BRIDGING THE BUSINESS AND HUMAN RIGHTS DIVIDE WITH LESSONS FROM UNCLOS' DEEP SEA MINING REGIME

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ABSTRACT

The norms that govern international economic law have for decades been criticised by the Third World for favouring the interests of western Industrialised Powers to the detriment of Third World peoples and their states. Among the contested issues is whether the very structure of international law facilitates this skewed situation, in matters such as accountability abeyances of business entities for human rights violations and the clash of state obligations under international human rights and international economic law. The United Nations Convention on the Law of the Sea (UNCLOS) regulates matters that undoubtedly affect critical economic interests of states. It is lauded for having, through tortured negotiations (1973-82, 90-94), arrived at far more equalising standards between established maritime powers and economically weaker Third World states. The UNCLOS deep sea mining regime was so contested that it delayed UNCLOS' acceptance among established economic powers for over a decade. In this paper, we interrogate whether this regime offers a viable model that the business and human rights divide could emulate, both in terms of the viability of the 'treaty road' as well as establishing reasonable terms of assigning international responsibility among international organisations, states and corporate entities within municipal law, especially since the 2011 ITLOS Advisory Opinion on responsibilities and obligations of states, arose from concerns of small island states.

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"*a lawyer who has not studied economics ...*
is very apt to become a public enemy"[1].

INTRODUCTION

As a UPeace student in the class of 2013, I quickly found out that the two study streams at the Department of International Law somewhat split my budding research interests. Having spent some years working closely with the institutions of the African human rights system, I was strongly inclined to absorb as much as I could from the 'International law and human rights' stream. Yet, the foundational courses on public international law had began to answer some questions I had had lingering from my earlier working years, on the nature, history and internal logic of international law, especially its seeming affinity for a certain cognitive dissonance, if I may. The second study stream, 'International law and settlement of disputes' seemed to afford more courses to help me understand further, public international law. It was upon Dr Sainz-Borgo's enthusiastic advice and support that I registered for the law of the sea course, which is taught by Amb. Eiriksson (and had to give up the globalisation and human rights class, which I was very interested in). Needless to say, I thoroughly enjoyed his classes, greatly appreciated his mastery of the field, humourous take on the UNCLOS III negotiations (including the Comma sub-Committee, which as an editor, I empathise with) and continue to contemplate, years later, his advice on legal questions over lunch break. His lectures transported us into treaty negotiation committee rooms and allowed us a glimpse of the complexities of international adjudication of disputes. At times, one felt like a fly on the wall of a committee room back in the 70s or court room in the 90s. He was particularly enthusiastic about, what was the then fairly recent Advisory Opinion by what he still calls "our court" on responsibilities of states under the Convention's deep sea mining regime. This paper, flowing from my initial impetus to 'cross over' into the law of the sea class, is an attempt to interrogate what we in the human rights world may gain from recalling the unity and diversity of international law, and how advances in international law almost invariably come from persistent commitment to a vision against contemporary pragmatic odds.

"There is something very wrong with our global economic system which takes little, if any, account of the environmental and human rights costs of business activity"[2]. Thus begins Penelope Simons' argument that the current global economic order is not so much governed by

[1] Citing sociologist Charles R Henderson, Louis D. Brandeis, "The Living Law: An Address Delivered before the Chicago Bar Association, January 3, 1916" in *Business - A Profession* available from http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-21 (accessed 12 August 2015).

[2] Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" *Journal of Human Rights and the Environment*, Vol. 3, No. 1 (March 2012), p.6.

market forces as envisioned by Adam Smith[3], but a legal structure that cements a rigid aversion in political economy of government involvement in economic activity[4] and even regulation[5]. As this legal structure and its disciplinary basis, which some economists consider pseudo-scientific[6] and ideological[7], does not offer accountability for wayward behaviour, business is not conditioned to respect the environment and human dignity[8].

There have been several unsuccessful attempts to bring legal accountability to business for actions resulting in such violations[9]. In this paper, we shall discuss international law's seeming impotence in its task to concurrently promote business and human rights, and investigate how, given the supposed mutual exclusivity of accountability for business and promotion of human rights and environmental protection, the United Nations Convention on the Law of the Sea (UNCLOS)[10] regulation of activities in the Area can serve as a viable model.

Third World Approaches to International Law (TWAIL) scholars have done much to capture the structural bases of international law that create a lopsided economic system[11], although largely focusing on its unjust effects on the so-called Third World[12]. Some wonder[13] how

[3]Simons' title applies an instructive pun, with the invisible hand alluding to Adam Smith's famous description of market forces. "The rich ... divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life which would have been made, had the earth been divided into equal proportions among all its inhabitants and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species." Adam Smith, The Theory of Moral Sentiments, Part IV Chapter 1, cited in Yanis Varoufakis, "Egalitarianism's Latest Foe: A Critical Review of Thomas Piketty's Capital in the Twenty-First Century" *Real-world Economics Review*, No. 69 (October 2014), p.18.

[4] See generally, Milton Freidman, *Capitalism and Freedom* (Chicago, University of Chicago Press, 1962).

[5] UNESCOR, "Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organizations in General Consultative Status", 2003 (UN Doc E/CN.4/Sub.2/2003/NGO/44 2); see also Simons, "International Law's Invisible Hand", note 14.

[6] Yanis Varoufakis, "All the Good Stuff that Cannot Be Measured". Available from www.youtube.com/watch?v=FqZ2evtU0Yg (accessed 4 March 2015).

[7] Joseph Stiglitz's remarks in Institute for New Economic Thinking, "A Conversation on the Economy with Joe Stiglitz and Paul Krugman". Available from www.youtube.com/watch?v=xd0Uz__ebzA (accessed 4 March 2015); see also, Joseph Stiglitz, *Globalization and Its Discontents* (London, Penguin Books, 2002), especially pp.3-52.

[8] The 2003 documentary "The Corporation" (directed by Mark Achbar and Jennifer Abbott, written by Joel Bakan) argues that a line of US Supreme Court decisions dating back to the late 1890s have allowed the corporate entity to evolve into its current state as society's "dominant institution", which it argues is a curious blend of enormous power and amoral conduct. Simons' "International Law's Invisible Hand" looks at international, rather than municipal legal structure.

[9] For instance, the 2003 UN Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights (UN Doc E/CN 4/Sub 2/2003/12/Rev 2).

[10]1833 UNTS 3, 10 December 1982.

[11] Simons, "International Law's Invisible Hand", pp.6, 19-29; also, Antony Anghie *et al.*, eds., *The Third World and International Order: Law, Politics, and Globalization* (Leiden, MartinusNijhoff, 2003); LL Lee, "Trials and TRIPS-ulations: Indian Patent Law and *Novartis AG v. Union of India*" *Berkeley Technology Law Journal*, No. 23 (2008), pp.281-313; James Gathii, "The Sanctity of Sovereign Loan Contracts and Its Origins in Enforcement Litigation" *The George Washington International Law Review*, Vol. 38, No.2 (2006).

[12] Some TWAIL scholars have included American indigenous peoples within this conceptual framework, like SuneraThobani, "Reading TWAIL in the Canadian Context: Race, Gender and National Formation" *International Community Law* Vol. 10 (2008), p.421; In "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" *Osgoode Hall Law Journal*, Vol. 43 (2005), p.177, OC. Okafor "locates TWAIL's origins in the pre-1940s decolonisation movements of Latin America" cited in Remi Bachand, "Critical Approaches and The Third World: Towards a Global and Radical Critique of International Law". Available from www.mcgill.ca/files/legal-theory-workshop/Bachand-3rd-world-critical-approaches.pdf (accessed 12 August 2014).

democracy can survive in a world where the largest corporations are many times wealthier than nation-states[14], nation-states which themselves suffer from weak legal and political foundation. Legal analyses are divided over the appropriate analytic approach[15], as are political economic analyses[16].

UNCLOS' CONTRIBUTION TO A MORE JUST INTERNATIONAL ECONOMIC ORDER

To understand the TWAILers, one must invariably begin from the premise that if any injustice exists in the international order, it is structural, and such structural basis is, as always, concretised by law[17]. In essence, the critics of the international legal system argue that, while apparently an equalising force, international law only serves to preserve the socio-economic inequalities and unbalanced power structures that existed at its creation.

In 1970, International Court of Justice judge Fouad Ammoun, captured Third World frustration over the matter: "[t]he development of international law *cannot* … have as its sole or principal object the protection of foreign nationals and of the international economic activities of the industrialized Powers"[18]. The history of the law of the sea, in particular, reflects the deep seated economic interests of these powers Judge Ammoun seems to refer to, which are, *almost exclusively* coastal and former colonial powers. The law of the sea's history also records possibly the only successful struggle for a normative framework that redeems international law from the charges TWAILers level. In fact, so successful was the law of the sea regime at this task that it remains, to our mind, the first major economics related treaty that left the industrialised maritime powers dissatisfied[19]. The deep sea mining regime reflected so deeply the divergent views of

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[13] MigaiAkech, *Privatization and Democracy in East Africa: The Promise of Administrative Law* (Nairobi, East African Educational Publishers, 2009)*;* Naomi Klein, *The Shock Doctrine*,*The Rise of Disaster Capitalism* (Toronto, Alfred Knopf, 2007);Lynn Parramore, "Rana Dasgupta: Can Democracy Survive Aggressive Global Capitalism?" *Institute for New Economic Thinking Blog*, 6 March 2015. Available from ineteconomics.org/institute-blog/rana-dasgupta-can-democracy-survive-aggressive-global-capitalism (accessed 10 March 2015).

[14] Writing in 2011, Vincent Trivett, notes, for instance, that Walmart's then $421.89 billion revenue was larger than Norway's then GDP of $414.46 billion. See Trivett, "25 US Mega Corporations: Where They Rank If They Were Countries" *Business Insider*,27 June 2011. Available from www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1#ixzz3ZQWgrtzJ (accessed 27 March 2015).

[15] See Mihir Kanade, "Human Rights and Multilateral Trade: A Pragmatic Approach to Understanding the Linkages" *The Journal Jurisprudence* (2012); Simons, "International Law's Invisible Hand".

[16] John Ruggie, "Business and Human Rights: The Evolving International Agenda" *American Journal of International Law*, Vol. 101 (2007); Walter Rodney, *How Europe Underdeveloped Africa* (Nairobi, East African Educational Publishers, 1989)*;* Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (London, Allen Lane, 2009); Julius K. Nyerere, "Developing Tasks for Non-Alignment" and "The Rational Choice" in *Man and Development* (Dar es Salaam, Oxford University Press, 1974),pp.65-81; 111-25.

[17] "[The removal of the Maasai from their land] may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. [However, t]hese are considerations into which this Court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy". *Ol le Njogo v Attorney General*, (1913) 5 EAPLR 70, 80 (Kenya), cited in James Gathii, "Imperialism, Colonialism and International Law" *Buffalo Law Review*,Vol. 54, No. 4 (January 2007), p.1013.

[18] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain*), Second Phase, Judgment, ICJ Reports 1970, p.3, Separate Opinion of Judge Fouad Ammoun,p.290. (Emphasis added.)

[19] RR Churchill and AV Lowe, *The Law of the Sea*, 3rd ed. (Manchester, Juris Publishing, 1999), p.22. Churchill and Lowe report the continuing dissatisfaction even with the 1994 Implementation Agreement. Other earlier treaties that drew such dissatisfaction were largely in human rights law, such as the ICCPR and ICESCR.

these established versus emerging economic interests that it effectively kept UNCLOS in abeyance until the 1994 Agreement Relating to the Implementation of Part XI of the Convention[20].

At the Third UN Conference on the Law of the Sea, the tide began to turn in favour of newly independent Third World states[21], buoyed by the dissatisfaction in the existing law of the sea regime of landlocked and geographically disadvantaged developed European countries[22].Indeed, it is precisely this peculiar alignment of North landlocked-South coastal states' economic interests that, we opine, allowed UNCLOS to be so successful[23] where other legal regimes have failed[24]. For instance, Tayo Akintoba reports that "the [exclusive economic zone] concept was first introduced by African states … [they] called for the extension of fisheries jurisdiction within the zone *in order to keep developed countries away from their shores and to ensure the exclusive right of coastal African states to exploit living and non-living marine resources*"[25].

It is also noteworthy for our present discussion that when deep sea bed mining began to be technologically feasible in the 1970s, among the countries set to suffer most in terms of reduced incomes to their mining based economies were the then Zaire (copper and cobalt) and Gabon (manganese)[26].

It is important that the tortured political context of 70s negotiations not be understated. By 1970, UN General Assembly Resolution 2570, in calling for the convening of a conference to negotiate a comprehensive law of the sea convention, recognised that the 1958 Geneva Conventions regimes were inadequate and unworkable. The highly politicised nature of the negotiations was evident in its handling by the UN General Assembly's First (Political and Security) Committee, rather than the Sixth (Legal) Committee[27].

Given the historical and normative advances in the law of the sea, could its norms and political struggles be instructive for human rights and business? To properly answer this question, we must first consider the debate over business and human rights.

CONTENTIONS IN BUSINESS AND HUMAN RIGHTS LAW

Currently, transnational corporations (TNCs) do not have binding international human rights obligations. The last attempt to begin a process towards such binding obligations, the 2003 UN Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises

[20] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London, Routledge, 2002), p.174.

[21] In paying tribute to the late RP Anand, Ambassador Eiriksson noted "…it is precisely in the law of the sea negotiations beginning in the late 1960s and continued at [the Conference] that the domination of Eurocentric doctrine in our field, […] began to recede." Speaker's Note: His Excellency Gudmundur Eiriksson on 'Recent Developments in the Law of the Sea' *South Asia Law Affairs*. Available from http://southasiacanteen.wordpress.com/2013/02/11/speakers-note-his-excellency-gudmundur-eiriksson-on-recent-developments-in-the-law-of-the-sea/ (accessed 16 August 2014).

[22] Judge Helmut Tuerk, "Landlocked States and the Law of the Sea", UN Audiovisual Library of International Law (accessed 20 February 2014).

[23] Churchill and Lowe, *The Law of the Sea*, p.17.

[24] Whether Third World – especially African – states have fully taken advantage of their greater jurisdiction's rich economic opportunities is, however, the subject of a separate study.

[25] T.O. Akintoba, *African States and Contemporary International Law: A Case Study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (The Hague, Martinus Nijhoff, 1996), pp.2-3. (Emphasis added.)

[26] Churchill and Lowe, *The Law of the Sea*, p.223.

[27] Churchill and Lowe, *The Law of the Sea*, p.17.

with Regard to Human Rights[28], although unanimously adopted by the then Sub-Commission on Promotion and Protection of Human Rights, ground to an acrimonious halt at the former Commission for Human Rights[29].

Among its most divisive aspects were that it proposed binding obligations, in contrast to other initiatives that allow TNCs to voluntarily adhere[30]. Their most contested trait was "their apparent attempt to impose obligations directly on companies, *in addition to parallel obligations on states*"[31]. In the view of the corporate world, "[t]o be effective and relevant to a company's specific circumstances, business principles and responsibilities should be developed and implemented by the companies themselves"[32].

To avoid this divisive backlash, John Ruggie, United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG), appointed in the aftermath of the Draft Norms controversy, elected a different path. Rather than aim for binding legislation with direct corporate responsibility[33], Professor Ruggie proposed the Guiding Principles on Business and Human Rights[34], under his policy framework, dubbed Protect, Respect and Remedy[35], whose appeal to the business community was precisely that they "would find no new legal obligations advocated [therein]"[36], much to the chagrin of NGOs and some Third World states[37].

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[28] UN Doc E/CN 4/Sub 2/2003/12/Rev 2. See also UNESCOR, "Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", 2003 (UN Doc E/CN 4/Sub 2/2003/38/Rev 2).

[29] Simons, "International Law's Invisible Hand", p.7.

[30] Mainly, the UN Global Compact, the OECD Guidelines for Multinational Enterprises (Ministerial Declaration) 25 May 2011 and The Voluntary Principles on Security and Human Rights. Instructively all these come after the Draft Norms.

[31] D Kinley, J Nolan and N Zerial, "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations" *Companies and Securities Law Journal*, No. 25 (2007) cited in Simons, "International Law's Invisible Hand", p.7. (Emphasis added for reasons we shall return to later.)

[32] UNESCOR, "Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organizations in General Consultative Status", 2003 (UN Doc E/CN.4/Sub.2/2003/NGO/44, 2), cited in Simons, "International Law's Invisible Hand", note 14.

[33] Simons, "International Law's Invisible Hand", pp.9-10, also note 29.

[34] John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and other Business Enterprises", 2011 (UN Doc A/HRC/17/31).

[35] See John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises", 2008 (UN Doc A/HRC/8/5); Report of the Special Representative of the Secretary-General [SRSG] On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework, 2009 (UN Doc A/HRC/11/13); Report of the Special Representative of the Secretary-General [SRSG] On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, "Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework", 2010 (UN Doc A/HRC/14/27).

[36] Weil, Gotshal and Manges LLP, "Memorandum: Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative's Report Entitled 'Protect, Respect and Remedy: a Framework for Business and Human Rights'" (Report) (22 May 2008). Available from www.reports-andmaterials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf, cited in Simons, "International Law's Invisible Hand", note. 29.

[37] Simons, "International Law's Invisible Hand", p.11.

ARE NEW DIRECT OBLIGATIONS ON CORPORATIONS NEEDED?

John Ruggie has asserted the view that "[t]he root cause of the business and human rights predicament today lies in the *governance gaps* created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences"[38]. This view seems to suggest that sufficient binding norms do exist, at least at the municipal level, and it is rather the lack of robust governance structures that make impunity possible.[39] It is hard to deny that "companies [may] intentionally engage in illegal business ventures with armed groups in places where weak judiciaries are unlikely to prosecute much-needed investors for corporate malfeasance"[40]. In other words, the problem here is one of *municipal rule of law*. Simons disagrees, finding this view as inadequate, adding that "corporate human rights impunity is deeply imbedded in the international legal system"[41].

John Ruggie has suggested that direct international responsibility may be helpful in situations where host states are unwilling or unable to assert their due regulatory law[42]. Probably more instructively, Ruggie has suggested "that binding international human rights obligations could themselves *undermine* the governance capacity of states by weakening 'domestic political incentives to make governments more responsive and responsible to their own citizenry'"[43]. Among his key motivations for disfavouring the 'treaty road' involves not just avoiding the stalemate that met the UN Draft Norms but also the fact that treaty negotiations themselves take time and even when concluded do not guarantee adherence by states[44]. In the interests of filling protection gaps, ways of applying the current normative framework along with a principled approach seems the best counsel. Simons, on the other hand, sees that there is already wide acceptance that "egregious violations of human rights that amount to international crimes"[45] are applicable to business entities and thus what is needed is a clear UN strategy to seek binding international legal obligations.

Under the Protect, Respect, Remedy framework, states are called upon to further develop their duty to protect under international human rights law; to clarify the moral responsibility of

[38]Ruggie, "Protect, Respect and Remedy", 2008, para.3. (Emphasis added.)

[39]I am indebted to Mihir Kanade for pointing out that this could be fleshed out further. "Governance gaps also arise from lack of appropriate domestic laws, [and the fact that] many corporations are simply more powerful than host states. The 'capacity' of societies can therefore, refer to lack of laws, lack of capabilities/power, or lack of governance structures." Personal communication, 9 May 2016.

[40] Julia Graff, "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo" *Human Rights Brief*, Vol. 11, No. 2 (2004), p.23.

[41] Simons, "International Law's Invisible Hand", p.11.

[42]*Interim Report of the Special Representative of the Secretary-General[SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (2006) UN Doc E/CN 4/2006/97, n. 17, 65.

[43] John Ruggie, "Business and Human Rights: The Evolving International Agenda" *American Journal of International Law*, Vol. 101 (2007), pp.826, 838. (Emphasis added.)

[44] John Ruggie, "Treaty Road Not Travelled" *Ethical Corporation* (2008).

[45] Simons, "International Law's Invisible Hand", p.10. See also, A Clapham, "State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations" in *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity*, L Bomann-Larsen and O Wiggen, eds. (Tokyo, United Nations University Press, 2004), p.68; Ruggie, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts", 2007 (UN Doc A/HRC/4/35), pp.19-32. This "wide acceptance" will however remain shallow as long as there lacks an international judicial body with jurisdiction to pronounce authoritatively on the matter, hence the need for a treaty.

corporate actors to respect human rights; and develop remedies for victims of corporate violations of human rights[46].

John Ruggie's Protect and Remedy pillars clearly rest binding legal responsibility on the state in its municipal capacity while the Respect pillar, in calling for clarification of a *moral* corporate responsibility, applies a less stringent standard for corporations. The former two have clear binding application in international human rights law. The Protect pillar, in this context, is a due diligence obligation, requiring states to take measures to prevent, regulate, investigate and prosecute actions by private actors, including business entities. International human rights law understands such obligation as not restricted to investigating a specific violation but also "the *power structures* that allowed, designed and executed it, both intellectually and directly"[47]. Failure to take such measures then attracts international responsibility[48].

It is in international trade and investment law that John Ruggie's tripod policy framework meets its greatest challenge. Bilateral investment treaties (BITs) are interesting for this discussion on several points. First, they, like human rights treaties, create obligations for states and rights for third parties – in the case of BITs, corporate foreign nationals investing in the host state. Secondly, and again like human rights treaties, they grant corporations standing to bring host states to binding adjudication. Thirdly, their provisions create strong protections in favour of the investing foreign corporate national to the detriment of the host state's regulatory function[49]. Stabilisation clauses, common in BITs, usually freeze host state laws during the project, require the host state to compensate the investor for any change or contain a mix of both[50]. As such, these BITs act largely as profit-guarantee agreements[51]. Investment agreements with OECD countries tend to incorporate public interest concerns, while those with non-OECD countries

[46] Simons, "International Law's Invisible Hand", p.14.

[47] *Manuel Cepeda Vargas v. Colombia* (Preliminary Objections, Merits, Reparations, and Costs), 26 May 2010, para.119. (Emphasis added.)

[48] Simons cites Inter-American Court of Human Rights, *Vélásquez Rodrıguez v Honduras* (Merits), 29 July 1988; UN Human Rights Committee, *Herra Rubio v Colombia* (161/1983), HRC Report, UNGAOR 43rd Session Supp 40 190 (1988), [11] as examples.

[49] "While BITs give multi-national corporations wide ranging 'investment rights', they rarely impose responsibilities on these corporations. As a result, MNCs … do not have sufficient incentives to pursue public-regarding objectives and may in fact violate the human rights of citizens". Akech, *Privatization and Democracy*, p.55.

[50] A Shemberg, "Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary-General on Business and Human Rights", 2008. Available from www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf>, cited in Simons, "International Law's Invisible Hand", p.16.

[51] The capitalist model is predicated on profit as the incentive that drives innovation. Market forces, Adam Smith's proverbial invisible hand, in a certain Darwinian action, punish the slow to adapt and reward the nimble. The stated purpose of BITs is the seemingly reasonable aim of protecting investments from expropriation and other discriminatory host state behaviour (Akech, *Privatization and Democracy*, p.72). Yet, BITs, by seeking to insulate foreign investors from progressive realisation of human rights or even the regulatory pressure for the ill effects of their business, can be seen as aberrations of capitalism itself, by using law, not to establish predictability of state intervention – therefore preserving the Darwinian logic of the market's invisible hand – but rather to eliminate the Darwinian logic by cementing a risk free, profit guaranteed business. Akech cites NGOs arguments in the *BiWaterGauff v Tanzania* arbitration (ICSID Case no. ARB/05), "BITs should not be construed as insurance policies against bad business judgments" (*Id, Privatization and Democracy*, p.73). Varoufakis draws similar conclusions with regard to the banking system after the financial crisis of 2008, where the bankrupt banks are rescued by public funds rather than letting Darwinian market forces drive them to extinction. This has ironically made such bankrupt banks all the more powerful, a system he refers to as bankruptocracy. *Id, The Global Minotaur: America, Europe and the Future of the Global Economy*, 2nd ed. (New York, Zed Books, 2013), pp.167-8.

tend to be more constraining, with the most adversely affected being Sub-Saharan African countries[52].

Two critical issues arise from this situation. First is that the economically weaker[53] host state finds itself bound to two contradicting sets of international obligations, one being to protect and progressively realise human rights guarantees, and the other to not, in law or policy[54], change the investor climate which in many cases includes matters duly within the scope of human rights law[55]. John Ruggie acknowledges the imbalance created by such agreements as it is precisely in these countries that better regulation is required[56]. Yet, by urging such politically and economically weak states to avoid such restricting agreements and maintain the public interest policy making space[57], Ruggie's framework fails to recognise that the imbalance is not created *by* such agreements but rather that such agreements are only possible because of a *pre-existing* imbalance[58] which they further cement[59].

Such imbalance derives not only from existing international law structure, but probably more importantly from the weak capacity of the Third World state to identify and successfully assert its national interest and that of its people[60]. Orthodoxy in development economics shifted from

[52] Shemberg, "Stabilization Clauses", p.32; Ruggie, "2009 Report", note 5, p.32, cited in Simons, "International Law's Invisible Hand", p.17.

[53] Simons notes that even powerful Western states have been threatened or subjected to arbitration for laws strengthening the public interest, citing *Dow Agrosciences LLC v Government of Canada* (Notice of Arbitration under the UNCITRAL Arbitration Rules and North American Free Trade Agreement), 31 March 2009.*Id*, "International Law's Invisible Hand", note 75, pp.18, 20. See also, Varoufakis, *The Global Minotaur*, pp.165-6 on the banking sector after the 2008 financial crisis.

[54] Kanade, "Human Rights and Multilateral Trade", pp.391, 396, 405, draws a distinction between the limiting of policy space given the absence of human rights obligations in WTO law, and a conclusion thereof that such WTO law is in contradiction to states' human rights obligations. While such distinction remains eminently useful in analysing international law that allows for the operation of self-contained regimes, the distinction immediately blurs when such obligations clash in the municipal sphere under constitutional law, especially of monist states, where the bulk of human rights guarantees are to be enforced.

[55] "All members of the WTO have ratified at least one core international human rights treaty". J Dine and A Fagan, *Human Rights and Capitalism* (Cheltenham, Edward Elgar Publishing, 2006), p.228, cited in Kanade, "Human Rights and Multilateral Trade", p.389.

[56]Ruggie, "Protect, Respect and Remedy" (2008), p.36.

[57]Ruggie, "2010 Report" p.25; Ruggie, "Guiding Principles" (2011), p.12.

[58] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, CUP, 2005), pp.233-5; Simons, "International Law's Invisible Hand", pp.20-2, citing the foundational cases, *Petroleum Development Ltd v The Sheikh of Abu Dhabi* (1951) ILR 144; *Qatar (Ruler of) v International Marine Oil Company* (1953) ILR 534. See also, the unequal effects of *Case Concerning the Payment of Various Serbian Loans Issued in France*, PCIJ Series A, Nos. 20/21; *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, PCIJ Series A, No. 21 (1929), especially the dissenting opinions. *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v. Costa Rica)[Tinoco Arbitration]*18 October 1923 RIAA Vol I, pp.369-399 could also be seen in this light. See also, Akech, *Privatization and Democracy*, p.53.

[59] The ICSID arbitration procedure, for instance, is not conducive to the protection of public policy space, let alone human rights concerns. Its procedure is opaque, with no public access to pleadings, evidence, hearings and even award. Only a notification is accessible. Akech, *Privatization and Democracy*, p.71.

[60] Speaking of the recognition, at the turn of the 21st Century, by free market economists of the "priority of [state] strength over scope," Francis Fukuyama recalls the views of Milton Freidman in 2001. "He noted that a decade earlier, he would have had just three words of advice for countries making the transition from socialism: 'privatize, privatize, privatize.' To this he added: 'But I was wrong. It turns out that the rule of law is probably more basic than privatization.'"Fukuyama, "The Imperative of State-Building" *Journal of Democracy*, Vol. 15, No. 2 (April 2004), p.28

Keynesian active state participation in the free market[61], to state withdrawal from the market through aggressive privatisations[62]. The rather spectacular failure of public enterprises in the developing world provided the required evidentiary accelerant to the notion of an acceptable reduction of the state[63]. The Third World state, and the African in particular, maintains a power structure[64] that amalgamates the minority rule objectives of the authoritarian unaccountable colonial state with the postcolonial neopatrimonial politics where personal and familial connections exist within and in fact run the formal state structures[65]. Further suggesting the validity of the politico-cultural factor, "the concepts of 'global' and 'local' are, however, themselves problematic because there is a 'local' world of international elites and a partially globalised world of everyday life"[66]. It therefore becomes necessary to engage "a genuine critical theory of the state to show how some specific social groups have, in many instances, seized the 'will of the [Third World] State'"[67], if we are to accurately assess the viability of John Ruggie's exhortation to states to avoid constricting investment agreements while protecting and remedying the human rights guarantees affected by corporate action[68].

In one aspect of the issue of business and human rights, privatisation, Migai Akech is of the unambiguous view that "the problem of privatisation in East Africa is that it is not sufficiently democratic", being neither participatory nor accountable[69]. Another problem is the application of

[61] Akech, *Privatization and Democracy*,p.3. See also, Varoufakis, *The Global Minotaur*, pp.59-62, 81.

[62] "[W]hile privatization involves a reduction in the scope of state functions, it requires functioning markets and a high degree of state capacity to implement." Fukuyama, "The Imperative of State-Building", p.28.

[63] Citing Thandika Mkandawire and Charles C Soludo, *Our Continent, Our Future: African Perspectives on Structural Adjustment* (Trenton, NJ, Africa World Press, 1999), p.42, Akech notes that it remains unclear whether this failure was due to the policies *per se* or their poor implementation. His later views (pp.19-26) on the neopatrimonialist nature of the African state may allude to the latter. See also, Fukuyama, "The Imperative of State-Building", pp.26-7.

[64] Mahmoud Mamdani relates the futility of attempts at insulating economic theory from the political thus: "For the growth economist, [underdevelopment] is a *natural* condition. … this is synonymous to denying the very problem. … their solutions for 'development' are all economic, that is technical. … But determining [the rate of savings and investment necessary for 'take off'] is not technical [but political]." *Id*, *Politics and Class Formation in Uganda* (New York, Monthly Press, 1976), p.5. In his turn, Georges Abi-Saab captures the inextricable links of law and politics thus: "changing the law, any law, partakes of legislation, which is not a purely legal but an eminently political activity." *Id*, "Membership and Voting in the United Nations" in *The Changing Constitution of the United Nations*, Abi-Saab *et al*.,eds. (London, British Institute of International & Comparative Law, 1997), p.19.

[65] Akech, *Privatization and Democracy*, pp.19-26, also citing Mahmoud Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, Princeton University Press, 1996), pp.17-8.

[66] Freeman, "On the Interactions between Law and Social Science", pp.9, 13. Here, Freeman argues that a cultural gap between international elites and local actors may colour the universality of human rights. His view however on the merging of global and local elite interests forms an insightful basis for understanding why Third World states would enter into agreements that are detrimental to their policy-making sovereignty and their peoples' interests. See also, Abdullahi An-Na'im, "Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice" *International Journal of Transitional Justice*, Vol. 7 (2013), p.198, arguing that the neo-colonial mindset of well meaning "former colonies" scholars and social actors may lead them to poorly appraise their local contexts.

[67] Bachand, "Critical Approaches and the Third World"; also, Simons, "International Law's Invisible Hand", pp.19-29; BS Chimni, "Third World Approaches to International Law: A Manifesto" in A Anghie *et al*., eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden, Martinus Nijhoff, 2003), p.72.

[68] See also, Balakrishnan Rajagopal, "Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle", Jawaharlal Nehru University, Centre for the Study of Law and Governance, Working Paper Series, May 2004.

[69] Akech, *Privatization and Democracy*,p.7, echoing the views of Simons, "International Law's Invisible Hand", pp.35-7, 40 and Alvaro Regil, "Business and Human Rights: Upholding the Market's Social Darwinism: An

WTO law aimed at eliminating protectionism in international trade. Unlike BITs and Host Government Agreements (HGAs), WTO law remains an inter-state legal regime. BS Chimni argues that WTO law presents states with an all or nothing proposition thus ensuring "that Third World states cannot opt out of legal obligations that are inimical to interests of their people"[70]. Simons observes that the WTO is legally obliged to cooperate with the World Bank and IMF towards "greater coherence in global economic policy making"[71], thus vastly increasing its coercive force.

It follows that if the international economic law described above necessarily weakens the nation-state politically and economically, then it will also weaken its regulatory capacity. But does this mean international economic law promotes violation of human rights and environmental law? Mihir Kanade disputes the view that, in particular, WTO law *per se* violates human rights. First, he points out that rather than create contradictory obligations, WTO law is either silent or inadequate in protecting public interest concerns. For instance, labour rights obligations are binding on states under ILO and UN human rights treaties but WTO law is silent on the same, largely upon the strong opposition of Third World states that *inter alia*, feared neocolonial action[72]. Rather, it is states that, in a bid to enhance their Ricardian comparative advantage, ignore, if not violate, their other (non-WTO) binding labour rights obligations. James Gathii's study provides further evidence of this tendency of Third World states to voluntarily subscribe to such international economic law[73]. Second, WTO law is inadequate for redressing protectionist conduct. Giving the example of US and EU cotton subsidies and their negative effects on small West African economies, WTO law excludes commensurate financial compensation, only allowing the weaker state to impose proportionate countermeasures on the subsidised product or concession on other products. Such remedies in operation are ineffective for such weak economies that are over-reliant on cotton for hard currency earnings and therefore

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Assessment of John Ruggie's Report 'Protect, Respect, Remedy: A Framework for Business and Human Rights'" *TLWNSI* Issue Essay 10/2008, pp.6-8.

[70] BS Chimni, "International Institutions Today: An Imperial Global State in the Making" *European Journal of International Law*, Vol. 15, No. 1 (2004), p.20, cited in Simons, "International Law's Invisible Hand", note 126.

[71] Simons, "International Law's Invisible Hand", p.26. It is noteworthy here that such 'coherence' is further buttressed by the Paris Club system. In order to protect their varied interests in bilateral loan agreements, creditor nations bind themselves to the Paris Club principles of consensus and solidarity and ensure that bilateral creditor nations and multilateral donors like the IMF and regional development banks attend Paris Club debt renegotiations. In addition, HIPC countries can only receive bilateral debt relief within an appropriate IMF reform programme. The prohibition of a premature improvement-in-position (requiring that a creditor not seek repayment term detrimental to other creditors of equal status) is further cemented in the Paris Club principle of comparability of treatment. This system ensures that officially bilateral debt renegotiation talks are in effect multilateral, with a single debt stricken nation facing all its creditors at once. See B Caughey, "A Creditor's Right to Set-off: When Does a Creditor Impermissibly Improve Its Position?" *ABI Journal*, No. 32 (Dec/Jan 2011), p.32; www.clubdeparis.org/sections/composition/principes/accords-bilateraux; www.clubdeparis.org/sections/composition/principes/cinq-grands-principes (accessed 12 January 2013).

[72] Kanade, "Human Rights and Multilateral Trade", p.402. He concludes that seeking to amend WTO law to add a "labour clause" is unfeasible given the legal complexity and political environment, proposing rather the strengthening of the ILO Constitution to grant more robust enforcement jurisdiction (p.404).

[73] Prof. Gathii ascribes this tendency to factors such as the neoliberal education of senior Third World financial technocrats and the compelling nature of economics orthodoxy itself that makes such states want to look investor friendly. *Id*, "The Neo-Liberal Turn in Regional Trade Agreements" *Washington Law Review*, Vol. 86, No. 3 (October 2011), pp.421-74.

lack the economic muscle to impose the allowable countermeasures or demand concessions thereof[74].

It however must be noted that certain spaces, albeit limited and inadequate, offer states policy flexibility. The Declaration on the TRIPS Agreement on Public Health and the August 30 Decision allowed Rwanda to import the AIDS drug Trivir under compulsory licence from Canada on public health grounds[75]. Kanade does however concede that the WTO Dispute Settlement Body's application of the Exception Clauses of GATT Article XX providing for territorial protectionist action in favour of public morals and human, animal or plant life or health (paragraphs a-b), but only while not violating Article XX chapeau prohibitions against discrimination and disguised restriction to international trade, is rather restrictive[76]. Kanade concludes by affirming that the real legal problems with WTO law – inadequacies in the Dispute Settlement Understanding relating to economic compensations, inadequacies in the TRIPS Agreement relating to additional waivers, and GATT Article XX policy restricting imperatives – need to be rectified by way of *negotiations*[77].

To paraphrase Kanade, in this legal, political and economic matrix, solutions need to be provided and responsibility clearly fixed on states and business actors respectively, in international law, to provide for accountability for human rights protection without venturing into beggar-thy-neighbour policies[78]. To assess the viability of any such solutions, we turn to the deep sea mining regime of international responsibility.

LESSONS FROM ITLOS' ADVISORY OPINION ON THE DEEP SEA MINING REGIME

The genius of UNCLOS' deep sea mining regime is its starting point, the principle of the Area's[79] status and that of its resources as the common heritage of mankind, whence no state can

[74] Kanade, "Human Rights and Multilateral Trade", pp.406-7. Taking the point further, Simons in "International Law's Invisible Hand", pp.27-9, adds that even before the question of effective remedies, the implementation of liberalization placed weaker economies at a disadvantage. For instance, IMF and World Bank structural adjustment policies (SAPs) had secured liberalisation of Third World agricultural markets before the advent of WTO's Agreement on Agriculture (adopted on 15 April 1994) 1867 UNTS 410, while allowing certain Western states to keep some subsidies and set high initial tariffs. The Food and Agriculture Organisation also raises concerns over the long term effects of premature agro-markets liberalisation. *Id, State of Food and Agriculture 2005: Agricultural Trade and Poverty – Can Trade Work for the Poor?* (FAO, Rome 2005), p.6.

[75] Kanade, "Human Rights and Multilateral Trade", pp.407-8.

[76] Kanade, "Human Rights and Multilateral Trade", pp.408-10, citing the following cases *Brazil – Measures Affecting Import of Retreaded Tyres*, DS/332, Appellate Body Report adopted on 17 December 2007; *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, DS/47 and DS/48, Appellate Body Report adopted on 13/02/1998, in which applicability of exceptions (Art XX.b) was rejected for inconsistency with chapeau requirements. The only successful case is*European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products* (WT/DS135), Appellate Body Report, adopted on 5 April 2001.

[77] Kanade, "Human Rights and Multilateral Trade", pp.411, 416.

[78] Kanade, "Human Rights and Multilateral Trade", p.391. While Kanade makes these remarks specifically in the context of seeking a reconciliation between protectionist versus liberalised multilateral trade (WTO), we make similar considerations but in light of the wider regime of international economic law and human rights, strongly influenced but not exclusively governed by WTO law. The key distinction is that Kanade proceeds from the starting point that protectionism entails a beggar-thy-neighbour result, a view which, while valid, fails to capture the reality that the neighbour can and does get "beggared" by the prevailing alternative of risk-free anti-Darwinian multilateral trade. See Akech, *Privatization and Democracy*, p.53, "privatization may undermine public interest objectives such as access to water for all, unless it is carefully regulated."

[79] The seabed and subsoil beyond the limits of national jurisdiction.

claim sovereign rights, nor any state, natural or juridical person appropriate any part of[80]. The significance of these founding principles can hardly be understated, against the background of Area exploration by corporate nationals of powerful states as far back as 1970s[81], as well as the political-economic view of public assets as tragic commons that are best managed in private hands[82].

Simultaneously affirming the common heritage status of the Area and the commercial exploitability of resources therein expectedly bore a complex legal regime involving the International Seabed Authority, the Enterprise, sponsoring states and sponsored entities[83], and incorporating WTO law[84].

The effective participation of developing states

In its proposal to the Council of the International Seabed Authority (hereafter, Authority) for an advisory opinion, Nauru pointed out the financial and technical disadvantage that developing countries face in undertaking deep seafloor mining[85]. If liabilities are significant, Nauru argued, developing states would be precluded from participating in deep seabed mining, contrary to the principles set out in UNCLOS Part XI (Articles 148, 150(c), 152 (2)). In fact, UNCLOS' preambular provisions point to the aim of "realis[ing] a just and equitable international economic order [cognizant] of the needs and interests of [humanity] and the *special interests and needs of developing countries*"[86]. In essence, Nauru wondered whether developing states had to bear similarly onerous responsibility as did developed ones.

By the turn of the century, six contractors representing India, France, Japan, Russia, China and a rare Bulgarian, Czech, Cuban, Polish, Russian and Slovak joint venture had submitted plans of work to the Authority for deep seabed mining[87]. In 2008, the small island states of Nauru and Tonga[88] sponsored entities submitting plans of work[89].

By the time of filing the request for advisory opinion in May 2010, eight contractors (six entities and two states) had signed contracts with the Authority. Of these, none were developing states[90]. As at April 2015, the Authority reports to have concluded 21 exploration contracts for

[80]UNCLOS, Articles 136-7.

[81] Churchill and Lowe, *The Law of the Sea*, p.224.

[82] Mary M. Shirley, "The What, Why, and How of Privatization: A World Bank Perspective" *Fordham Law Review*, No. 60 (1992), S25-S27.

[83] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011), Case No. 17, para.74.

[84] Deep sea mining is, *inter alia*, to not enjoy subsidies or preferential procurement or access to markets over non deep seabed mined minerals. Disputes are also to be referred to the WTO dispute settlement procedures. 1994 Implementation Agreement, Annex, Section 6(1). See, Churchill and Lowe, *The Law of the Sea*, pp.250-1.

[85]*Responsibilities and Obligations of States*, para.4.

[86] UNCLOS Preamble 5; *Responsibilities and Obligations of States*, para.151. (Emphasis added.) Also, UNCLOS Articles 140(1), 148.

[87] Churchill and Lowe, *The Law of the Sea*, p.251.

[88] Tonga was ranked 186 out of 192 and Kiribati 191 out of 192 in the 2013 GDP rankings in the World Development Indicators database, World Bank, 14 April 2015. Nauru does not feature as a distinct economy under any World Bank classification.

[89]*Responsibilities and Obligations of States*, para.4.

[90] While considering gross national income per capita would significantly alter the status of China and India negatively and Singapore positively in the rankings below, considering Nauru's concern over economy size as a factor in considering capacity to absorb liability for deep seafloor mining wrongful acts, we have elected to use the

polymetallic nodules (14), polymetallic sulphides (4) and cobalt-rich ferromanganese crusts (3). Of these, only three contracts and only for polymetallic nodules have been concluded by contractors sponsored by developing states. An overwhelming 81% of contracts for exploration of humanity's common heritage are from the top 40 world economies[91]. This represents 17 out of 21 contracts, excluding Interoceanmetal Joint Organisation joint venture, whose initial contract period came to an end in March 2016. As at August 2016, a total of 25 contracts had been concluded, (16 for polymetallic nodules, 5 for polymetallic sulphides and 4 for cobalt-rich ferromanganese crusts)[92]. These include the July 2016 five year extensions of the first six 15 year licences issued in 2001[93].

It is therefore noteworthy that Nauru, Tonga and Kiribati sponsored entities only signed their contracts in July 2011, January 2012 and January 2015 respectively, *after* the 1 February 2011 Advisory Opinion. While these statistics are presented in disregard of the technical difference between sponsored entity contractors and states contractors, we would argue that direct state contracting is strongly indicative of economic wherewithal, and it is therefore instructive that no developing state is a direct contractor.

From the foregoing, it is clear that Nauru had a point worth considering. Are developing states accorded some form of affirmative action to allow them the effective possibility of participating in deep seafloor mining? In what areas could developing states expect obligations commensurate to their capacities?

The Seabed Disputes Chamber (Chamber) recognises that possibility for differential obligations to the precautionary principle according to a state's capabilities[94], while maintaining a universal obligation to employ best environmental practices[95]. It finds specific provisions in UNCLOS Part XI that provide preferential consideration of developing states: international cooperation on marine scientific research; promotion of technology transfer and training of developing states' personnel; special consideration of developing states by the Authority despite the non-discrimination rule; and particular consideration of developing states in the equitable sharing of financial and other benefits of Area activities[96].

However, the Chamber could not find any specific provisions mandating preferential considerations of responsibility or liability for developing states. It approves of this situation, citing the need to dissuade developed state TNCs from setting up shop in developing countries to benefit from preferential treatment, and ultimately offending the "uniform application of the highest standards of protection of the marine environment, the safe development of activities in

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total GDP rankings as listed above and below. All contractor information below from www.isa.org.jm/deep-seabed-minerals-contractors/overview (accessed 26 April 2015).

[91] With their rankings as per their 2013 GDP rankings in the World Development Indicators database, World Bank, 14 April 2015: China(2), Japan(3), Germany(4), France(5), UK(6), Russia(9), India(10), South Korea(14), Belgium(24), Singapore(36).

[92] "International Seabed Authority 22nd Session (Background Press Release)", citing ISA Secretary General's Report (ISBA/22/C/5); "Cook Islands Investment Corporation Signs Exploration Contract with the International Seabed Authority" 16 July 2016, https://www.isa.org.jm/news/cook-islands-investment-corporation-signs-exploration-contract-international-seabed-authority Accessed 10 August 2016.

[93] See ISBA/22/C/21; ISBA/22/C/22; ISBA/22/C/23; ISBA/22/C/24; ISBA/22/C/25; ISBA/22/C/26. All approved during the 22nd Session of the International Seabed Authority Session, 11-22 July 2016, on 18 July 2016.

[94] *Responsibilities and Obligations of States*, paras.129, 151-63.

[95] *Responsibilities and Obligations of States*, para.161.

[96] *Responsibilities and Obligations of States*, para.157. See also Churchill and Lowe, *The Law of the Sea*, p.253, citing UNCLOS Article 151 (10); 1994 Implementation Agreement, Annex, Section 7 on preferential financial benefits to those developing states that may suffer significant export income falls.

the Area and protection of the common heritage of mankind"[97]. Given the earlier discussion on the challenges faced by developing countries of regulating gargantuan TNCs, we cannot help but agree with this affirmation by the Chamber.

The Chamber concludes that the effect of UNCLOS Article 148 and Annex III, Article 9(4) is to *reserve half of the proposed contract areas* for the Authority and developing states. Given the statistics presented above on developing states' participation in seabed mining, this view of the Chamber takes on particular meaning. It, however, by electing the term "should" rather than "shall", shies away from declaring an obligation on developed states to provide necessary assistance, including training for developing states to participate "on an equal footing"[98].

A model for assigning obligations to states and private business actors

The deep sea mining regime offers, to our mind, a viable model for answering the challenges of assigning direct accountability to business actors, clarifying corresponding state obligations and preserving the traditional regulatory function of municipal administrative law frameworks[99]. Significantly, the deep sea mining regime preserves the current state-centric[100] model of international law.

States sponsor entities and entities cannot act in the Area without state sponsorship[101]. The Seabed Disputes Chamber is clear that the purpose of sponsorship is to provide a link between international law's state-centric responsibility model and "entities that are subjects of domestic legal systems"[102]. These "domestic law entities" are connected to their sponsor state by nationality and effective control, thus roping in any other state that may exercise such jurisdiction over the entity in question[103]. Nationality and effective control are however, not considered sufficient, by UNCLOS, for securing conformity to the Convention. It is the decision to sponsor that establishes this legal obligation[104]. This aspect is critical in recognising the multiple nationalities of TNCs and ensuring all relevant states collaborate in effectively controlling them. The sponsoring state(s) is therefore co-guardian of humankind's common interest, supporting the Seabed Authority's role[105]. To further highlight this, the Chamber takes note that states engaged in deep sea mining, as states, are directly bound by UNCLOS and the relevant Regulations, as subjects of international law, and therefore require no sponsorship[106], unlike state enterprises, for instance[107].

Sponsoring states bear 'responsibility to ensure'. This becomes a mechanism through which treaty law is "effective for sponsored contractors which find their legal basis in domestic law" by creating State party obligations which are fulfilled "by exercising their power over entities of

[97] *Responsibilities and Obligations of States*, para.159.

[98] *Responsibilities and Obligations of States*, para.163.

[99] As raised by Kanade, "Human Rights and Multilateral Trade"; Simons, "International Law's Invisible Hand"; and Akech, *Privatization and Democracy;* respectively.

[100] UNCLOS, Articles 139(1), 153(4), Annex III, Article 4(4).

[101] UNCLOS, Article 153 (2); *Responsibilities and Obligations of States*, para.74.

[102] *Responsibilities and Obligations of States*, para.75.

[103] UNCLOS, Annex III, Article 4(3), Nodules Regulations and Sulphides Regulations 11(2); *Responsibilities and Obligations of States*, para.77.

[104] *Responsibilities and Obligations of States*, para.78.

[105] UNCLOS, Article 153 (4); *Responsibilities and Obligations of States*, para.76.

[106] *Responsibilities and Obligations of States*, para.79. This despite state practice to the contrary. See *Responsibilities and Obligations of States*, para.80.

[107] UNCLOS Article 153(2)(b); *Responsibilities and Obligations of States*, para.74.

their nationality and under their control"[108]. Breach of such obligation entails "liability", but to be sure, not all sponsored entity violations engage the sponsor state liability[109].

Such liability arises from failure to ensure the compliance of the sponsored contractor. Ensuring compliance entails a due diligence obligation, one of conduct, not of result[110]. It constitutes an obligation "to adopt regulatory and administrative measures … and to enforce them"[111]. The utility of this distinction can hardly be gainsaid in considering accountability for business actors for human rights violations. Migai Akech, Mihir Kanade and Penelope Simons, for instance, form much of their critique of the current business and human rights regime on precisely this failure by states.

The Seabed Disputes Chamber offers further insights. Such due diligence obligations, often apply when "it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction" while being "equally [un]satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law"[112]. The Chamber gives the example of obligations pertaining to transboundary and environmental pollution under UNCLOS Article 194(2)[113].

Even the direct obligations of sponsoring states, that is, "the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments"[114] are themselves components of the due diligence obligation[115].

The Chamber, when considering what kinds of transportation constitute "activities in the Area", distinguishes transport to land points of minerals[116] from transport within the high seas in waters superjacent to the mining site, when directly connected to extraction and lifting[117]. Transportation to land points involves navigation in the high seas, which is already covered by other conventional provisions. Furthermore, extraction and lifting related transportation "are among the most hazardous to the environment" and were such transportation to be excluded from 'activities in the Area', they would fall outside the responsibilities of sponsoring states, thus

[108] *Responsibilities and Obligations of States*, para.108.

[109] What the International Law Commission would call "responsibility" in its 2001 Articles on Responsibility of States for Internationally Wrongful Acts. The Chamber takes great care to explain the differential use of this term, to maintain "juridical concordance". See *Responsibilities and Obligations of States*,paras.64-71.

[110] *Responsibilities and Obligations of States*,para.110.

[111] *Responsibilities and Obligations of States*, para.111, citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p.14, para.187; also *Responsibilities and Obligations of States*, paras.120, 238-9.

[112] *Responsibilities and Obligations of States*, para.112, citing see ILC Articles on State Responsibility, Commentary to Article 8(1).

[113] *Responsibilities and Obligations of States*, paras.113, 115-6.

[114] *Responsibilities and Obligations of States*, paras.122, 124-50.

[115] *Responsibilities and Obligations of States*, para.123.

[116] UNCLOS Article 133 (b) "resources, when recovered from the Area, are referred to as 'minerals'". *Responsibilities and Obligations of States*, para.82.

[117] *Responsibilities and Obligations of States*, para.96.

failing "the general obligation of States Parties, under [UNCLOS] Article 192, 'to protect and preserve the marine environment'"[118].

The deep sea mining regime preserves the interests of international law by creating a niche for the relevant international organisation, the International Seabed Authority, to act on behalf of humanity[119]. Thus, while states and their entities have their role, the same contracting states are compelled into collegiate policymaking[120] to give effect to the ends of conventional provisions[121].

A balance is attempted between due strict regulation, which includes the precautionary principle[122], and undue interference with business[123]. The Chamber observes that the precautionary principle is well on its way to be established as customary international law[124].

Although, the Chamber was not explicitly requested to delineate the obligations of sponsored entities, it however, made some indications. The Sulphides Regulations[125] bind contractors to best environmental protection standards including the precautionary principle. This is extended to polymetallic nodules exploration as a general obligation[126], which can be expected to also cover any further activities in the Area – exploitation – and other resources as well[127].

Contractors are required to employ the "best technology available" in the Nodules Regulations, which the Chamber notes is further developed as "best environmental practices"[128]. Sponsoring states are required to ensure the Authority can police contractors in the event of emergency orders, especially for those contractors that have not provided guarantees of their financial and technical capability to so comply with the Authority's emergency orders[129]. It would seem therefore that a wise state, especially a vulnerable developing one, would do well to demand of its sponsored entities, such guarantees, well in advance of an emergency. As such, one can also say that therefore sponsored entities will be required to maintain such emergency financial and technical capabilities.

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[118] *Responsibilities and Obligations of States*, para.97.

[119] UNCLOS, Articles 137(2), 153(4).

[120] "[Regulations adopted by the Authority, namely, the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area of 2000 ("the Nodules Regulations"), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area of 2010 ("the Sulphides Regulations")] are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences". *Responsibilities and Obligations of States*, para.60.

[121] "The Regulations are instruments subordinate to the Convention, which, if not in conformity with it, should be interpreted so as to ensure consistency with its provisions. They may, nevertheless be used to clarify and supplement certain aspects of the relevant provisions of the Convention." *Responsibilities and Obligations of States*, para.93.

[122] Nodules Regulations 31(2) and Sulphides Regulations 33(2) turn the non-binding principle in Principle 15 of the 1992 Rio Declaration on Environment and Development into a binding obligation. *Responsibilities and Obligations of States*, paras.126-7.

[123] "[T]he sponsoring State must adopt laws and regulations and take administrative measures which do not hinder the contractor in the effective fulfilment of its contractual obligations but rather assist the contractor in that respect." *Responsibilities and Obligations of States*, para.238.

[124] *Responsibilities and Obligations of States*, para.135.

[125] Annex 4, Section 5.1; *Responsibilities and Obligations of States*, para.133.

[126] *Responsibilities and Obligations of States*, paras.131, 134.

[127] *Responsibilities and Obligations of States*, para.130. It is noteworthy that updated Nodules Regulations were adopted on 25 July 2013, and new Regulations on Prospecting and Exploration for Cobalt-Rich Crusts 27 July 2012.

[128] *Responsibilities and Obligations of States*, paras.136-7.

[129] *Responsibilities and Obligations of States*, para.138.

UNCLOS Annex II Article 22 obliges sponsored entities to provide reparation for damages for wrongful acts committed in its activities in the Area. While sponsoring states are therefore required to ensure their domestic legal systems can so provide such recourse for injured persons, the Convention is clear that the "polluter must pay", as it were[130]. This goes hand in hand with the requirement that the contractor conduct environmental impact assessment prior to starting work and cooperate, along with their sponsor state, to monitor the impact of approved activities on the marine environment[131]. The mandate to establish "impact reference zones" and "preservation reference zones"[132] provides an ingenious tool for all parties, including civil society and ultimately, domestic courts to establish liability from verifiable scientific conclusions comparable with a control experiment. Environmental impact assessments are affirmed by the Chamber as not only general treaty obligations, but indeed, customary international law[133].

It must be noted that the Chamber's proper judicial function was to clarify the *lex lata,* as per the request which centred on the nature of sponsor state obligations and extent of their liability thereof. As such, a review of its decision would ideally not venture into questions of how best a legal regime recognising the interrelated roles of municipal and international economic law could be. However, one wonders how a possible BIT-like stabilisation clause between sponsoring state and sponsored entity would fair against the fast crystallising precautionary principle and best technology available obligation.

From the foregoing, we reiterate our view that the genius of the regime clarified by the Seabed Disputes Chamber, flows from the recognition of the Area as the common heritage of humanity, where all have a stake and therefore neither tragic commons nor unregulated privatisations can be countenanced. The legal regime affirms the due roles of both international law and domestic law, and their respective subjects. It is cognisant of the need to promote business while protecting the marine environment, thus utterly rejecting the fiction of the acceptability of unregulated market forces. As law, it is a creature of international politics. It took many decades to develop. It affirms that the treaty road, though long and narrow, is well worth it. Obviously, it is still too early to declare its unmitigated success, but it stands testament of the possibilities available to humanity for regulating human rights and business.

Yet, for business and human rights to emulate the grand project being attempted by the law of the sea here, it must also begin by recapturing an oft-forgotten human value. Public goods, those enjoyed by humanity within national borders, whether wholly controllable within those bounds or interconnected by the globalised economy, "are critical for the livelihoods and liberties of citizens"[134]. Protecting these is also the legacy we live our progeny.

[130] *Responsibilities and Obligations of States*, paras.139-40.
[131] *Responsibilities and Obligations of States*, paras.141-44.
[132] *Responsibilities and Obligations of States*, paras.143-4.
[133] *Responsibilities and Obligations of States*, paras.145-50.
[134] Akech, *Privatization and Democracy*,p.15.