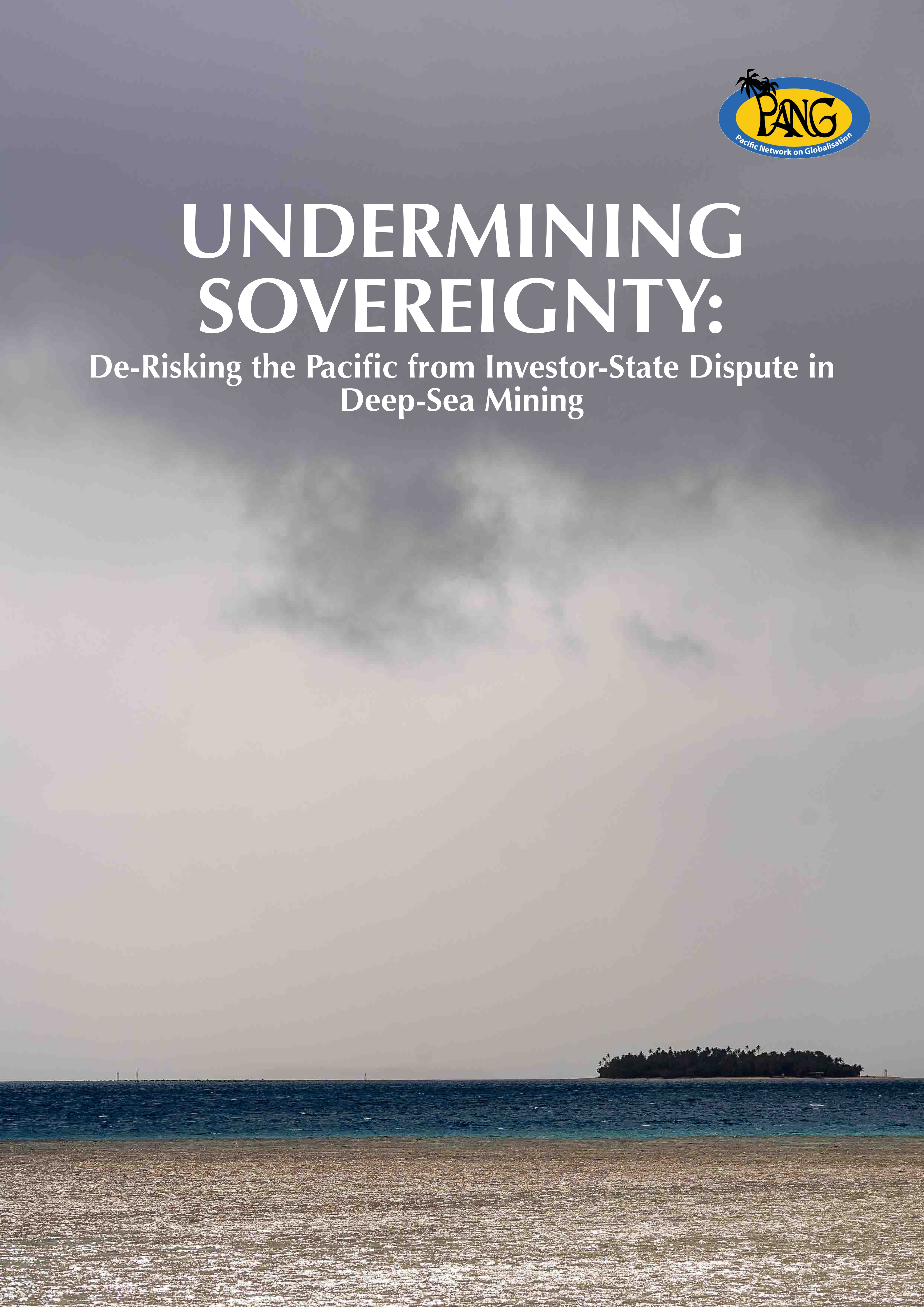
UNDERMINING SOVEREIGNTY:

De-Risking the Pacific from Investor-State Dispute in Deep-Sea Mining



PANG
Pacific Network on Globalisation

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Acknowledgements: Thank you to Professor Karen Scott from the Law Faculty at the University of Canterbury; Lori Osmundsen, international environmental lawyer and Compliance Officer for the Friends of Tonga; and Adam Wolfenden and Joey Tau from PANG.

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July 2026

Executive Summary

Deep-sea mining[1] is one of the most controversial issues in the Pacific today. Pacific Island Countries and territories have vast Exclusive Economic Zones (EEZs) and control approximately 30% of the world's oceans and seas, making them Big Ocean States as much as small island states.[2] Critical minerals and rare earth elements secreted in their ocean floor are touted as a lucrative new goldmine. A surge in demand to meet a range of military, energy, digital and commercial uses has been heightened by geostrategic rivalry, as the United States (US) seeks to counter China's dominance over raw materials, processing and supply chains.[3] Global mining companies and their backers, as well as the super-powers, are moving fast to cash in, with eyes focused on the Pacific as if it were theirs for the taking.

This situation is sold as a potential game-changer for resource-rich states, especially small islands that are surrounded by enormous oceans, despite a growing sentiment that the returns are small or even net losses.[4] Pacific governments that have few economic and development options face intense pressure to enter into contracts or joint ventures with controversial deep-sea mining companies and to sign agreements with either the US, China or other foreign powers including Russia and Japan. That requires them to choose: do they prioritise the social and environmental wellbeing of their nation, constitutional obligations, good governance and democratic participation, or do they seek to maximise their commercial interests, strategic alliances and economic returns?

For some Pacific Island governments, the lure of potential windfalls from mining the deep ocean floor has won out, despite the risks and speculative nature of the returns. For others, the price is too high: authorising and participating in deep-sea mining carries potentially dire environmental, social, cultural, fiscal and legal risks, and inserts Pacific States into a volatile conflict between super-powers that have no concern for their wellbeing.

Research and advocacy in the region has focused mainly on the implications of these developments for ocean ecosystems, peoples' livelihoods, coastal communities, and cultural and spiritual relationships and responsibilities. This briefing paper examines a lesser-known element: special rights and protections that are conferred on deep-sea mining companies which they can enforce directly against a State through international arbitration, known as investor-state dispute settlement or ISDS, often claiming hundreds of millions and sometimes billions of dollars. This report highlights the dangers to Pacific Island States that ISDS disputes can fetter the exercise of their sovereign powers in the interests of their nations, and of their responsibilities to their people and the ocean ecosystem to which they are bound and on which they all depend.

This is not a legal opinion and does not purport to provide a comprehensive survey of the many relevant legal instruments and issues to which they may give rise. Nor does it engage with related questions, such as the geopolitical conflict that is driving current legal developments. Rather, it examines how ISDS might operate in Pacific Island Countries that allow deep-sea mining and what that might mean for effective regulation, public finance, transparency, indigenous rights, democracy and sovereignty. It also provides a heads-up for other Pacific Island Countries that may consider going down that path.

Part A introduces the challenges deep-sea mining poses for Small Island Development States (SIDS) and how various Pacific Island Countries are responding to them.

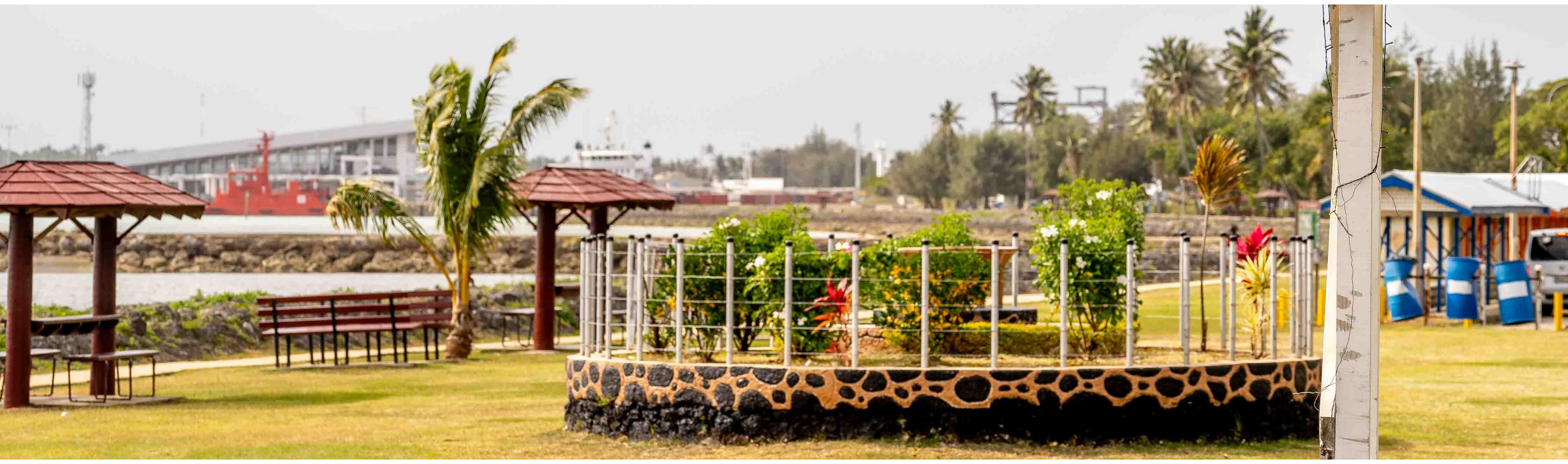
Part B explains how mining of the deep sea and in states' territorial waters is governed internationally, recent moves by the US to assert its unilateral authority over the same area, and the tensions this has created in the Pacific.

Part C reviews the controversy surrounding ISDS and provides data from the United Nations Conference on Trade and Development (UNCTAD) on the dominance of fossil fuel and mining industries in investment arbitration disputes.

Part D reviews three relevant case studies of mining that show how investor-state disputes have played out: Odyssey v Mexico, the first known ISDS dispute on deep-sea mining; Porgera v Papua New Guinea, a dispute over a land-based gold mine brought by an Australian subsidiary of global mining giant Barrick Gold Ltd against Papua New Guinea (PNG) that involved simultaneous investor-state disputes in arbitration under its bilateral investment treaty with Australia and conciliation under an investor-State contract, as well as judicial review in the domestic court; and Nautilus v Papua New Guinea (Solwara1), which involved international arbitration in a dispute over the PNG Government's investment in an offshore mining venture, with serious fiscal and legal consequences.

Part E identifies five pathways that foreign companies might use to bring ISDS disputes against Pacific States that have authorised deep-sea mining: bilateral investment treaties; State-investor contracts; Sponsorship Agreements under the International Seabed Authority (ISA); domestic legislation; and disputes arising from deep-sea mining permits issued by the US.

In conclusion, Part F urges Pacific Island States to act now to minimise their exposure to ISDS, including by terminating their bilateral investment treaties and amending domestic legislation that provides standing consent to international investor-State arbitration, and to ensure that contracts, permits and other rights related to seabed mining can only be enforced through the domestic courts in a manner consistent with constitutional, kastom, and international law.



PART A. THE CHALLENGE OF DSM FOR PACIFIC ISLAND STATES

A Statement on the Future of Seabed Governance issued during the International Day for Small Island Developing States in Jamaica on 25 April 2026 stressed the importance of SIDS' voices in deciding how the deep-sea is managed and who benefits from its resources.[5] The meeting recognised the difficulties deep-sea mining poses for SIDS, and that balancing potential benefits from ocean resources, while respecting environmental limits and supporting long-term resilience, is "not simple".

Their statement highlighted numerous structural constraints, including limited resources, exposure to climate change, accelerated biodiversity loss, and economic vulnerabilities of size and specialisation. It noted how sponsoring states that authorise contracts under the ISA regime are responsible for ensuring that their contractors comply with the applicable rules, regulations and procedures, as well as the terms of the contracts, but that SIDS often struggle to regulate and monitor those activities and are often driven by the mining contractor

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Doing so requires strong national legal and regulatory frameworks, institutional capacity and coordination between various government agencies that are responsible for environmental protection, maritime governance and economic planning. They also need capacity in contract management and oversight, and reliable data to evaluate risks, assess economic opportunities, support long-term planning and advocate for policies that reflect their interests. These are constantly lacking, which intensifies the need for caution.

In a Pacific region that strongly values its unity, there is a stark divide on how to address these challenges and opportunities. More than 40 States and territories have endorsed a global moratorium and precautionary pause on deep-sea mining until robust, independent scientific research can fully assess the environmental, social, and economic impacts. As of June 2026, these include the Federated States of Micronesia (FSM), Fiji, French Polynesia, Marshall Islands, Palau, Samoa, Tuvalu, Vanuatu, Guam, Kanaky New Caledonia, and the Northern Mariana Islands.[6] In August 2023 members of the Melanesian Spearhead Group (Fiji, PNG,[7] Solomon Islands, Vanuatu and FLNKS of Kanaky New Caledonia) adopted the Udaune Declaration calling for a Pacific-wide moratorium on deep-sea mining, pending proof that it would not impact on the marine environment and life.

Many affected communities whose livelihoods, cultural and spiritual identity are at stake have vigorously opposed projects being established on their doorsteps without their consent. Pacific and international civil society organisations have been leading the campaign for a ban.[8] But they are largely excluded from government decisions about domestic policy and licensing and from international negotiations. Even taking action in the domestic courts is costly, and when they do win, there has been no guarantee the governments will implement the outcome.[9] Community unrest and organised protests are sometimes the most effective way of having their voices heard, but that comes at a price - and some forms of protest, such as offshore actions around mining vessels, are now at risk of being penalised under domestic seabed mining legislation.[10]

Other Pacific Island States have taken the gamble to work with offshore mining companies in hopes that the promised returns will materialise. The Cook Islands, Kiribati,[11] Nauru and Tonga are four of the seven SIDS that have acted as Sponsoring States for ISA contractors, along with Jamaica, Cuba and Singapore. Together they have allocated or sponsored activities in reserved areas totalling around 504,666 km2 of the Area.

PART B. DEEP-SEABED MINING GOVERNANCE

Deep-sea mining of the ocean's floor is a high-risk venture. It is capital intensive with uncertain, but putatively massive, returns. The process is experimental, and the immediate, downstream and longer-term impacts on ecosystems, fisheries and coastal areas are largely unknown. The science and technologies are still evolving. These risks have generated widespread support for a moratorium on extraction until more is understood, as well as calls for a complete ban.

States still have the sovereign right to authorise mining within their EEZ. Some Pacific States have adopted legislation to govern and enable exploration and mining operations within their territorial waters and enter Sponsorship Agreements in the ISA Area. These Acts are largely identical, having been drafted under an arrangement between The Pacific Community (formerly known as the South Pacific Community (SPC)) and the European Union. Few States have developed detailed regulations to accompany their Acts. Most lack the resources for hands-on implementation and monitoring.

International law, including the Mining Code governing these activities, is also still evolving. "The Area" beyond states' continental shelves is deemed the "common heritage of humankind" and governed by the United Nations Convention on the Law of the Sea (UNCLOS) and the ISA that was established under the Convention's auspices.[(12)] All the Pacific Island States are parties to UNCLOS and members of the ISA. Three (the Cook Islands, Tonga and Nauru) currently sponsor mining companies to explore, but not to exploit, mineral resources in designated zones.[(13)]

Regulations to govern prospecting and exploration have been agreed at the ISA, but not those for exploitation. In 2021, Nauru pushed the ISA to the brink by triggering a two-year deadline for the adoption of regulations to authorise exploitation in the deep-sea, pursuant to Part XI of the UNCLOS, and failing that, the right to submit a work plan to initiate the extraction process.[(14)] Strong disagreements between member states meant that deadline was never achievable; nor was a two-year extension. In 2025, eight seabed mining companies, including the state-owned Cook Islands Investment Corporation, wrote to the ISA asking for regulations on seabed mining to be adopted within that year.[(15)] That did not happen either.

The US is a long-time critic of the Common Heritage of Mankind regime for deep-sea minerals as developed under UNCLOS. It has not ratified UNCLOS and is not a member of the ISA. In 2025, the Trump administration re-launched a policy to expand its access to critical minerals for a range of military, energy, industrial and geostrategic goals.[(16)] The President's Executive Order in April 2025[(17)], resurrected a 1980s Carter/Reagan-era Deep-Seabed Hard Mineral Resources Act to authorise full-scale commercial exploitation by US-domiciled companies in all the oceans of the world.[(18)] As of July 2026, seven applications filed under the Act were known to be under consideration by the US National Oceanic and Atmospheric Administration (NOAA), two of which sought permission to mine the deep sea, including by companies active in the Pacific. However, only the exploration applications have been publicly notified.[(19)]

The Metals Company (TMC), which wholly owns two subsidiaries operating under sponsorship of Nauru and Tonga, was one of the first to apply for an exploration license and for a commercial recovery permit to mine the ocean floor through a US subsidiary, TMC USA.(20) One from the American Ocean Minerals Corporation, which is in the process of merging with Odyssey Marine Exploration, is the other mining application(21). Global Sea Mineral Resources, which is partnered with the state-owned Cook Islands Investment Corporation (CIIC) under an ISA sponsorship agreement in the same zone, has apparently not yet applied. However, recent moves by Nauru and Tonga to revise their Sponsorship Agreements, and Nauru to enact its Seabed Mining Act 2025, would accommodate applications to the US, and are likely to put those States in breach of their obligations under international law.(22)

This patchwork of international treaties, domestic laws and bilateral contracts contains a complex array of dispute and enforcement mechanisms that pose significant legal, reputational, fiscal and political risks for the countries involved. Their ISDS implications, including the potential conflict between US contracts, the Sponsorship Agreements that operate under the UNCLOS and ISA rules, and the States' domestic legislation, are discussed in Part E.

PART C. ISDS AS A CORPORATE DE-RISKING STRATEGY

A small number of companies currently dominate the emerging deep-sea mining industry. They are mainly incorporated in Canada, the US, Europe and China, although their real ownership may lie elsewhere. Some have secured direct licenses and contracts from States for exploration and extraction in their territorial waters. Some, often the same companies, are being sponsored by States to explore in the Area under contracts from the ISA, which requires them to be incorporated under the sponsoring State's law.

Their activities are controversial. Governments face pressure to ban seabed mining or regulate it more intensively. There is litigation, protest and political flak over environmental harm, loss of livelihoods, and security excesses including deaths. Secrecy surrounding mining contracts has fueled distrust. Failed government investments have deepened public debt, and corporate tax avoidance compounds balance of payments deficits.

The companies have a vested interest in minimising these and other risks to their ventures and profits. Corporate influence and lobbying at the international level, and directly with host states have been well-documented.[(23)] A less visible legal strategy relies on bilateral investment treaties, contracts between the investor and the state, and domestic legislation. These confer special rights on the mining companies, their shareholders, affiliates and sub-contractors and protections from impacts of government regulation, court action and community resistance. In many cases, investors can enforce those guarantees directly against the state through international investor-State arbitration that overrides sovereign states' domestic authority and bypasses their national courts.

The controversy over ISDS

Investor-state dispute settlement dates from the era of decolonisation as colonial States sought to protect their legacy investments, mainly through bilateral investment treaties (BITs). Old-generation treaties adopted last century are especially blunt instruments. Ironically, BITs were originally promoted by UNCTAD, which now works to help governments exit from them.[(24)] Even former colonial powers, including the European Union, are withdrawing from treaties that provide for ISDS, especially in the energy sector where climate policies are increasingly challenged by investors in the mining and fossil fuel industries. Other governments, such as Australia[(25)] and Aotearoa New Zealand[(26)], have adopted policies to exclude ISDS from future agreements and are seeking to amend existing ones.

Because BITs have become increasingly toxic, investors are turning to contracts to provide similar protections and guarantees which they can enforce against the State through ISDS. Most deep-sea mining contracts contain similar guarantees to BITs but by their nature are even more secretive. The arbitration process, and its flaws, are basically the same. Some of the Pacific's domestic mining legislation also includes BIT-style language, with a pre-commitment to enforcement through international arbitration.

The defects with ISDS are systemic: [27]

- Most disputes are brought by rich countries' corporations against poorer country governments, although more rich countries are also now being sued.

- Foreign investors are guaranteed enforceable rights that override national constitutions, kastom law, Indigenous treaties and other international agreements.

- Investment tribunals enforce these guarantees and protections for investors without needing to balance competing considerations or hear counterclaims, except in rare cases where agreements or contracts permit.

- Investor protections, such as "fair and equitable treatment" or "full protection and security", are vaguely worded and commonly given a pro-investor interpretation.

- Tribunals are appointed on an ad hoc basis and there is no system of precedent, so it is impossible for states to accurately assess the legal risk and predict outcomes in a dispute.

- The "judges" are arbitrators selected by the parties, often from a small pool of investment lawyers and academics with no effective conflicts of interest rules.

- There is no appeal from a tribunal's finding or award of compensation, only a difficult annulment procedure that is limited to procedural irregularities.

- Most arbitral proceedings and outcomes are veiled in secrecy; sometimes even the existence of a dispute remains unknown in the State that is being sued.

- Damages awards of hundreds of millions or even billions of dollars can be based on projected future earnings for the lifetime of the investment, even when there has been minimal actual investment, and attract compound interest.

- Awards are enforceable against the State, even when payment will cripple its economy, divert resources from social priorities, and deepen the country's public debt.

- Third-party funders can bankroll the disputes for a share of the awards, making legal action cost- and risk-free for the investor.

- Communities affected by the matter in dispute have no right to participate; their protests may instead form part of an investor's complaint that the State has failed to protect it.

- The mere threat or fear of an ISDS dispute can "chill" the decisions of governments, who may then agree to a settlement or drop a proposed new law or policy, meaning the investor wins without even having to make a case.

This asymmetrical relationship between the mining corporations and States, including recourse to ISDS and its operation is a genuine risk to Pacific States engaged in deep-sea mining: ISDS is reflected in deep-sea mining Sponsorship Agreements signed by Tonga, the Cook Islands and Nauru; old-generation bilateral investment treaties involving PNG and Tonga; and domestic mining legislation, such as Nauru's Seabed Mining Act 2025 and Cook Islands Seabed Minerals Act 2019.

ISDS disputes on mining

The UNCTAD, which monitors known ISDS disputes, provided the following overview of ISDS as of November 2024:(28)

- In the past 10 years, the total number of ISDS cases has more than doubled.

- In 2023, ISDS tribunals were known to have rendered at least 49 substantive decisions, 28 of which were in the public domain.

- From 1987 to 2023, 46% of cases were decided, or settled, in the investor's favour, 38% were decided in favour of the State, and 13% discontinued.

- The average amount of damages awarded has escalated: the average claim over the decade to 2023 was USD1.1 billion and awards in favour of investors averaged USD385 million, excluding pre- and post-award interest.

According to UNCTAD in 2024, about one third of total ISDS cases from 1987 to 2023 involved energy supply and extractive industries (Figure 1).

Figure 2 shows that investors succeeded in full or in part (settled) in almost two-thirds of cases.

Figure 1: Investor-State cases involving energy supply & extractive industries

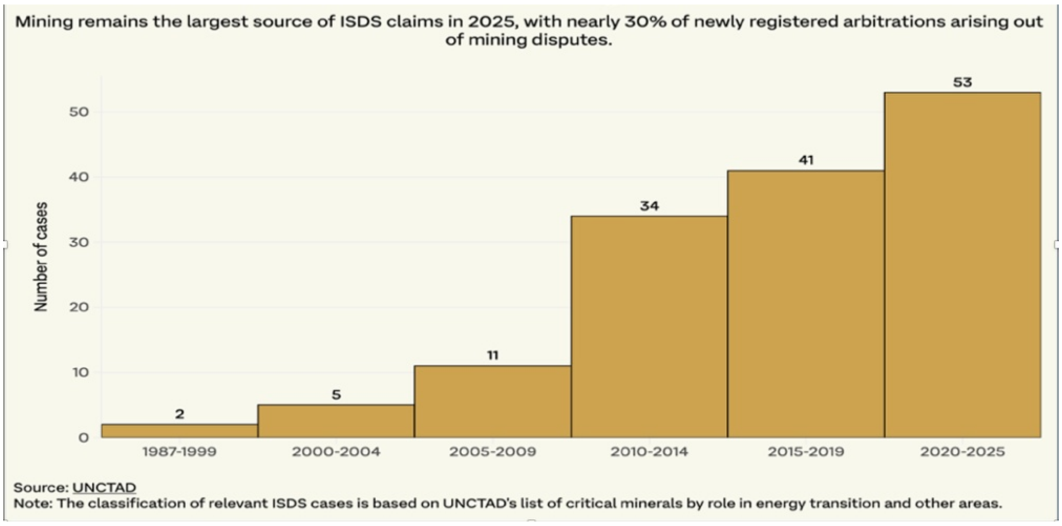
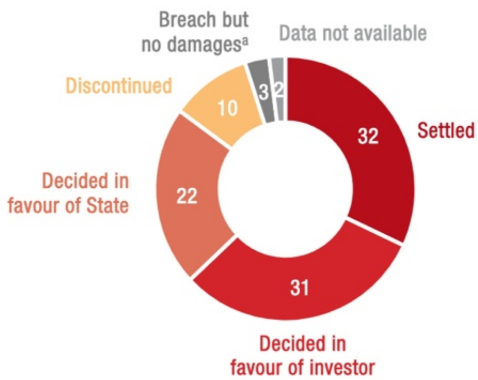


Figure 2: Outcomes in fossil fuel ISDS cases, 1987-2021 (per cent)



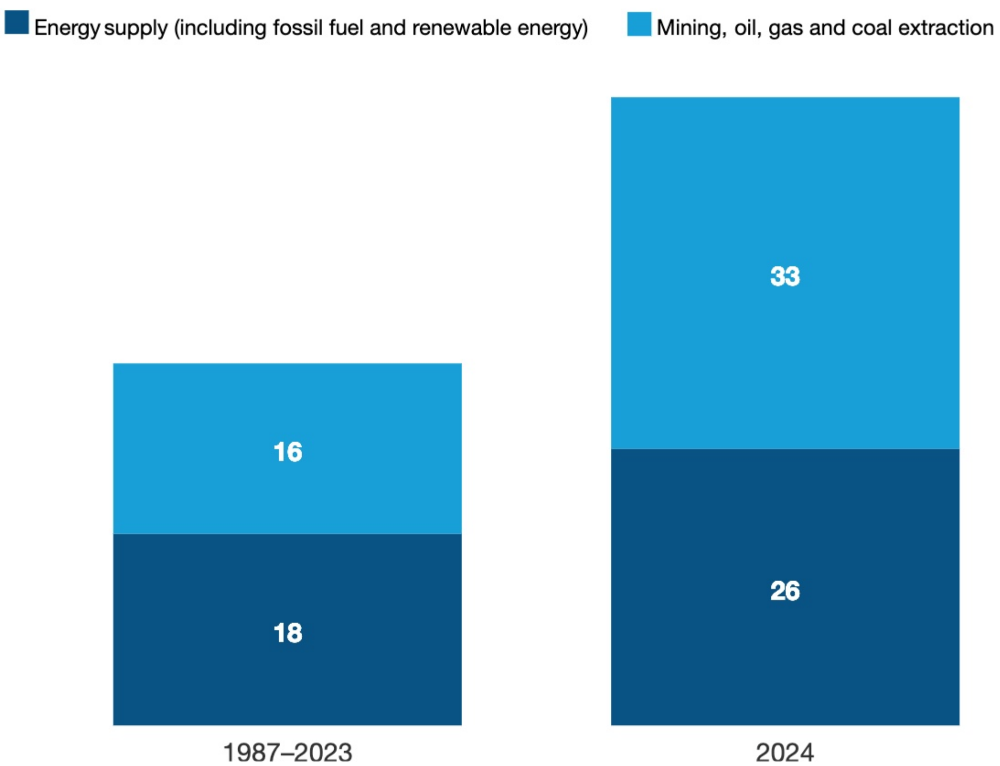
Source: UNCTAD, ISDS Navigator
Note: Based on 144 concluded cases out of 192 fossil fuel ISDS cases identified by UNCTAD (the remaining 48 cases are pending).

Disputes involving extractive activities and energy, including critical minerals, are escalating dramatically.(29) (Figure 3)

These statistics understate the reality, because they only reflect known disputes and outcomes. Over 50% of fossil fuel-related ISDS cases are kept entirely confidential, effectively hiding corporate challenges to state environmental and energy policies from public scrutiny. UN Special Rapporteur on Human Rights and the Environment David Boyd wrote in 2023:

"Lack of transparency is a particular problem in ISDS cases related to fossil fuels, which are often completely confidential, meaning that party submissions, procedural orders and awards are not made public. ... Almost one third of known fossil fuel arbitrations are settled before reaching final decisions and all settlement documents are confidential."(30)

Figure 3: The share of disputes about extractive activities and energy supply grew in 2024
- Cases in these sectors as a share of all cases (Percentage)



Source: UNCTAD, ISDS Navigator database, accessed on 1 April 2025.

Note: Some cases concerned both sectors.

PART D. ISDS CASE STUDIES

ISDS cases and their impacts can be hard to document because many - sometimes all - of the relevant documents are kept confidential to the parties. Bearing that limitation in mind, the following three case studies provide important insights into how future deep-sea mining disputes might play out in the Pacific.

Case Study 1: Odyssey v Mexico 2024

The story of Odyssey Marine Exploration Inc (ExO) v United Mexican States in 2024,[31] the first known ISDS arbitration on deep-sea mining, is the most complete due to publication of the documents and extensive media commentary and academic analysis.

The contracting entity in this case, ExO, was incorporated and operated in Mexico. Its ultimate majority shareholder was US-incorporated Odyssey, which claimed a controlling interest through a 54% shareholding in a Panamanian company.[32] Odyssey had been formed in the 1990s to find sunken treasure and its prior experience in deep-sea mining was considered limited.

ExO was required to submit an Environmental Impact Statement (EIS) as a condition of its proposed prospecting and core drilling project for phosphates off the coast of the Baja California Peninsula. In 2016, the Mexican Government's Environmental Secretariat rejected the EIS. The company successfully challenged that rejection in the courts. In June 2018, ExO secured the mining concessions for 50 years with a possible 50-year extension and resubmitted an EIS. That, too, was rejected and the company again sought judicial review in Mexico's national courts. It also filed an investor-State dispute under the North American Free Trade Agreement (NAFTA) seeking USD3.54 billion in damages. The dispute was bankrolled by a third-party funder, private US Litigation firm Poplar Falls LLC, which removed the financial risk from the investor in return for a lump sum plus a share of any award.[33]

The company argued that Mexico had breached a raft of broadly worded investor protections in NAFTA: the minimum standard of treatment, including "fair and equitable treatment", "full protection and security", "national treatment" (non-discrimination), and "indirect expropriation". The majority of arbitrators (the investor's nominee and the presiding member) found there was a breach of "fair and equitable treatment". They relied mainly on evidence from former government officials who said the outcome was predetermined – and who were paid by the company to appear. Having made that finding, they said it was unnecessary to investigate the other breaches. The majority awarded Odyssey USD37 million compensation, the bulk of which would have gone to the funder.

The dissenting arbitrator (Mexico's nominee) said the case warranted more diligent attention to the obligation on Mexico to protect the environment using a precautionary approach, given the nature of the project and its untested methodology, alongside Mexico's international obligations under the Convention on Biological Diversity and UNCLOS. The "questionable" evidence of the two government employees should not have been privileged ahead of a rigorous engagement with the Secretariat's environmental concerns.

A second aspect of the dispute is especially pertinent to the Pacific: the majority refused to hear from the affected communities who had objected to the project.[34] The detailed 16-page amicus curiae submission from the Sociedad Cooperativa de Produccīōn Pesquera Puerto Chale, a cooperative of local fisherfolk, and the Centre for International Environmental Law (CIEL), outlined risks to the environment and to local people's livelihoods if the project proceeded. According to CIEL:

"The Cooperativa brings over 60 years of experience from hundreds of fisherfolk in the region, and they are only one of the cooperatives that depend on the marine ecosystem for their livelihoods. Should underwater phosphate mining operations proceed, they will have serious impacts on marine ecosystems and the biodiversity of the region, with consequences for the health and livelihood of fishing communities. Furthermore, deep-sea mining projects are highly controversial, the IUCN, marine scientists and experts have called for a halt to all deep-seabed and deep-sea mining projects worldwide, these new developments in international law should be considered."[35]

The Tribunal decided, again by two to one, that neither the Cooperativa nor CIEL had a significant interest in the arbitration and would not bring new insights beyond the Mexican State and the investor. The arbitrator nominated by Mexico, Philippe Sands, dissented:

"[to] suggest, as the Majority appears to, that the impact of the project is irrelevant and that the dispute concerns only the legality of the decision to refuse operating permits is not persuasive. The two issues are intrinsically connected, and a conclusion on the latter cannot be reached without consideration of the former."

He stressed that

"amicus curiae submissions have the potential to improve both the quality and the legitimacy of the final award, even if the tribunal ultimately disagrees with the reasoning of those submissions" and considered it "incumbent upon arbitrators to have regard for the need to consider the impact on the legitimacy of the final award in light of both (a) general legitimacy concerns in relation to investment treaty arbitration, and (b) specific local community interests that are engaged by a particular case. Regrettably, the Majority's decision indicates no awareness of these considerations, and has in effect overridden the views of the Respondent, which contributed to the drafting of the FTC statement".

Although this dispute was against Mexico, it has additional relevance for the Pacific. The investor, Odyssey, is a part-owner of two companies with ISA-based exploration permits that were sponsored by the Cook Islands. Odyssey has majority ownership of Cook Islands Cobalt Limited, and holds equity in Moana Minerals Ltd, a subsidiary of Texas-based Ocean Minerals Ltd.

In May 2026, Odyssey announced plans to merge with American Ocean Minerals Corporation with the intention of exploiting those exploration licenses in the Cook Islands alongside the commercial extraction permits in the Clarion-Clipperton Zone being sought under the US Deep-Seabed Hard Mineral Resources Act.[36] The conflict between exploration authorised by the ISA pursuant to UNCLOS and ISA, and commercial extraction permits granted by the US, over parts of the same area heightens the potential for investor-state disputes, as discussed in Part E.

Case Study 2: Porgera Disputes in Papua New Guinea

It is not uncommon for foreign investors to engage in "forum shopping" by seeking a favourable outcome on causes of action, legal issues and redress in numerous international and domestic jurisdictions and legal regimes. Papua New Guinea is the only Pacific State known to have direct experience of duplicate investor-state legal challenges: the Government's reluctance to extend the mining lease for the Porgera onshore mining project was the subject of numerous legal proceedings brought by Barrick (PD) Australia Pty Ltd, an Australian subsidiary of Barrick Gold Ltd (now Barrick Mining Ltd), including under the BIT between Australia and PNG.

Porgera is an open-pit and underground gold mine in the Enga Province about 600 kilometres northwest of Port Moresby in PNG's remote highlands. The first Special Mining Lease was issued back in 1989. In 2007, Barrick (PD) Australia acquired the lease and formed Barrick Niugini Limited (BNL). This became a joint venture in 2015 between Barrick Australia and Chinese state-enterprise Zijin, which bought a 47.5% share from Barrick for AUD298 million. Zijin is listed on the Shanghai stock exchange and the Hong Kong Exchange through Gold Mountains, a Hong Kong owned subsidiary. At the time the lease expired in 2019, the corporate owners each had 47.5% shares, with a 5% interest held by Mineral Resources Enga, an investment vehicle for local landowners.

In 2017, BNL sought a 20-year extension to the Special Mining Lease, which was due to expire in August 2019. On 2 August 2019, the National Court ruled that Porgera could continue operating while the application to extend its special license was being considered. However, in April 2020, the Government refused to renew the lease and the mine went into "care and maintenance". Prime Minister James Marape said his Government was accepting a recommendation from the country's Mining Advisory Committee to refuse Barrick's 20-year lease extension application owing to environmental and social problems connected to the mine. At least nine people, including women and children, had been killed during an outbreak of violence in the area in March 2020, where locals with little other form of income often informally looked for gold.[37] Media reported Prime Minister Marape saying:

"The state has every right to refuse the lease, or to extend the lease, and in this instance, because of the environmental issues, resettlement issues and many, many other legacy issues . . . the state has now refused the lease to Porgera." Further: "We are now going through transitional arrangements ... and once the transition phase has been completed, then the state will enter into owning and operating the mine."[38]

Mine supporters accused Marape of responding to a sustained social media campaign against Porgera and Barrick over the environmental and social impacts of the mine and claims of a heavy-handed approach by police and joint venture security staff.[39] Barrick Niugini Ltd complained that the PNG Government had not properly explained the "legacy issues" on resettlement and environmental concerns behind its decision. The mine insisted it had complied with its resettlement obligations, planned further resettlement of landowner families, and had reached a historic agreement with the Porgera Landowner's Association negotiation committee for a benefit-sharing arrangement for a further 20 years of mining.[40] It also insisted it complied with the Government's environmental regulations.

Relying on the 2019 court decision, the company argued that the Special Mining Lease did not expire when the government declined to extend it, because it had submitted an application two years prior to the expiry date of August 2019, consistent with the Mining Act 1992. Because the Government did not automatically own the mine on its expiry, it was unlawful for it to transfer the lease to state-owned Kumul Minerals Holdings Ltd.

Observing that "investors have rights", the company vowed to "pursue all legal avenues" to challenge the decision, enforce its legal rights and recover any damages the decision may cause.[(41)] Portfolio manager at Van Eck Associates Corp, Barrick's second-largest shareholder, predicted: "They'll use negotiations and lawsuits and diplomacy to do what they can to keep it."[(42)] Barrick did just that, pursuing multiple lawsuits in multiple fora using multiple legal identities under multiple legal instruments: an ISDS dispute at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) under the Australia PNG BIT; conciliation at ICSID pursuant to the contract; and litigation in the domestic courts.

Barrick v PNG: Investor-State arbitration under the Australia PNG BIT

Barrick's wording when the Government refused to extend the Special Mining Lease suggests it had investor rights under the BIT in mind. The decision was "tantamount to nationalisation without due process" (code for expropriation) and in violation of the Government's "legal obligations".[(43)] Prime Minister Marape's letter to the Chief Executive of BNL that said "the Government values our continued partnership with Barrick and it is our intention to do everything possible to ensure that arrangements are in place to enable continued operations of the Porgera Gold Mine once the current SML expires in August 2019" had created a "legitimate expectation" of renewal - a concept commonly used to argue that investor rights to fair and equitable treatment and a minimum standard of treatment have been breached.

On 10 July 2020, Barrick (PD) Australia announced it had sought consultations with the PNG Government under the Australia PNG BIT[(44)]. If that did not resolve the matter, it would lodge a dispute with the World Bank's investment arbitration facility (ICSID). In August 2020, the company registered a dispute with ICSID,[(45)] alleging the PNG Government's decision not to renew the mining lease breached the BIT and international law governing foreign investment.[(46)] The company sought "to recover damages it has already suffered and damages it may suffer in the future".

The tribunal was established in March 2021, and three arbitrators were appointed: Alexis Mourre Presiding; Brian King, appointed by the claimant; and Philippe Sands by PNG (the dissenting arbitrator in the Odyssey case). The ICSID record is scant. The online summary merely says: "Claims arising out of the Government's decision not to extend a special mining lease held by the claimant's local company, Barrick Niugini, for the operation of the Porgera Gold Mine" were brought under the 1990 Bilateral Investment Treaty between Australia and PNG. The dispute was settled. There is no information on the breaches alleged, the amount claimed, or the settlement reached. The formal order is not public and no further data is available.

> ***"With Barrack's court cases, we had to go down this path. … We realised that these court cases could have dragged on for years, so we have reached out for a possible commercial negotiation with Barrick."***
>
> - PNG Prime Minister James Marape

As discussed below, the settlement appeared to involve the creation of a new joint venture between Barrick/Zijin and the PNG State and landowners. However, the proceedings were not discontinued until 25 January 2024.

Barrick v PNG: Investor-State Contract Conciliation under ICSID

On 20 July 2020, Barrick Niugini Ltd filed a request with ICSID for Conciliation arguing there had been an "unlawful and invalid" transfer of the 20-year mining lease to State-owned Kumul Minerals Holdings Ltd.(47) The Commission established under the ICSID Conciliation Rules reported on 9 April 2021.(48) No further details are publicly available. Media reported that a framework agreement to reopen the mine had been reached, which ended the Conciliation but that the dispute under the BIT was still pending.(49)

Barrick v PNG: Domestic litigation

In August 2019, Barrick Niugini Ltd secured an interim injunction in the National Court that, under the Mining Act 1992, it could continue operating if it had applied for renewal of its 20-year Special Mining License before it expired.(50) A year later, the National Court dismissed Barrick Niugini's application for judicial review of the Government's non-renewal and the transfer of the lease to Kumul Minerals Holdings Ltd. The Court viewed the multiplicity of proceedings as an abuse of process,(51) noting that Barrick Niugini had requested Conciliation at ICSID on 8 July 2020, and Barrick Australia had initiated arbitration proceedings under the bilateral investment treaty.

Barrick Niugini asked the Supreme Court to set that decision aside. In rejecting the request on 25 September 2020, Makail J. agreed that there were significant questions of law that constituted an arguable case.(52) However, he would only grant a stay of the lower court's decision if the balance of convenience was in Barrick's favour. The judge decided it was not.

In considering whether there was an abuse of process, Justice Makail canvassed the complex matrix of legal proceedings and issues at play in the national court, conciliation at ICSID, and arbitration at the international tribunal. The company claimed the legal issues in each were different, and that those at ICSID were purely commercial and seeking damages. The State countered that the basic question in all the cases was the validity of its decision to refuse the extension, and the relief - to quash those decisions - was the same.

Justice Makail considered Barrick's legal arguments were worthy of further consideration, amounting to an arguable case for interim relief pending the full hearing. But the court also needed to consider the "balance of convenience" before reinstating the lease. He concluded that the relationship between the parties "has become obnoxious and broken down to the point of no return and it would not be in the interests of justice that the unwilling party be ordered to maintain the relationship." This case involved a procedural issue; the substantive matter was still to be heard. It never was.

Porgera v PNG: The Government's Settlement

The settlement of the ICSID tribunal case, and the report from the ICSID conciliation in April 2021, coincided with the Government and Barrick Niugini Ltd signing a Framework Agreement to reopen the mine under a new joint venture between Barrick Niugini Ltd and the PNG Government. That was the first step toward securing a new mining licence and finalising other agreements, including shareholder agreements, the mining development agreement, and other arrangements involving landowners.

A year later, the two parties signed a Deed of Amendment to the Porgera Project Commencement Agreement and Escrow Deed,(53) along with a New Porgera Shareholders Agreement signed between Barrick Niugini Ltd and State-owned Kumul Mineral (Porgera) Ltd.(54) Placing the landowners entitlement in escrow enabled the mine to be restarted, even though the compensation agreement for local communities was not yet in place.

The deal provided a 51:49 equity split between PNG parties (36% Kumul Ltd, 5% Mineral Resources Enga Ltd, 10% other PNG stakeholders) and Barrick Niugini (50% shares held by Zijin Mining and Barrick Gold), with the company providing the capital to restart. Part of the equity increase was to be allocated to a broad group of landowners from the Porgera region, although that would involve some complex legal title issues. Papua New Guinea retained the right to acquire the remaining 49% of the mine from BNL at "fair market value" after 10 years. The parties also agreed a 53:47 split in the economic benefits generated over the life of the mine.(55)

The settlement saw the Government back down on its proposed termination and transfer of the mine to State ownership, despite the negative local impacts of the Barrick-run project, with a trade-off that gave it and some local landowners a larger share of the company. Prime Minister Marape put a positive spin on a "far-superior deal than before", while admitting that:

"With Barrack's court cases, we had to go down this path. … We realised that these court cases could have dragged on for years, so we have reached out for a possible commercial negotiation with Barrick."(56)

MiningWatch Canada remarked more acutely on how:

"the legal pressure Barrick has maintained on the COVID-19-ravished state has finally worn down the resolve of the PNG government to chart a course for the mine without Barrick. It will be important to see what kind of deal Barrick has offered local landowners, as most have been adamant that they want to see the back of this controversial company. Our partners in particular want to know that human rights claims for victims of violence by mine security will finally be dealt with equitably."(57)

Significantly, the ICSID arbitration was not discontinued until January 2024, which suggests the investors retained it as insurance/leverage over the Government in finalising the new arrangement.

Assessing future risks is necessarily speculative. The full texts of the Special Mining Lease and Leases for Mining Purposes documents for the Porgera Gold Mine are legally protected and not publicly available. Given the troubled history of litigation at Porgera, however, further investor-state disputes could be forthcoming from several quarters.

In April 2020 Chinese State-owned Zijin reportedly warned the PNG Government that China was angry over the refusal to extend Porgera's Special Mining License.[58] The chair of Zijin's board told Prime Minister Marape that "if Zijin's investment in Porgera mine is not properly protected by the PNG Government, I am afraid there will be significant negative impact on the bilateral relations between China and PNG, which is something we definitely do not want to see." Barrick's top Chinese executive and former US diplomat Woo Lee took over handling the day-to-day talks with the PNG Government.[59] In addition to Porgera, China has other active interests in PNG, including as the 85% majority owner and operator of the Ramu Nickel Mine in Madang Province, which it will want to protect.

China generally prefers diplomatic channels and leverage over legal proceedings. However, it has an old-generation BIT with PNG. There was no known reference to the BIT during the Porgera dispute. However, Zijin is a joint shareholder of New Porgera Ltd and qualifies as an investor under PNG's BIT with China (see Table 1 in Part E), so arbitration under the BIT remains an option.

The Australian Government and mining companies also retain an active interest with considerable leverage. Australian commentators accused the PNG Government of undermining confidence in the mining, oil and gas sectors during the Porgera dispute and suggested that PNG would need to "insist that investor confidence be secured, and not be smashed even further" for Australia to continue its "generous support".[60]

As a postscript, these investor-State interventions were made through an Australian subsidiary under the PNG Australia BIT. In 2025, Barrick Niugini Ltd was acquired by Porgera (Jersey) Ltd.[61] Papua New Guinea's Independent Consumer and Competition Commission approved the 100% takeover,[62] noting the company's ultimate ownership by Barrick Gold and Zijin would remain the same. As a result, Pongera (Jersey) Ltd has a 49% ownership in the Porgera mine, and Barrick Niugini Ltd operates the mine under contract with New Porgera Ltd, which owns the mine.[63] Because PNG has a BIT with the UK, which includes Jersey, the reconstructed company has another avenue for an investor-State dispute against PNG.

Case Study 3: Nautilus, PNG and the Solwara 1 Project

Even less detail is known about PNG's second ISDS dispute, which involved arbitration under an investor-State contract and was conducted in Australia under rules of the United Nations Commission on International Trade Law (UNCITRAL). The story is as convoluted as for the Porgera project.

Nautilus v PNG: The first Solwara 1 project

The Solwara 1 project (Solwara is pidgin for "salt water" and refers to the ocean) is an offshore mining operation in PNG's territorial waters to find and exploit copper and gold in the rocks about 1,500-1,600 metres (4,900-5,250 feet) below sea level in the Bismarck Sea, just off New Ireland Province not far from the Autonomous Region of Bougainville.[64] Given the unique eco-system of the Solwara 1 project having hydrotermal vents, the process in this case involved a deep-sea mining robot operated from a control room on the vessel above, which cuts and crushes the ore. An auxiliary vehicle prepares and flattens the seabed by levelling chimneys, a bulk cutter cuts material on the seabed, then a collecting machine gathers the material as slurry. That is pumped up a rigid pipe to the production support vessel on the sea surface, where it is "de-watered" and transferred to a nearby vessel to go to PNG and further processing. The seawater is pumped back into the ocean and released near the sea floor.[65]

Many PNG communities are still living with the impacts and trauma of land-based mining disasters such as Ok Tedi, Misima and Panguna; people feared that Solwara would be equally destructive. Concerns included minerals leaching into seawater, affecting fisheries and livelihoods, the extinction of unique sea species, and the risk of accidents and spillages. Granting the license would breach the principle of Free, Prior Informed Consent under the UN Declaration on the Rights of Indigenous Peoples[66] (although PNG is not a signatory). There would also be serious cultural and social impacts: oceans are a holistic entity to which Indigenous and coastal peoples are spiritually connected; the mine would disrupt this relationship and prevent them from fulfilling their obligations of stewardship.

The involvement of Canadian-based mining company Nautilus Minerals added to the controversy. Nautilus began its initial exploration in PNG waters in 1997.[67] Listed on the Toronto stock exchange, the majority shareholder was Mawarid Mining, owned by MB Holding Company LLC from the Sultanate of Oman[68]. Russian iron ore and steel major Metalloinvest, a subsidiary of USM Holdings Ltd, held around 20%, and global mining giant Anglo American around 5%.[69]

Section 6 of PNG's Environment Act 2000 requires an Environmental Impact Statement to permit mining. Nautilus provided an EIS to the Government in 2008. An environmental permit (EP-L3-234) that authorised high risk/heavy impact extraction was issued for the field in 2009. In 2011 the PNG Government granted Nautilus Minerals Niugini Ltd the world's first Deep-sea Mining Licence (ML154) for a 20-year term, focusing on extraction of copper, gold, silver, and zinc in an area 25 kilometres off the New Ireland coast. [70]

> ***"The technology is not proven anywhere and PNG, we burnt almost 300 million Kina in that Nautilus [Solwara 1] project on a concept that someone told us can work, but is ... a total failure."***
>
> \- PNG Prime Minister James Marape

In 2011, the Government exercised its option under the Mining Act 1992 to enter a State Equity Option Agreement with Nautilus that allowed it to secure a 30% stake in Solwara 1.[(71)] However, it did not complete the transaction,[(72)] apparently because confidentiality provisions in deeds between Nautilus and its partners prevented the State securing a 30% share of related intellectual property rights.[(73)] Nautilus put construction of the seafloor system on hold in 2012, citing lack of funds. Meanwhile, local opposition continued to grow. The Deep-Sea Mining Campaign produced a report, Out of Our Depth, in 2011 that challenged the EIS. During the next year, local youth mobilised to garner 24,000 signatures on a petition opposing the project.[(74)]

Nautilus v PNG: The 2013 Arbitration and Settlement

In 2013, Nautilus took the PNG Government to arbitration in Sydney under the UNCITRAL rules, alleging it had breached the Option Agreement by not completing the transaction, including its share of project development costs.[(75)] The Government countered that Nautilus had not met certain obligations that the transaction depended on. In October 2013, the arbitrator found for Nautilus. The decision and legal documentation are not public, but media reports say the arbitrator required the Government to purchase the full 30%, and pay interest and a 30% share of project expenditure to date.[(76)]

Nautilus issued the Government with a notice requiring payment of around USD118 million by 23 October 2013[(77)], after which it would withdraw the arbitration seeking damages.[(78)] If the Government did not complete the transaction, the claim would be reinstated. The Government missed the deadline, saying it was addressing legal and other issues raised by local communities and Parliament.[(79)] In February 2014, Nautilus announced it was terminating the agreement because PNG had failed to complete the purchase of its 30% interest and it planned to claim damages.[(80)] But it also wanted to reach an amicable solution.

The limited available documentation makes it impossible to know how the Government's loss at arbitration and the prospect of further proceedings influenced what happened next.

In April 2014, after negotiations, and with the arbitration not formally terminated, Nautilus and the Government reached a compromise: the State would initially purchase a 15% stake through Eda Kopa Ltd, a subsidiary of state-owned Petromin PNG Holdings, with an option to purchase another 15% within 12 months of the agreement becoming unconditional. The conditions were (i) that the Government could access the necessary funds, which would be held in escrow by a neutral third party until (ii) Nautilus met its conditions, including chartering a production support vessel.[(81)] The compromise deal included the disputed intellectual property rights.[(82)]

The Government paid a non-refundable deposit of USD7 million on the initial 15% share and had ten weeks to secure the remaining USD113 million to cover the development phase up to the first production. That was financed by a loan from the Bank of the South Pacific.[(83)] As with Porgera, the Government's compromise following the arbitration had allowed the project to proceed.[(84)]

Nautilus v PNG: The Collapse

In 2016, Nautilus began conducting exploration drilling in the Bismarck Sea in the face of intense opposition. A multi-province coalition, including the Alliance of Solwara Warriors, comprising NGOs, Indigenous communities and religious groups, called for cancellation of the license.(85) In 2017, PNG's former Attorney-General attacked the investment in a "dodgy project" and admitted the Government lacked the capacity or resources to monitor the activities and was without an adequate regulatory framework for offshore mining.(86)

By that time, the project was in deep trouble and being scaled back(87). Nautilus informed the Toronto Stock Exchange it was having cash flow and financing difficulties. The company had developed and successfully tested three undersea robots designed to mine hydrothermal vents on the ocean floor,(88) but funding for its production support vessel dried up midway through construction. Anglo American sold its shares, saying the project did not meet global standards of corporate social responsibility.(89)

In 2019, a Canadian court approved a restructuring plan that transferred the company's debt and assets to Deep-sea Mining Finance, another joint venture between Russian and Omani shareholders. This effectively meant they acquired Nautilus Mineral Niugini Limited, including the current Mining Licence and Environmental Permit. Nautilus went into liquidation and was delisted from the Toronto Stock Exchange. Eda Kopa, now a unit of State-owned Kumul Minerals Holdings, unsuccessfully sought damages in the British Columbia Supreme Court for its lost investment(90) and the State was left as an unsecured creditor.

Following the collapse of Nautilus in 2019, the PNG Government appeared to rethink the wisdom of its investment. Prime Minister Marape said:

"The technology is not proven anywhere and PNG, we burnt almost 300 million Kina in that Nautilus [Solwara 1] project on a concept that someone told us can work, but is ... a total failure." (91)

At the Pacific Islands Forum in 2019, Prime Minisrer Marape announced a 10-year, countrywide moratorium on deep-sea mining, along with Fiji and Vanuatu.(92) Former Chief Justice of PNG and Governor of Madang Province Sir Arnold Amet, who was a Member of Parliament when Solwara 1 was approved, said:

"We now know how deep-sea mining companies attempt to manipulate governments according to their own narrow profit motives without any conscience. We look to PM Marape to stand up for Papua New Guineans against the pressure exerted by these corporations."(93)

The next year, the then Deputy Prime Minister Davis Steven said:

"The Solwara 1 project continues to remind us, as a nation, to be careful in how we deal with our maritime resources, the blue economy that we have. … Our Government's priority right now is to reform the law, take back PNG using lawful means, building investor confidence, building industry, building capacity, but what belongs to the people of Papua New Guinea must be given to the people and not by stealing but by the right way."(94)

> ***"The Solwara 1 project continues to remind us, as a nation, to be careful in how we deal with our maritime resources, the blue economy that we have. … Our Government's priority right now is to reform the law, take back PNG using lawful means, building investor confidence, building industry, building capacity, but what belongs to the people of Papua New Guinea must be given to the people and not by stealing but by the right way."***
>
> - Former Deputy Prime Minister Davis Steven

Stevens indicated they were looking for legal avenues to recoup their losses from the Solwara 1 Project and forming a committee to determine how the project was approved, what went wrong, and what lessons can be learned.

Nautilus v PNG: Another contradictory compromise

Despite regretting the investment in Solwara 1, the Government faced a conflict of interest. The prospect of vast earnings had tempted it to speculate using public funds, sinking 375 million kina (AUD157 million) into the project for a 15% stake in Nautilus Minerals, which it raised through a bank loan via a state-owned enterprise without parliamentary approval.[95] The State stood to lose this investment if the license was terminated following Nautilus' bankruptcy.

In August 2023, the then Mining Minister told Parliament the three 20-year mining licenses held by Nautilus Minerals, issued in 2011, were in the process of renewal and it looked like the company was once more looking to mine[96]. Deep Sea Mining Finance Ltd had taken over the licenses, which were still operating under the 25-year Environmental Permit issued in 2009.[97] Rather than lose its investment if it cancelled the permits, the Government was prepared to let the mining go ahead. It defended the resurrection of the project, saying the country would benefit from the Niu Solwara Project profits, mining royalties, and tax revenues (PAYE, corporate, etc) in the future and the Government would have no obligation to allocate funding beyond its 15% direct equity interest through Eda Kopa Ltd. [98]

Meanwhile, Deep Sea Mining Finance Ltd entered a joint venture with SM2 Limited and affiliate Magellan Ltd, to form Sustainable Mining Solutions through a "farm-in agreement" for work conducted on the project.[99] In 2024, Magellan's vessel Coco was seen operating in the Bismarck Sea collecting samples, operating under charter by Deep Sea Mining Finance Ltd.[100] Communities had not been informed. Nor had PNG's Mineral Resources Authority or the provincial government. But the Authority said bulk sampling was part of the approved work programme for the exploration lease and was "lawfully carried out"[101]. It said it was not aware of any moratorium.

Again, the spectre of future ISDS disputes hangs over the PNG Government. The Solwara project is regulated under PNG law – in practice, with difficulty. But the terms of the 2011 mining license and contractual arrangements, and the dispute mechanisms therein, will determine future arbitral disputes. While these are confidential, they can be expected to provide BIT-style investor rights and protections to be enforced through investor-State arbitration. In addition, Deep Sea Mining Finance Ltd is registered in the British Virgin Islands and headquartered in the Isle of Man,[102] so any future dispute with the PNG Government would also be subject to PNG's bilateral investment treaty with the UK and enforcement by ISDS. [103]

What the case studies tell us

The three examples should be treated as “canaries in the (deep-sea) coal mine”. Governments that sought to exercise their sovereign rights and responsibilities to their peoples and their environment over highly risky mining operations found themselves embroiled in investor-state arbitral disputes. Whether they resulted in large financial awards, retreat from the government’s proposed policies, and/or compromises that enabled the mining to continue, ISDS created the legal and potential conditions that mining companies were able to exploit. As pressures to authorise further exploration and exploitation of the ocean’s resources intensify, so will these legal, fiscal and political risks associated with ISDS.

Duke of York Islanders (from East New Britain) who are affiliated to the Alliance of Solwara Warriors in West Coast Sentral Nui Ailan standing with Moana in solidarity to oppose Seabed mining in American Samoa by the US Government. PNG Photo Credit: The Healthy Oceans Network

PART E. INVESTORS' PATHWAYS TO ISDS IN THE PACIFIC

Legal advisers to mining companies are responding to the backlash against ISDS by advising them to develop "flexible" strategies. Freshfields, a leading transnational law firm that specialises in representing investors in such disputes, offered this advice to clients in 2026:

"Investor-state arbitration faces a rapidly changing landscape as governments take a firmer hand in sectors viewed as critical to national interests and the energy transition. States are tightening controls over strategic investments, invoking national security and adopting policies to secure domestic access to vital resources. The mining sector, in particular, is under the spotlight, with growing demand for minerals like lithium and cobalt matched by new restrictions on foreign investment and increased state intervention. In parallel, disputes are moving beyond arbitration to national courts, from anti-arbitration injunctions to enforcement battles and EU sanctions. In this context, investors must adopt flexible, coordinated strategies to navigate a playing field that is more dynamic and complex than ever."[104]

The investors can be as creative as the lawyers, as Australian mining billionaire Clive Palmer shows.[105] After losing several challenges to mining-related decisions in Australia's domestic courts, in 2019 Palmer reincorporated his Australian company in Singapore to take advantage of the ASEAN-Australia-New Zealand Free Trade Agreement that contains ISDS. Between 2023 and 2025 Palmer lodged four claims against Australia totalling AUD420 billion. The tribunal dismissed the first of these, treating the forum shopping as illegitimate. But the Australian Government still had to argue the case, and Palmer then sought to review the decision in the Swiss courts, which he lost. With no system of precedent, the remaining three disputes, remain live. [106]

The rapid development and volatility surrounding both deep-sea mining and ISDS make it important to understand how various legal instruments reinforce each other. There are five potential pathways for investors to bring cases directly against the State in international arbitral tribunals over deep-sea mining disputes in the Pacific Islands:

i. **Bilateral investment treaties** between two States that provide guarantees to each other's investors;[107]
ii. **Licenses or contracts** between the company and the State, including through joint ventures, for exploration or extraction within the State's territorial waters or continental shelf;
iii. **Sponsorship Agreements** between the State and a contractor for exploration, and potentially for future extraction, in the "Area", as a pre-requisite to the investor's contract with the ISA;
iv. **Domestic legislation** that authorises seabed mining and allows investors to bypass domestic courts and have recourse to international arbitration; and
v. (Potentially) an **extraction permit issued by the US** to mine in the deep-sea.

Each of these may have different dispute mechanism, arbitral forum, jurisdiction, and procedural rules. Several, or all, could apply to a single deep-sea mining venture and matter in dispute.

(i) Bilateral Investment Treaties between Host State and Investor State

Bilateral Investment Treaties are made between States. But unlike most international treaties, they confer broadly worded rights and protections on foreign investors from one (home) State that are directly enforceable by that investor against the other (host) State in offshore arbitral tribunals (ISDS). The standard BIT binds the State parties for a specific period, after which they can mutually terminate it, or one can withdraw unilaterally, with notice.

Agreements that were signed many years ago are considered especially problematic.(108) They contain the strongest rights for investors and the weakest protections and exceptions for the state's right to regulate. They operate behind the veil of an international arbitration regime that is largely invisible to those affected and even to parliamentarians with responsibility to govern. Not surprisingly, these are the agreements that investors most commonly use for disputes. A growing number of governments around the world have responded by exiting these old agreements, by consent or unilaterally.(109)

However, existing investors continue to enjoy the BIT's protections and access to ISDS for a specified number of years, known as a "survivor clause". Some States wanting to terminate their BITs have neutralised this risk by first agreeing to amend the survivor clause and then proceeding to terminate the agreement.

BITs: The Pacific's Exposure

Two Pacific Island States (PNG and Tonga) and Timor-Leste have BITs that are currently in force (see Table 1).(110) These are almost all old-generation treaties. All of them are beyond the point at which the State could terminate them to minimise their exposure to ISDS disputes.

PNG has the most exposure, and the Government will be well aware of the potential for further ISDS disputes given its experience with Porgera and Solwara1. While the disputes were under the BIT with Australia, Part D explained that shareholders in existing mining investments could bring ISDS disputes under PNG's other agreements: the change of Porgera's ownership from the Australian subsidiary of Barrick Gold to a Jersey-based entity with the same shareholders would bring the investor under the UK agreement; and the Chinese shareholding through Zijin could bring the PNG China BIT into play. Despite these risks, PNG has not withdrawn from its BITs.

Tonga also has a very old BIT with the UK which could be activated by investors, including shareholders, if they can establish UK nationality. Currently, however, Tonga can withdraw from the agreement with 12 months' notice with no existing mining investors that would qualify for the survivor clause.

Table 1: PICs' bilateral investment treaties

Pacific Island Country	Other Party	Entry Into Force	Termination Date	Survivor period post-termination
Papua New Guinea	Japan	2014	2024, with 12 months notice	10 years
Papua New Guinea	Germany	1983	1993 with 12 months notice	15 years
Papua New Guinea	UK	1981	1991 with 12 months notice	15 years
Papua New Guinea	Australia	1991	2006 with 12 months notice	15 years
Papua New Guinea	China	1993	2008 with 12 months notice	15 years
Papua New Guinea	Malaysia	Not in force	-	-
Tonga	UK	1997	2007 with 12 months notice	20 years
Tonga	UAE	Not in force	-	-
Timor Leste	Portugal	2004	2014 with 12 months notice	10 years
Timor Leste	Qatar	Not in force	-	-
Timor Leste	Germany	Not in force	-	-
Republic of the Marshall Islands	Taiwan	Not in force	-	-
Vanuatu	China	Not in force	-	-
Vanuatu	UK	Not in force	-	-

BITs: Criteria for coverage

The BIT sets out who qualifies as an investor of the other State and can therefore bring an ISDS dispute. As the case studies show, this can be complex. Deep-sea mining operations involve multiple players, including joint venture partners, parent companies, shareholders, partnerships and sub-contractors. Any of these who claim nationality of the other State to the BIT could potentially bring a claim. An investor needs to meet the following criteria: [(111)]

- There must be an ***investment treaty*** between the State of the investor and the host State.

- The investor must ***qualify as an "investor"*** under that agreement. Normally that means the entity is incorporated in, or a national of, the other State. The Porgera dispute against PNG was brought by the Australian subsidiary of the US parent company, under the BIT with Australia. Because a Sponsorship Agreement requires the sponsored entity to be a national, or be controlled by a national, of the sponsoring State,[(112)] that would seem to disqualify from bringing a dispute. However, the parent company might still qualify by place of incorporation. So could the major, or indeed any, shareholders (human or corporate) that can claim the State's actions have caused them loss by breaching the rights or protections in the BIT, or a contract that is considered an investment covered by the BIT.

- The investor's ***investment*** must fall within the treaty's definition. Most BITs list various kinds of investment, such as physical assets, land, shares, bonds, licenses, contracts and permits relating to natural resources, and intellectual property rights. However, the definition is not exhaustive, so it can apply to things of value that are not specified.

- For an investment to qualify, it must also be situated ***within the territory*** of the host state. Whether that would include the territorial waters and EEZ of the State is debatable and ultimately depends on the interpretation of a panel of investment arbitrators. It is even less clear whether that would extend to contracts for deep-sea mining in "the Area" beyond the EEZ. Some argue it could qualify if the State accrues economic benefits, such as royalties and other revenues, and potentially other benefits such as commitments to local development and infrastructure. Others suggest an investment activity that is conducted outside the territory would be covered if the output goes to the State, viewing the investment as a whole. [(113)]

BITs: The Scope of Protections

The BIT sets out the scope of protections, and hence the grounds for claims, and remedies. It also specifies the forums or rules for the conduct of disputes.

- The ***definition of Investments*** is broad and explicitly includes physical assets, permits and mining licences (so include a Sponsorship Agreement), and intellectual property such as research and data, as noted above.

- The obligations ***apply to State actions, decisions or omissions*** that impact negatively on the value or profitability of the investment throughout the entire lifetime of an investment, from the time of application to renewal or disposal.

- The obligations usually apply to ***all levels of the State***: central or local government, an administrative agency or tribunal, court or other judicial body, or any state-authorised entity.

- A claim for ***compensation or damages*** commonly extends beyond an investor's actual expenditure to include lost future profits, with simple or compound interest, and even punitive damages. Awards may run into hundreds of millions, or even billions, of dollars.

- Investors have the right to ***transfer funds*** freely and without delay in their currency of choice, including earnings, profits, proceeds of sale, sales revenue and other income, including of employees. The BIT may not have exceptions for prudential or balance of payments reasons.

Applied to deep-sea mining, ISDS claims could potentially challenge:

- adoption of a ***moratorium*** on seabed mining that precludes renewal of licenses;

- tightening of criteria and approval ***processes for foreign investments***, generally or specific to mining;

- new or stronger ***environmental impact assessment*** requirements;

- obligations to secure ***free prior informed consent*** from affected communities and landowners;

- ***non-renewal of a Sponsorship Certificate*** for public policy reasons;

- a council or ***resource body's refusal*** to grant or renew a consent or licence for environmental reasons;

- ***a court judgement*** terminating a licence for breaches of criminal or human rights laws or inconsistency with the constitution;

- failure to protect a mine against ***protests*** that impede its operations or to enforce criminal law protections for mining activities;

- more onerous ***tax and royalties laws*** or restrictions on inter-corporate profit shifting;

- ***restrictions on the repatriation of profits*** and transfer pricing, including for balance of payments reasons.

Bilateral investment treaties almost always pre-commit governments to investor-state arbitration of disputes under one or several forums or sets of rules.[114] The most common are the World Bank's International Centre for the Settlement of Investment Disputes (ICSID); the rules of the United Nations Commission on International Trade Law (UNCITRAL); administration of the International Chamber of Commerce; or ad hoc arbitration.

Admission of an amicus curiae brief is also usually governed by the applicable arbitral rules, as in the Odyssey dispute discussed in Part C.

BITs: Core Investor Protections

Six standard investor protections contained in BITS can be broadly summarised as:

- ***Non-discrimination: "national treatment"*** which requires foreign investors and investments to receive no less favourable, but possibly better, treatment than comparable domestic investors and investments.

- ***Non-discrimination: "most-favoured-nation treatment"*** that requires foreign investors and investments of a party to receive the best treatment that the host state gives to investors and investments of another country.

- ***"Fair and equitable treatment"***, to a "minimum standard of treatment" under international law. Investors commonly argue that this creates a "legitimate expectation" that the terms on which they invested will not be changed adversely for the lifetime of their investment.

- ***"Direct expropriation",*** requiring non-discriminatory treatment and full and timely compensation if the investment is nationalised, destroyed, or terminated.

- ***"Indirect expropriation"***, where regulatory or other measures have significantly eroded the value and profitability of the investment.

- ***"Full protection and security"*** requires the host state to take non-discriminatory steps that are reasonably necessary to ensure the physical protection and security of the investment.

There are minimal, and varying, exceptions in old-generation BITs like those of the Pacific States.

(ii) State-Investor Contracts that Provide for ISDS

Contract-based arbitration has become more popular with investors given the controversy over BITs.[115] The contracts themselves are usually kept confidential to the parties, along with supplementary documents, so they attract less attention.

Mining contracts commonly cover the exploration and/or extraction licence and associated instruments, and include the same investor protections and language as BITs. This includes "stabilisation" clauses that make any regulatory changes potential targets,[116] similar to the "fair and equitable treatment" language in BITs, as well as "fiscal stability" commitments not to alter royalties or taxes. Investor rights and protections in contracts may go further than BITS, reflecting the parties' asymmetrical bargaining power. For example, governments may promise not to criticise the investors' operations or commit to blocking domestic legal action against them by ensuring "complete and unconditional legal protection". [117]

It is also possible for one-off contracts to provide more flexibility to include investor obligations, such as engagement with communities, relocation of affected communities, funding and terms for use of infrastructure, support for social services, and local training and employment. However, these are usually separate documents or not subject to the same enforcement options for the State against the investor.

States also have conflicts of interest between their economic, commercial and reputational objectives, and their governance responsibilities to enforce compliance. There are few, if any, exceptions available to the State. As with BITs, communities that benefit from these positive commitments have no standing to require compliance, and rely on tenuous participation as amicus curiae, where the contract and/or arbitral rules permit.

As with BITs, there is usually standing consent to international arbitration. The contract will specify the jurisdiction and rules that apply to disputes, generally including:[118]

- Rules applicable to arbitral procedures (e.g. UNCITRAL, International Chamber of Commerce, ICSID);

- Seat of arbitration (jurisdiction whose laws govern procedural aspects of arbitration);

- Governing law of arbitration (law that applies to substantive aspects of the contract);

- Venue of arbitration (jurisdiction in which it is heard).

- Transparency of the dispute proceedings and disclosure of related documents may be covered in the contract or left to the relevant arbitral forum. That will likely result in minimal, if any, disclosure of details of a claim, including legal grounds and argument, amount claimed, and final awards or settlements.

According to ICSID in 2019,[119] the largest share of contract-based investment arbitrations involved investments in oil, gas, mining and energy sectors. It reported that just under half of contract-based cases were settled or discontinued before reaching an award, which was fewer than overall, meaning the dispute was more likely to go to a hearing. Of those that went to a hearing, the investors succeeded in part or in full in 66% of arbitrations, compared to 48% overall.

Contracts like these may assume even greater importance if the US begins issuing commercial exploitation permits unilaterally under its domestic law. Their likely content and dispute mechanisms are still unknown, but can be expected to involve similar investor rights and investor-state arbitration.

The Cook Islands is an example. In 2022, the Cook Islands issued three 5-year polymetallic nodules exploration licenses within its EEZ. Two were to Cook Islands Cobalt and Moana Minerals. Odyssey Marine Exploration has majority ownership of Cook Islands Cobalt Limited, and holds equity in Moana Minerals Ltd.[120] The third license went to Cobalt Seabed Resources Ltd, a joint venture between state-owned Cook Islands Investment Corporation and Belgian-based Global Sea Mineral Resources.

Although the Cook Islands Authority has only authorised exploration through these permits, not extraction, the Government passed regulations in 2023 and 2025 that include harvesting nodules.[121] A recent extension of the exploration licenses to 2032 defers any decision on commercial extraction until then. Despite that, associates of the Cook Islands companies are actively pursuing extraction licenses to complement the local permits. In April 2026, Odyssey signed a merger agreement with American Ocean Minerals, a subsidiary of Texas-based Ocean Minerals Ltd. American Ocean Minerals was reportedly one of the first to seek a consolidated exploration and extraction permit under the US Deep-Seabed Hard Mineral Resources Act through subsidiary AOM Area-1 LLC.[122] If the merger is approved by the US Securities and Exchange Commission, that would effectively merge the exploration licenses held by CIIC and Moana Minerals in the Cook Islands EEZ with its application to the US. The ISDS implications of this are discussed in Part E below.

(iii) ISA Sponsorship Agreements between States and Entities

Exploration licenses in "the Area" beyond countries' jurisdiction are issued by the International Seabed Authority, pursuant to UNCLOS. The ISA contracts directly with the mining entity that is either a member State or a mining company, including as a joint venture with the State.(123) The standard ISA contract sets out the geographical coordinates and a 5-year work plan that includes an environmental assessment and training programme.(124) There are also standard clauses from ISA regulations on contractor responsibility and liability, transfer of rights, and compliance and enforcement. Disputes on interpretation or application of the regulations are governed by Part XI of UNCLOS and the 1994 Implementing Agreement.(125) Those contracts are beyond the scope of this paper.

As a prerequisite for the ISA contract, a private entity must secure a Sponsorship Certificate and Sponsorship Agreement with a State that is a member of the ISA and has rights in the relevant seabed area. The entity must be incorporated in the Sponsoring State, or be effectively controlled by individuals who have sponsoring State nationality. As noted earlier, that can lead to complex corporate structures that intersect with BITs.

Three Pacific Islands Countries – Tonga, Nauru and the Cook Islands - currently have signed Sponsorship Agreements. This analysis focuses on Tonga and Nauru.

Tonga(126) and Nauru(127) originally signed Sponsorship Agreements with Tonga Offshore Mining Ltd (TOML) in 2008(128) and Nauru Ocean Resources Inc (NORI) in 2011,(129) respectively. These support exploration, and potentially future extraction, of minerals within designated zones in the Area governed by the ISA. Both TOML and NORI are wholly-owned subsidiaries of The Metals Company (TMC), based in Vancouver, Canada and listed on the NASDAQ, with a number of institutional investors.

In 2025, both Tonga and Nauru adopted new Sponsorship Agreements. Significantly, the revised wording anticipates the issuing of the US commercial extraction permits, discussed below. The texts are almost identical, indicating they were drafted elsewhere, probably by TMC. The amended agreements guarantee almost unassailable legal rights and protections to the mining companies, beyond those in the original Sponsorship Agreements and commonly found in BITs. They have been described as "tilting the balance toward investor protection at the expense of state discretion", a development that "challenges the foundational principle that the deep-seabed is the common heritage of mankind." The new clauses also "raise serious questions about transparency, sovereignty, and corporate influence in international governance".(130)

Many clauses provide multiple permutations of similar guarantees. The Agreements require that any inconsistencies within the text are interpreted in favour of TOML/NORI and TOML/NORI Groups. (131)

Examples of core obligations, taken from the TOML version, include:

- Open-ended BIT-style language of "fair and equitable treatment", "a stable and predictable legal environment", consistent and transparent decisions, in accordance with the "legitimate expectations" of TOML and the TOML Group. (132)

- The State must never adopt a new law, or act and not act, in a way that prejudices TOML rights and the "full and peaceful enjoyment" of those rights under the Sponsorship Agreement.[133]

- The State shall not do, nor cause any "thing" to be done or not done, whether legislative, executive or administrative, that discriminates adversely or unfairly against TOML, its rights, or of any member of the TOML Group, and whose impact deprives them of full enjoyment of their rights.[134]

- Protection against "direct or indirect expropriation" through taxation measures, regulation or other actions (such as judicial and tribunal decisions) without prompt, adequate and effective compensation.[135] Expropriation is expansively defined to include "unreasonably" interfering with, or unduly delaying, effective enjoyment of rights and property, and regulation that reduces the economic value or viability of an asset, property or right, including otherwise lawful measures that deprive the company of the ultimate enjoyment of the value of the property.[136]

- Ensure "full protection and security" to TOML, which could be interpreted to require police action, military presence and criminal prosecution provided for under the seabed minerals legislation (discussed below) to suppress local community resistance on land and at sea. This includes "complete and unconditional legal protection", which could oblige the State to immunise the companies against domestic legal action, even for breaches of criminal or civil law, and to deny peoples' rights to sue the companies in domestic courts.[137]

- Absolute rights for TOML and TOML Group to convert and transfer money related to the business (including proceeds of sale), freely and without delay, subject only to the States' procedural laws.[138] Similar terms for TOML Group, its affiliates and subcontractors to convert and transfer earnings and savings overseas.

- Rights of the wider TOML Group to access and be assigned intellectual property, including research and data, without prior consultation with the State, simply notification.[139]

There are effectively no exceptions that provide the Government with flexibility to reassess its obligations in light of new knowledge or adverse experiences. Environmental protections are weak. For example, TOML only undertakes that exploitation in the area will not "directly impact" on the environment in Tonga.[140] "Serious harm" to the marine environment is narrowly defined as harm caused by one or more activities that constitutes a serious breach of TOML's ISA obligations.[141]

Nor, it seems, can the Government respond to a balance of payments crisis or act to stem transfer pricing and tax evasion by the company, its affiliates or sub-contractors, or TMC.

Such open-ended language and complex intersections between different provisions in the agreements create high risks of disputes.

The Sponsorship Agreements require initial attempts to resolve disputes through discussions, with standing consent to arbitration where that fails. Unlike BITs, the dispute resolution provisions allow both the State and the investor to resort to international arbitration. However, the obligations likely to be adjudicated in a dispute are one-sided. TOML and NORI can enforce the Sponsorship Agreement, even when they allege it is rights conferred on their Group, including TMC, that are breached.

The UNCITRAL rules are the default option for arbitration, unless the parties agree to conduct disputes another way.[(142)] As the Odyssey case showed, these rules exclude affected communities from participation unless the arbitral panel agrees to allow their marginal participation as amicus curiae. Tonga and Nauru's domestic courts have no jurisdiction under the contracts,[(143)] except for interim injunctive or declaratory relief.

The appointing authority is the International Chamber of Commerce and Singapore is the seat of arbitration.[(144)] The governing law and jurisdiction is also Singapore and applies "general principles of international law regarding the protection of foreign investors to the extent that such rules do not contradict the provisions of this Agreement or would reduce the rights of TOML/ NORI under this Agreement".[(145)] International law is narrowly defined as legally binding treaties and conventions and legally binding international rules, which includes customary international law·[(146)] An arbitral award would be binding and enforced as if it were a final judgment of the State.

These Sponsorship Agreements need to be read alongside the other legal instruments, including BITs and domestic legislation.

(iv) Domestic Seabed Mining Legislation

The lack of balance, interpretive uncertainty, and complexity of the contracts and Agreements is compounded by the interface with domestic legislation. This creates a legal minefield that mining companies can exploit just by threatening to initiate a dispute.

Until 2025, Tonga,[147] Kiribati,[148] Nauru,[149] the Cook Islands[150] and Fiji[151] had very similar seabed minerals legislation.[152] That was developed under a Regional Legislative and Regulatory Framework project to harmonise legislation throughout the region, as part of a Deep-sea Minerals Project of the then South Pacific Community and the EU.[153]

The laws establish Seabed Minerals Authorities and licensing processes for activities within the national jurisdiction and provide the legal basis for Sponsorship Agreements in the international seabed Area under the ISA. Tonga's legislation has somewhat more conditional language, and includes obligations to provide information to, and consult, the public - but only for domestic applications and licensing within the EEZ, not for deep-sea mining.[154] PNG is the outlier as it still operates under the Mining Act of 1992 that applies to all mining. A new Mining Bill was proposed in 2025 which did not follow the pattern of the others, although the Government described it as an overhaul to drive global investment and transform PNG into the Asia-Pacific region's most conducive destination for mining investment. Its final form remains to be seen.

The following analysis highlights ISDS-risks under the legislation in the three Pacific Islands that have Sponsorship Agreements:

- ***Nauru's Seabed Minerals Authority Act 2024***, which replaced the 2015 Act, and preceded the revised Sponsorship Agreement with NORI in 2025;

- ***Tonga's Seabed Minerals Act 2014***, which had limited amendments in 2020, and has not been updated to reflect the revised Sponsorship Agreement with TOML; and

- The ***Cook Islands Seabed Minerals Act 2019***.

Both the Nauru[155] and the Cook Islands'[156] legislation provide for arbitration of investor-state disputes, with limited scope for judicial review in the domestic courts.[157] By contrast, Tonga requires that investor-state disputes in connection with administration of the Act are first approached by seeking mutual agreement or mediation, and if that fails, by application to the Supreme Court of Tonga.[158] However, that would not neutralise dispute provisions for enforcement of the Sponsorship Agreement or the BIT with the UK.

All three States adopt language that restricts new regulation and invites legal challenge. For example:

- Nauru requires the State to "not impose unnecessary, disproportionate or duplicate regulatory burden on Sponsored Parties".[159] The Act also repeats the broadly-worded BIT-style investor protections in its Sponsorship Agreement.[160]

- Tonga's Authority has an overall "accountability objective" to "provide a stable, transparent and accountable regime"[161] and will "so far as reasonably practicable" apply principles that "regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases where action is needed".(162) In relation to sponsorship, the Crown has leeway if the regulations are consistent with existing requirements imposed by the UNCLOS, the ISA Rules and other applicable international law standards.(163)

- The Cook Islands adopts almost identical regulatory principles for the Authority,(164) and will take all "appropriate means to ensure" the Authority does not impose requirements on a sponsored party unless they are "consistent with existing applicable standards of international law or are otherwise in the best interests of the Cook Islands."(165)

Tonga and the Cook Islands, under their domestic law, could apply new ISA regulations that are inconsistent with their Sponsorship Agreements. However, that would not, in itself, alter the obligations and enforcement provisions in the Sponsorship Agreements or the Tonga-UK BIT, unless they expressly say the Act prevails. Such legal interpretations are likely to be contested, raising the risks of costly arbitration and increasing the investor's leverage over how the government responds.

The exercise of discretion based on broad and subjective national interest criteria exercised under these domestic laws is another common basis for ISDS claims that governments have breached "fair and equitable treatment" or committed "direct or indirect expropriation". Examples include:

- Nauru's Minister can revoke a Sponsorship Certificate where the Cabinet is "satisfied it is in the Republic's interest" to do so,(166) including to avoid conflict with obligations under any international agreements or instruments in force for Nauru.

- In Tonga, the Authority must deny a prospecting permit in the EEZ where "the Authority is aware of other grounds that reasonably indicate that the grant of the Prospecting Permit would be contrary to the interests of the Kingdom ... ".(167)

- The Tongan Authority must refuse to issue a Sponsorship Certificate where, in its "reasonable opinion", the proposed activities "are likely to result in irreparable harm to any community, cultural practice, or industry in the Kingdom; or would not be in the public interest of the Kingdom".(168)

- The Cook Islands has similar criteria for a Sponsorship Certificate: the activity "will not result in irreparable harm to any community, environment, cultural practice, or industry" in the Cook Islands, and "would be generally in the public interest of the country, taking into account the potential for capacity-building and/or local employment and the long-term economic benefit to the Cook Islands."(169)

- The Authority can take administrative actions to vary, suspend or cancel licenses if "in the reasonable opinion of the Authority" doing so is "necessary to ... avoid damage to the national interest",(170) or if in the view of the Cabinet the relevant activities constitute an "unacceptable risk to the Cook Islands or are clearly no longer in the public interest due to changes in circumstances relating to seabed mining activities ..."(171)

The exercise of these subjective powers could still potentially be challenged as breaches of the Sponsorship Agreement or the Tonga-UK BIT, unless the provisions in dispute are explicitly subject to domestic law.

All three Acts also establish criminal offences and prescribe harsh penalties that investors are likely to consider integral to "full protection and security" under the Sponsorship Agreement and create a "legitimate expectation" that States will enforce them:

- In Nauru, physical interference with any Activities, vessel or related infrastructure that causes or is likely to cause danger to health and safety, or that physically hinders, obstructs or uses violence against a person exercising powers or functions under the Act or an ISA contract, can result in a fine up to AUD1 million or imprisonment for 10 years or both.(172)

- Tonga and the Cook Islands have variations on that language, with maximum penalties in Tonga of a $25,000 fine or 10 years imprisonment or both,(173) and a fine of up to $500,000 in the Cook Islands.(174)

- Vessels that enter designated "safety zones" around vessels and installations without the Authority's consent (eg Greenpeace ships or local fishers' flotillas) can be fined up to $250,000 in Tonga(175) and $1 million fine or 10 years imprisonment in Nauru.(176)

The domestic seabed mining laws sit alongside the Sponsorship Agreements. However, cross-references between them and how to reconcile conflicts are neither clear nor consistent. In one place, interpretation of contradictions within the Sponsorship Agreement may be required to favour the investor, so domestic law cannot reduce investor rights in the Sponsorship Agreement. Elsewhere, the sea-bed mining legislation may take precedence, but other legislation may not – even if compliance with other legislation, such as environment laws, is a feature of the seabed mining Act, as in Tonga.

For example:

- TOML's Sponsorship Agreement says it is "issued under and subject at all times to the Act and Regulations as at the date of this Agreement" (being August 2025), with the Act prevailing in any conflict or inconsistency.(177)

- Article 10.1(a) of the Agreement says any subsequent laws or regulations must not interfere with or diminish TOML's rights and not be a discriminatory change in Tongan law (meaning targeting TOML), except as required for Tonga to meet its international law or Sponsorship obligations. In such cases Tonga must engage in meaningful consultation and provide enough time for TOML to seek dispute resolution with regard to the application of Tongan law.

- Article 10.1(b) further says to the extent there is a conflict between TOML's rights and obligations under the Agreement and any Tongan Law, the Sponsorship Agreement takes precedence and TOML does not need to comply with those aspects of the law.

A subject-specific example relates to the assignment of the contract/permit to another entity:

- Tonga's Act says assignment or transfer of a title granted under the Act requires the prior written consent of the Authority, which must not be unreasonably withheld when it involves an internal corporate re-organisation.(178) A significant change in ownership or control of the Title holder needs approval of the Authority, again not to be unreasonably withheld.(179)

- Under Tonga's Sponsorship Agreement, any member of the TOML Group may, at their sole discretion, assign the TOML rights without prior consultation and just notifying the State. The State will not delay the transfer.(180)

- There is no equivalent in the Nauru Agreement, although on termination of the Agreement by the State the NORI Group retains the rights and title and can assign them or take other steps to preserve its rights and entitlements without further notification to the Government.(181)

The source and nature of the breach being alleged, and how inconsistencies are reconciled, will depend on any explicit hierarchy in the Act or Sponsorship Agreement, and for Tonga the UK BIT. Even that may be disputed.

Which legal forum is used for the dispute will affect the nature of the judicial body and judges, the jurisprudence that applies, and adjudicators' interpretation of vague guarantees and discretionary terms. The domestic courts will approach this through the lens of domestic jurisprudence and case law, while an arbitral tribunal's interpretations, including of the States' domestic law, can be idiosyncratic with no pathway to appeal. As PNG found with the Porgera disputes, governments could find themselves defending numerous costly legal actions in different fora that could produce vastly different outcomes.

(v) Deep-sea extraction permits under US legislation

The fifth potential source of ISDS disputes arises from recent moves in the US to authorise extraction in the international deep-sea bed pursuant to domestic legislation from 1980. These fast-moving developments seem destined to generate long and costly investor-state dispute risks under diverse legal instruments, with Pacific Islands States caught in the cross-fire. As this is still playing out, the following analysis is necessarily speculative. But these developments will clearly frame investors' claims to expectations of how Pacific States will meet their obligations under their Sponsorship Agreements and legislation. And all these documents, binding or not, add to the complexity of those obligations and mining companies' "legitimate expectations" as fuel for ISDS disputes.

The US v UNCLOS

As noted earlier, the UNCLOS and ISA have recognised responsibility under international law for the global ocean commons. The US has positioned itself outside that regime. After initially participating, critically, in the UNCLOS process, the US was one of four states to vote against the adoption of the Convention in April 1982, with 130 in favour and 17 abstentions. US President Reagan issued a *Statement on United States Actions Concerning the Conference on the Law of the Sea* in July 1982,[182] saying it would continue to participate at a technical level and only on provisions that serve US interests.

In parallel, Presidents Carter promoted, and Reagan then adopted, the Deep-Seabed Hard Mineral Resources Act (DSHMRA)[183] in 1980, followed by regulations under Reagan in 1981 and Bush in 1989. These empowered the National Oceanic and Atmospheric Administration (NOAA) to issue exclusive exploration licenses and commercial recovery (extraction) permits to US citizens or entities over specific tracts of the deep seabed. Congress intended that future international seabed agreements under UNCLOS would provide reasonable access to the deep-seabed mineral resources for US citizens and recognise continuing mining rights of US citizens who had begun such operations.

Four exploration licenses were issued by the NOAA in 1984 to multinational private sector consortia with participating companies from, Canada, the UK, Germany, Japan as well as the US. Two of these have been renewed every five years.[184] The legal form and content of these exploration licenses remains unclear, but they are likely at a minimum to include standard BIT-style investor rights and ISDS mechanisms.

Fast forward to the 2020s. The Biden administration's Indo-Pacific Economic Framework (IPEF) included a focus on critical minerals to boost US domestic production, secure supply for its military and technology industries, and counter Chinese dominance in the supply chain. Fiji was a party to IPEF, but did not participate in the critical minerals dialogue. No other Pacific States were involved.

The second Trump administration took a more aggressive approach. An Executive Order issued by the White House on 24 April 2025, Unleashing America's Offshore Critical Minerals and Resources, directed government agencies to take various steps to secure the seabed minerals essential to US industrial resilience and to:

"strengthe[n] partnerships with allies and industry to counter China's growing influence over seabed mineral resources and to ensure United States companies are well-positioned to support allies and partners interested in developing seabed minerals responsibly in areas within their national jurisdictions, including EEZs".(185)

This aimed to streamline permitting and expedite the process for reviewing and issuing exploration licenses and commercial recovery (extraction) permits in areas beyond national jurisdiction, under the Deep-Seabed Hard Mineral Resources Act (DSHMRA).(186) The US Government's optimism was met by scepticism from other commentators that those companies have the technical capacity and financial viability to deliver the projected bonanza.(187)

Nevertheless, mining companies were quick to lodge applications, with at leaast seven reportedly being submitted by mid-2026.(188) They included companies active in the Pacific. Within days of the Trump administration's Executive Order, The Metals Company, which wholly owns two subsidiaries operating under sponsorship of Nauru and Tonga, NORI and TOML, had filed applications for exploration licenses and an extraction permit through its US subsidiary for ocean seabed areas that partially overlapped the TOML and NORI ISA contract areas.(189) The Metals Company previously said it would apply to mine those areas through the ISA after Nauru had triggered the "2-year rule" that required the development of regulations for deep-sea mining in the Area. Now apparently it plans to mine only through US regulations.

Another was American Ocean Minerals Corporation (AOMC), which was in the process of merging with Odyssey Marine Exploration with the intention of exploiting the existing exploration licenses alongside the commercial extraction permits being sought under the US Act.(190) In July 2026 the company reported that NOAA had cleared AOMC's consolidated application to move to its next stage of formal environmental, public and regulatory review.(191)

The ISA Secretary-General has vigorously denounced US President Trump's April 2025 proclamation:

"Exploitation and exploration activity in the Area must be carried out under the Authority's control through a contract with the Authority and in accordance with the rules, regulations and procedures it establishes. ... A direct corollary of this legal status is that no State may claim, acquire, or exercise sovereignty or sovereign rights over any part of the Area or its mineral resources. This includes a prohibition on appropriation and alienation by any State or by any natural or juridical person".(192)

The ISA warned that authorising seabed mining outside the UNCLOS framework "may incur legal, diplomatic, economic, security, financial and reputational risks".(193) Those legal risks are mounting, with an investigation launched by the ISA Council into the actions of sea mining contractors to circumvent the regulations upheld by UNCLOS and the potential violation of international law,(194) and specifically to possible non-compliance by NORI and TOML with their contractual obligations arising out of direct or indirect actions related to activities in the Area.(195) The companies responded by filing proceedings in the Seabed Disputes Chamber against the ISA, pursuant to UNCLOS Part XI, alleging a breach of due process and seeking a halt to the proceedings until that was remedied.(196)

"Congress may consider whether and how promoting U.S. commercial seabed mining partnerships with certain PICs, among other actions in the critical minerals context, may contribute to diversification of the U.S. supply chain. In its deliberations, Congress may consider whether the benefits of such partnerships (including the potential lessening of China's control over supply chains) outweigh concerns about environmental and geostrategic impacts."

- US Congressional Report"Seabed Mining Interests Across the Pacific Islands"

US eyes on the Pacific

Separately, the US has been actively courting the Pacific as part of its critical minerals strategy. A report for the US Congress in August 2025 addressed Seabed Mining Interests Across the Pacific Islands, specifically the Cook Islands, Kiribati, PNG and Tonga, and competition from China.[197] It noted the differing positions between the FSM, Vanuatu, Fiji, Palau, Tuvalu and Samoa that support a moratorium, and Tonga, Cook Islands, Kiribati and Nauru that have sponsored companies under ISA and have similarly structured domestic seabed mining laws. The report suggested that:

"Congress may consider whether and how promoting U.S. commercial seabed mining partnerships with certain PICs, among other actions in the critical minerals context, may contribute to diversification of the U.S. supply chain. In its deliberations, Congress may consider whether the benefits of such partnerships (including the potential lessening of China's control over supply chains) outweigh concerns about environmental and geostrategic impacts."

On 14 January 2026, the White House issued a Proclamation on Critical Minerals[198] that instructed the US Trade Representative and Commerce Secretary to negotiate critical minerals agreements with its trading partners. To date, only the Cook Islands has entered into a Critical Minerals Framework Agreement with the US in February 2026, although other Pacific governments have been invited to do so.

In early February 2026, the US hosted a Critical Minerals Ministerial meeting in Washington DC. The Cook Islands was among eleven countries that signed bilateral minerals frameworks or MoUs with the US that follow a US template. The Government said the framework will provide a structured basis for collaboration on seabed minerals across research, geological mapping, exploration, investment facilitation, processing and supply chain development.[199] A working group is to coordinate engagement and identify areas of mutual strategic interest, promote joint research and mapping, and identify areas and opportunities for processing (in the US).

Formally, the framework is non-binding and affirms Cook Islands' sovereign control over its seabed minerals and decision-making. But the US President's January 2026 proclamation foreshadowed punitive tariffs and other sanctions if countries do not meet US expectations. It may also create "legitimate expectations" that firms operating under Cook Islands' auspices could invoke if a dispute arose with their Sponsorship Agreement or contract.

These developments have run alongside the US-driven Minerals Security Partnership, previously the Forum on Resource Geostrategic Engagement (FORGE). Plans include a Memorandum of Understanding (MoU) to support mining, refining, processing and recycling projects, and the development of an action plan to explore a binding plurilateral trade initiative on critical minerals.

On 28 February 2026, Pacific Islands leaders from the Solomon Islands, Cook Islands, Palau and Tonga, and senior ministers from PNG, Vanuatu and Fiji met in Hawai'i for the Pacific Agenda: Investment, Security and Shared Prosperity Summit.[200] Hosted by the US Deputy Secretary of State Landau, with participation from the US military's Indo-Pacific Command, the meeting focused on investment opportunities in critical minerals and regional supply chains. Following the summit, Landau visited Fiji, Samoa and Tonga. There has been little or no transparency in these processes.

Separately again, a Joint Statement on US-Tonga Cooperation to Advance Marine Scientific Research in February 2026 announced cooperation to advance marine scientific research for the "responsible exploration of seabed mineral resources".[201] The US had "begun discussions to support the marine scientific research necessary to inform seabed exploration, and the development of the appropriate global regulatory frameworks and standards", while incorporating Tonga's stewardship and obligations under international law – but it is unclear exactly how.

Potential for ISDS disputes

It is premature to predict how the US issuing extraction licences that overlap with the ISA zones might play out legally. However, there are some ISDS-specific issues that should be addressed.

The Sponsorship Certificates and Agreements with TOML and NORI are explicitly linked to Tonga and Nauru's status as signatories to UNCLOS and to the Rules of the ISA.[202] The companies also commit to ensure that their activities in the Area comply with the terms and conditions of the ISA contract, and their actions or omissions will not cause the States to materially breach their Sponsorship obligations.[203] TOML's and NORI's rights are pursuant to the rules of the ISA and ISA contracts.[204] Non-compliance by TOML and NORI carries legal consequences under the Sponsorship Agreements:

- Nauru can terminate and/or impose monetary penalties in the case of a material breach by NORI[205] and direct that the Sponsored Party continues to comply with obligations under the Act, ISA Rules and terms of the Sponsorship Agreement.[206] Nauru can also revoke the Sponsorship Certificate to avoid conflict with any obligation arising out of an international agreement.[207]

- Tonga can vary, suspend or revoke a licence relating to its territorial jurisdiction where in the "reasonable opinion of the Authority" it is necessary to avoid a conflict with the Kingdom's obligation arising out of any international agreement".[208] It can vary or revoke the Sponsorship Certificate where the Authority in its "reasonable opinion" believes that necessary to "prevent serious risk" to persons or the marine environment, or to "avoid a conflict with any obligation of the Kingdom arising out of any international agreement".[209]

- The Cook Islands Authority can take administrative actions to vary, suspend or cancel licenses if "in the reasonable opinion of the Authority" it is necessary to avoid a conflict with any obligations under international law.

The Tonga and Cook Islands legislation also says rights to the Area are governed by the Rules of the ISA and Seabed Mineral Activities in the Area, and shall be carried out in association with the ISA only by State Parties to the UNCLOS or by those sponsored by State Parties. Tonga's Act is to be interpreted "where possible" consistently with obligations under UNCLOS and other relevant international instruments and a long list of Tonga's duties, including environmental impact assessments. It recognises rights to the Area are governed by ISA Rules and seabed resources in the Area are common heritage. Seabed minerals activity in the Area is to be carried out only under the ISA.[210]

The Nauru Seabed Minerals Authority Act 2024 is more complicated. It recognises that seabed resources of the Area are the "common heritage of humankind", that the rights in the Area are governed by the UNCLOS and the Rules of the ISA, and that the ISA has responsibility to organise and control activities in the Area on behalf of humankind.[211] Section 27.2(b) says the terms of a Sponsorship Agreement "do not or are not likely to lead to a contravention by Nauru or the Sponsored Party of the UNCLOS, the Rules of the ISA or this Act." The Sponsorship Agreements reiterate that, so there is no inconsistency on its face.

However, the revised Act and Sponsorship Agreements aim to legitimise an alternative pathway to extraction. Section 67 says:

"This Act is made on the basis that the Rules of the ISA and the ISA's monitoring and enforcement capacity will be developed in an appropriate and timely manner for the purpose of securing that Seabed Mineral Activities will comply with relevant standards and obligations of international law."

The 2025 Sponsorship Agreement with NORI also notes the ISA's failure to develop regulations for exploitation according to the "2-year rule" and implicitly legitimises the US's unilateral issuing of permits in the Area. If Nauru withdrew its sponsorship or rejected an extension to the contract, Section 67 might be interpreted by a domestic court or an investment tribunal to negate some or all of the Act, and actions the State takes against NORI based on its inconsistency with the ISA and UNCLOS.

There are clearly legal risks for Tonga, Nauru and the Cook Islands. Both TOML and NORI need to obtain contract extensions from the ISA: NORI's 15-year Exploration Contract with the ISA was due to expire on 22 July 2026 and TOML's on 11 January 2027. Both sought 5-year extensions, which would preserve their positions for future extraction in those zones. In July 2026, the ISA Council approved the extension of NORI's exploration contract. However, the ISA's contractor compliance inquiry continues and could result in subsequent action being taken on NORI's and TOML's exploration contracts. Should the ISA decide that TMC and its subsidiaries have violated the ISA and UNCLOS, the Governments would seem to have no choice but to revoke their Sponsorship Agreements. What might happen next is speculative, but the following are possibilities ?

- The Sponsorship Agreements of NORI and TOML, and the domestic legislation, are premised on the application of the UNCLOS/ISA regime to the deep-sea and conformity with the ISA rules and UNCLOS. So the States could rely on this to terminate following a finding of breach. Under the UNCLOS, the Seabed Disputes Chamber has jurisdiction over disputes between the ISA and a prospective contractor, and between parties to a contract, with binding arbitration.(212) But that does not necessarily preclude disputes being brought through other instruments, which would depend on their wording. Termination could potentially trigger one or more ISDS disputes by litigious investors, drawing the complex intersection of the UNCLOS, ISA, Sponsorship Agreement, legislation and international law arguments into the sphere of an investment tribunal that is ill-suited to address it in a balanced way.

- Nauru and Tonga could make it clear they do not support the extension of NORI and TOML's exploration licences. But both States have obligations under the new Sponsorship Agreements to support those applications and not speak ill of NORI and TOML or members of their Groups. Not doing so would put them in breach of their Sponsorship Agreements and hence open to an ISDS complaint. But complying with that obligation risks making them complicit in the bad faith machinations of TMC.

- If TOML restructured to reincorporate in Jersey or Isle of Man, as with Porgera, it could access the Tonga UK BIT – but if Tonga withdrew from that BIT now it would have no legacy "survivor clause" obligations. Delay could lead to potentially crippling damages awards.

Very similar arguments would run across a range of legal forums. But the very nature of ISDS means there is no predictable outcome. The legal and fiscal risks might well have a chilling effect that leads the Tongan and Nauru Governments to sit on their hands.

PART F: CONCLUSION AND RECOMMENDATIONS

Sovereign Pacific States and their peoples need to decide how to address the emergence of deep-sea mining in the context of their commitments as guardians of the Ocean that surrounds and sustains them. This paper has been concerned with one specific aspect of the legal framework surrounding deep-sea mining - the right of investors to sue governments through international arbitration, or investor-State dispute settlement (ISDS) - with a view to identifying and minimising the State's legal, fiscal, regulatory, environmental and social risks.

The report has focused on five intersecting and often overlapping legal pathways for investors to bring deep-sea mining-related ISDS disputes: bilateral investment treaties, state-investor contracts, Sponsorship Contracts issued pursuant to the ISA, domestic legislation, and emergent commercial extraction contracts conferred by the US government on US-related mining companies.

The Pacific Islands States involved with deep-sea mining examined here – Tonga, Nauru, the Cook Islands and PNG - are, to varying degrees, affected by two or more of these. But this analysis also aims to forewarn other Pacific States of the risks from ISDS should they consider supporting deep-sea mining operations. To reiterate, this is not a legal opinion. While all care has been taken to ensure accuracy and balance, it has necessarily been selective of the issues and instruments covered and has truncated some legal arguments. It is also based on publicly information available at the time of writing.

The bottom line is that all the current pathways to ISDS in deep-sea mining activities are heavily skewed in favour of foreign investors, heightening the risks of a heavily criticised legal regime that many states are now rejecting. For small island developing states, which are also Big Ocean States, the impacts of ISDS disputes would be potentially crippling. That creates a condition known as the "chilling effect", where States come under pressure to tailor their regulatory and environmental regimes, judicial decisions, and the policing of their people's voices, to avoid long and costly disputes.

There are, of course, other factors at play. While not venturing into the geopolitical issues that underpin the superpower contest for control of critical minerals, it is important to recognise how pivotal research, data and intellectual property rights are to the companies and the super-powers – and the potential for these to become subjects of disputes.

Paradoxically, the US also announced in January 2026 it was withdrawing from the Secretariat of the Pacific Regional Environmental Programme (SPREP). This was part of a broader retreat from international entities based on the Trump administration's assessment that they "operate contrary to US national interests".[213] While the US has not yet initiated formal legal requirements for withdrawal,[214] it did not deliver the year's funding for 2025-2026. China, not part of SPREP, stepped in with an equivalent grant.[215]

More directly, China has been exploring critical minerals options with Pacific Islands Countries. In 2025 it signed a series of agreements with the Cook Islands: an Action Plan for the Comprehensive Strategic Partnership (CSP) 2025-2030[216] and Memoranda of Understanding (MoUs) on Deepening Blue Economy Cooperation,[217] Blue Partnership in Seabed Minerals Affairs,[218] and Economic and Technical Cooperation.[219] Clearly there will be tensions between this and the Critical Minerals Framework Agreement with the US and whatever comes next. Other Pacific States are also being courted by both super-powers.

Data and intellectual property are investments protected under BITs and specific rules apply to control and assignment of research and data under the Sponsorship Agreements and domestic laws. For the purposes of this paper, it is enough to flag the potential for this to become a major point of legal contention.

Recommendations

The following ***five recommendations*** are designed to minimise the risks Pacific Islands States face:

1) Terminate bilateral investment treaties by PNG, Tonga and Timor-Leste, with requests to the other State parties to amend and remove the "survivor" clause prior to that action. Australia has a policy of no ISDS in its own agreements, so it should be pressed to provide a precedent for doing so. Those States should take steps to cancel their other BITS that have not entered into force.

2) For Vanuatu and Marshall Islands not to ever bring their BITs into force and take steps to cancel them.

3) Amend domestic legislation that applies to seabed mining to remove pre-consent to investment arbitration and confine domestic enforcement of seabed mining activities to the domestic courts, and accord primacy to the nation's constitutional, kastom, and international law obligations.

4) Ensure that any new Sponsorship Agreements give primacy to that amended domestic law and preserve exclusive jurisdiction over all elements of disputes involving deep-sea mining to the domestic courts; and

5) Seek to amend existing Sponsorship Agreements, at least when they are due for renewal, along these lines or terminate the agreements where that cannot be achieved.

ENDNOTES

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143. But see the Tonga Seabed Minerals Act Section 122 that recognises only the courts’ jurisdiction over disputes in connection with the administration of the Act.

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156. In the Cook Islands Seabed Minerals Act 2019 Section 166(2) the process for disputes with a Sponsored Party is by mutual agreement or mediation and, failing that, by referral to arbitration under the Arbitration Act 2009. Under Section 128 the powers of the Supreme Court are the same as for Nauru, but time to bring judicial review proceedings is limited.

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159. Nauru Seabed Minerals Authority Act 2024 Section 30(c).

160. Nauru Seabed Minerals Authority Act 2024 Section 30 (k) “accord the Sponsored Party fair and equitable treatment, and provide a stable and predictable legal framework and make decisions consistently and transparently”; (m) “not nationalise or expropriate a Sponsored Party’s investment or take measures having effect equivalent to nationalisation or expropriation except for on a non-discriminatory basis and against prompt adequate and effective compensation ... : (n) “accord Sponsored Parties treatment no less favourable that the treatment it accords, in like situations, to other investors”; (o) “accord Sponsored Parties full security and protection”; and (p) “guarantee conversion and transfer overseas ... of Sponsored parties’ earnings and savings” or those of personnel, affiliates and subcontractors ...

161. Tonga Seabed Minerals Act 2014 Section 11(d).

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Pacific Network on Globalisation

ISBN 978-982-9083-14-2