- Research Article -

[H] GENERAL ASSESSMENT OF THE LEGAL RIGHTS OF OBSERVER STATES INCLUDING TÜRKİYE IN THE INTERNATIONAL SEABED AUTHORITY[*]

TÜRKİYE DAHİL GÖZLEMCİ DEVLETLERİN ULUSLARARASI DENİZ YATAĞI OTORİTESİNDEKİ HUKUKİ HAKLARININ GENEL DEĞERLENDİRMESİ

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ABSTRACT

Possibility of engaging deep seabed mining activities in the seabed areas beyond national jurisdiction referred as the Area has been considered an emerging issue in recent years. Technological advancements and increasing mineral supply-demand, especially rare earth minerals for technological devices, and the need of several minerals for infrastructure for renewable energy platforms have attracted most of the States to conduct deep seabed mining activities in the Area. As technology advances and

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commercial appetite increases, the transition from exploration to exploitation may commence soon.

While this demand is growing, there are still several concerns including the protection of the deep seabed ecosystem and effective application of common heritage of mankind principle. This article starts off the role of the International Seabed Authority (the ISA) including its historical development and mandate, then examines the participation of Observer States of the ISA to meetings and of activities in the area, discusses whether sufficient transparency for meetings and decisions for the Observer States and stakeholders is provided by the ISA with a recommendation for a way forward. Finally, the article examines Türkiye’s position to activities in the Area. The main objective of this article is to answer how could the ISA act on behalf of humankind as a whole, while Non-Party States to the UNCLOS cannot vote in the ISA meetings and how could the concept of common heritage of mankind be fully implemented while they are restricted from conducting activities in the Area?

Keywords: Common Heritage of Mankind, Observer State, Law of the Sea, International Seabed Authority

ÖZ

Saha olarak adlandırılan ulusal yetki alanlarının ötesindeki deniz yatağı alanlarında derin deniz yatağı madenciliği faaliyetlerinde bulunma imkanı son yıllarda giderek önem kazanan bir konu olarak değerlendirilmektedir. Teknolojik gelişmeler ve artan mineral arz-talebi, özellikle teknolojik cihazlar için nadir toprak mineralleri ve yenilenebilir

enerji platformlarının altyapısı için çeşitli minerallere duyulan ihtiyaç, Devletlerin çoğunu Sahada derin deniz dibi madenciliği faaliyetleri gerçekleştirmeye çekmiştir. Teknoloji ilerledikçe ve ticari talep arttıkça, aramadan faydalanmaya geçiş yakında başlayabilir.

Bu talep artarken, derin deniz yatağı ekosisteminin korunması ve insanlığın ortak mirası ilkesinin etkin bir şekilde uygulanması gibi bazı endişeler de devam etmektedir. Bu makale, Uluslararası Deniz Yatağı Otoritesi'nin (ISA) tarihsel gelişimi ve yetkileri de dahil olmak üzere üstlendiği rol ile başlamakta, daha sonra ISA'nın Gözlemci Devletlerinin toplantılara ve alandaki faaliyetlere katılımını incelemekte, Gözlemci Devletler ve paydaşlar için toplantılar ve kararlar için yeterli şeffaflığın ISA tarafından sağlanıp sağlanmadığını tartışmakta ve ileriye dönük bir yol haritası önermektedir. Makale son olarak, Türkiye'nin Saha'daki faaliyetlere yönelik tutumunu incelemektedir. Bu makalenin temel amacı, BMDHS'ye Taraf Olmayan Devletler ISA toplantılarında oy kullanamazken ISA'nın nasıl bir bütün olarak insanlık adına hareket edebileceğini ve Saha'da faaliyet yürütmeleri kısıtlanırken insanlığın ortak mirası kavramının nasıl tam olarak uygulanabileceğini cevaplamaktır.

Anahtar Kelimeler: İnsanlığın Ortak Mirası, Gözlemci Devlet, Deniz Hukuku, Uluslararası Deniz Yatağı Otoritesi

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ABBREVIATIONS

ABNJ	Areas Beyond National Jurisdiction
Draft Regulations	Draft Regulations on Exploitation of Mineral Resources in the Area
DSM	Deep Seabed Mining
EU	European Union
Implementation Agreement	1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LTC	Legal and Technical Commission
NGO	Non-Governmental Organization
Part XI	Part XI of the United Nations Convention on the Law of the Sea
RMFO	Regional Management Fisheries Organizations
Chamber	Seabed Chamber of ITLOS
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea, 1982

UNCLOS III	Third United Nations Law of the Sea Conference
UNGA	United Nations General Assembly
UK	United Kingdom
US	United States
Vienna Convention	1969 Vienna Convention on the Law of Treaties

INTRODUCTION

Half of the surface of the Earth is approximately covered by the deep seabed beyond national jurisdiction. Although it is the most unreachable and least explored space on the planet. The deep seabed, typically at depths of up to around 5,000 metres, is the place to a wealth of mineral resources, including a variety of valuable metals and rare earth elements[1].

Despite that, there are still lots of mystery around the deep seabed. Provisions regarding deep-sea mining were the most divisive issue during the negotiations at the Third United Nations Law of the Sea Conference (UNCLOS III). The legal regime of the Area, the establishment of the International Seabed Authority (ISA), and the regulations regarding the various activities in the Area were adopted by Part XI of the United Nations Convention on the Law of the Sea (UNCLOS) and entered into

[1] Joanna Dingwall, 'Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: The International Legal Framework' in C. Banet (ed.) *the Law of the Seabed: Access, Uses, and Protection of Seabed Resources*, (Brill, 2020) 139.

force in 1994[2]. UNCLOS deep seabed mining (DSM) regime still may be considered as a relatively new concept in terms of the law of the sea and international law. Aside from legal development of the deep seabed beyond national jurisdiction, exploration and exploitation of deep seabed minerals have attracted the interest of a growing number of states, including the European Union (EU)[3]. In the last years, indeed, technological advancements introduced new opportunities for mining the deep seabed. Albeit exploitation of mineral resources which are located at the areas beyond national jurisdiction (ABNJ) have not taken a place yet pending the adoption of exploitation rules by the ISA[4]. Consequently, there are still lots of uncertainties to be resolved concerning the environmental consequences of deep-sea mining, the vulnerability of the deep seabed ecosystem[5] and, its profitability[6]. Currently, the ISA is de-

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[2] United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 December 1982, entered into force 16 November 1994, UNTS 1994).

[3] The EU Commission is promoting economic exploitation of the oceans under its Blue Growth Initiative, which detects growth potential in five ‘focus areas’, one of them being seabed mineral resources.
Further information on the Blue Growth Initiative available at ‘Seabed Mining,’ <https://ec.europa.eu/maritimeaffairs/policy/ blue_growth_en.>, EU Project on Managing Impacts of Deep Sea Resource Exploitation (MIDAS) see, < https://www.eu-midas.net> (accessed on 10/03/2021).

[4] Draft Regulations on Exploitation of mineral Resources in the Area (accessed on 22/03/2019), ISA Doc. ISBA/25/C/WP.1, 2019.

[5] Due to environmental concerns, number of scientists and companies have signed a petition to call for a moratorium on deep-sea mining “until sufficient and robust scientific information has been obtained”. See petitions, <https://www.seabedminingsciencestatement.org>, <https://www.noseabedmining.org> (accessed on 13/10/2020).

[6] For further information on profitability of deep seabed mining see, Krutilla, K., Good, D., Toman, M., & Arin, T. (2021). Addressing Fundamental Uncertainty in Benefit–Cost Analysis: The Case of Deep Seabed Mining. Journal of Benefit-Cost Analysis, 12(1), 122-151.

bating with its members, stakeholders and observers about a Draft Regulations for Exploitation of Mineral Resources in the Area[7] (Draft Regulations)[8]. In furtherance of technology, as apparent, debates around deep-sea mining in the ABNJ have become more pivotal. Considering that the next decade will likely witness a significant increase in deep seabed mining activities in the Area.

The aim of this paper is to evaluate the rights of participation of Observer States in the ISA relating to the participation of decision-making process on the activities in the Area for Türkiye as a non-contracting State to the UNCLOS. This paper also will introduce Türkiye's possible alternatives to join deep-sea mining activities in the Area according to the international law of the sea.

This paper starts with the historical development of the Area to understand the zeitgeist of the ISA and DSM regime set out by the UNCLOS. Then, the mandate of the ISA in terms of activities in the Area is studied. After that, marine scientific research, prospecting, exploration, exploitation and protection of the marine environment in aspects of the Observer States is examined. Participation of the Observer States in the decision-making process of the ISA is evaluated. Lastly, possible scenarios about DSM in the perspective of Türkiye is illustrated.

Hereinafter the following questions are tried to be answered:

[7] The ISA, ISBA/25/C/WP.1, 22 March 2019.

[8] See comments on the Draft Exploitation Regulations and Draft Standards and Guidelines, <https://isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area> (accessed on 13/10/2020).

- What is the mandate of the ISA in accordance with the mining activities in the Area with under the UNCLOS?

- What does affect the decision-making procedure of the ISA to the Observer States?

- What is the role of Observer States as Türkiye in the ISA during the decision-making process?

- Does the ISA allow the Observer States to join the activities in the Area?

- What meetings of the ISA are open to the Observer States?

- What are the rights of Observer States with regards to the exploration and exploitation of the Area under the international law of the sea?

To answer the research questions above legal instruments are needs to be studied. Primarily, the UNCLOS especially Part XI thereof, Implementation Agreement, and relevant provisions of Mining Code are used as a source. Secondly, internal rules of the ISA Rules of Procedures of the Council of the International Seabed Authority and Rules of Procedures of the International Seabed Authority and Rules of Procedures of the Legal and Technical Commission are referred as much as related to the examination of the decision-making process in terms of Observer States. Lastly, Article 31 of the 1969 Vienna Convention on the Law of Treaties is evaluated for the interpretation of the UNCLOS. Academic resources

such as books, articles, the thesis will be used in tandem with the legal instruments.

I. ROLE OF THE INTERNATIONAL SEABED AUTHORITY IN THE AREA

A) HISTORICAL DEVELOPMENT

Presence of mineral resources[9] on the deep seabed was first exposed on the *HMS Challenger*[10] expedition in 1873. Manganese crusts were discovered as mineral resources from the deep seabed during the *HMS Challenger* voyage. However, exploration of the mineral resources on the deep seabed, deep-sea mining activities was not possible due to lack of technological development to do so.

In 1956 Report of the International Law Commission on the High Seas, the Commission decided not to study on rights of States to explore or exploit ABNJ due to the lack of sufficient technology to mine the deep seabed at that time[11]. Thus, the Convention on the High Seas does not

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9 Manganese crusts were firstly discovered as a mineral resource from the deep seabed during the HMS Challenger voyage.

10 The research vessel named HMS Challenger, owned by the British Royal Navy, has traveled along over 68,900 nautical miles during its research. A fifty-volume report on the results of marine scientific research was completed in almost twenty years. As a result of the study, manganese crusts were found on the eastern and western edges of the Mid-Atlantic ridges, as well as between the North Pacific and the Sandwich Islands (Hawaii) and around the Sandwich Islands, and in a 3,000-mile circle that includes a large amount of the South Pacific and Tahiti and Valparasio. *See*. Richard Corfield *The Scientific Voyage of HMS Challanger* (National Academies Press, 2003) 13.

11 United Nations Yearbook of The International Law Commission 1956 Vol.II p.9 "*In the report on the work of its seventh session, the Commission pointed out that it had not studied this problem in detail. It seems to the Rapporteur that the Commis-*

contain any special provision about the legal status of deep seabed ABNJ[12].

In 1965, American geologist John L. Mero published "the Mineral Resources of the Sea" [13] which asserted that mineral resources in the seabed, especially manganese crusts, could become a major source of supply for meeting the world's mineral demands. After this publication, serious attention was focused on deep-sea minerals and their economical profits.

During 1515th meeting of the United Nations General Assembly (UNGA) on 18th November 1967, Ambassador Arvid Pardo firstly made an epoch-making statement that the deep seabed beyond national jurisdiction and its resources which were beyond the limits of national jurisdiction should consider the common heritage of mankind[14] and should be reserved exclusively for peaceful purposes[15]. Hereinafter, the Seabed Committee was established with the resolution of the UNGA on 18th

sion will not have to consider the freedom of States to explore or exploit the subsoil of the high seas outside the continental shelf. The construction of permanent installations for that purpose in sea areas where the depth exceeds 200 metres is at present impossible and is likely to remain so for some considerable time".

12 Convention on the High Seas, opened for signature 29 April 1958 entered into force 30 September 1962, 450 UNTS 11.

13 For further information *see*, John L. Mero, *The Mineral Resources of the Sea* (Elsevier,1965).

14 Principle of the common heritage of mankind was used by Argentinean delegate, Aldo Armando Cocca, earlier to define space and materials from space during the meetings of the Committee on the Peaceful Uses of Outer Space Sezercan Bektaş, *Uluslararası Deniz Yatağının İşletilmesi ve Denizyatağı Uluslararası Otoritesi* (Legem Yayıncılık, 2016) 48.

15 For full text of Pardo's speech <https://www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf> (accessed on 13/10/2020).

December 1967[16] to examine the use of the seabed and ocean bottom for peaceful purposes, which are located in ABNJ and to prepare a draft convention for the conference on the law of the sea, which was supposed to be convened in 1973[17]. During that time, developed States such as the United States (US) and Japan kept conducting experiments on the exploration and the possible exploitation of seabed resources.

Moreover, in order to stop such activities until an international regime was established, draft moratorium resolution was presented to the UNGA by developing countries in 1969, which included banning the exploration of sea-bed resources from activities in this area until an international regime was established[18]. Despite the objections of industrial States, Moratorium Resolution was adopted in such a way to prohibit the experimental operations on the exploration and possible exploitation of seabed resources in the seabed[19].

Moratorium Resolution split developed and newly independent States in two camps. Newly independent States have been advocating against a free-for-all system in the ABNJ which was proposed by the industrial states. The reason behind it was the strong advocacy of decolonization. Among the negotiating States, there were newly independent States fighting to eliminate the traces of colonization that had lasted for many

[16] The resolution numbered 2340 of the UNGA dated 18th December 1967.

[17] Erdwin Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (Springer, 2011), 13.

[18] Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed', (2003) 4 Melbourne Journal of International Law 381.

[19] UNGA, UN DOC A/RES/2574(XXIV) (15 Dec.1969) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/257/08/IMG/NR025708.pdf?OpenElement>.

years, as well as technologically advanced States. In that reason, developing States favoured the establishment of strong international authority, which would itself engage in DSM and through which they could actively participate in.

In UNGA Resolution 2749, the Declaration of Principles Governing the Seabed and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (Declaration of Principles) was made with reference to Pardo's statement[20]. Declaration of Principles is the first official document considering the international seabed area and its resources are the common heritage of mankind[21]. Declaration of Principles formed is the basis of Section 2 (Principles Governing the Area) of Part XI of the UNCLOS including elaboration were essential or appropriate[22].

During the debates in UNCLOS III, divisive discussions happened between developed States and developing States concerning the legal regime of the Area. In general, nearly all States agreed on the principle of the common heritage of mankind and governed by an international organization[23]. But the divisive issues were concerning power and authori-

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20 Declaration of Principles Governing the Seabed and the Ocean Floor, and the subsoil, Thereof, beyond the Limits of National Jurisdiction, 17 of December 1970 <https://digitallibrary.un.org/record/201718> (accessed on 20/10/2020), it is adopted by solid consent: 108 for, none against and 14 abstention.

21 Andrey A. Todorov, 'Future Work of the International Seabed Authority in the context of the Arctic Governance', (2019) 34 Arktika i Sever (Arctic and North*)* 73,74.

22 Myron H. Nordquist and others (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* vol VI (Martinus Nijhoff, 1991) 96.

23 For deep analysis of the concept of common heritage of mankind, see Kemal Başlar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff Publishers 1998) 205-239.

ty of the ISA and participations of the decision-making process by member States. In the point of view of Türkiye, Türkiye underpinned the principle of the common heritage of mankind for the international deep seabed. In the 39th plenary meeting on 12 July 1974, Turkish Ambassador Namık Yolga, highlighted the necessity of establishing an effective international organization and the legal regime for the Area[24]:

> "The establishment of the regime for the international zone and the organization of its management should be based on the criterion of efficiency and should take proper account of the common good which was their goal. Without efficiency, the common heritage would not be of much benefit for mankind, and the principle of the common good would profit only a few countries if it were not scrupulously observed. The Assembly, in which all States would be equally represented, should be the main organ of the International Authority, with the power to decide general policy and budgetary matters, while the executive board would be empowered to decide questions of exploitation and the execution of projects[25]."

Coşkun Kırca, Turkish representative, importantly said during the UNCLOS III negotiations: "*Turkey was compelled to vote against the Convention, although it agreed with provisions contained in Part XI regarding the international area.*" Both speeches made by Turkish representatives are pivotal to understand Türkiye's approach to the Area and the ISA. If Türkiye would have become a party to the UNCLOS, the legal regime of DSM might have been a good ground for Türkiye to attend deep-sea mining activities in the Area in future.

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[24] Ekrem Korkut, *Turkey and The International Law of the Sea*, (SJD Dissertations, 2017) 117.

[25] Korkut, 117 (n24); Selami Kuran, 'Uluslararası Deniz Yatağının Hukuki Statüsü' (1998) 9 Argumentum 453, 458.

Eventually, many industrial States including the US dissatisfied legal regime of the Area regarding Part XI of the UNCLOS and abstained from ratifying that Convention. Even though there were enough parties for the UNCLOS to enter into force without the need for further ratification by developed States the aforementioned parties to ratify the Convention, it would be rational to have their support for the sake of reaching unified regime applicable to all oceans. With that purpose, the Part XI of the UNCLOS was amended in 1994 by the Implementation Agreement[26] to attract developed States for their ratification[27]. the Implementation Agreement worked well and so many developed States became a party to the UNCLOS with the exception of the US.

Consequently, the legal regime of the Area was established by Part XI, Annex III and, Annex IV of the UNCLOS, the Implementation Agreement and Mining Code[28] which contains regulations, procedures and, guidelines framing deep-sea mining activities on each mineral was adopted by the ISA. Consequently, the legal regime of the Area is *sui generis* due to combination of traditional public law, the UNCLOS, and

[26] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force pro- visionally 16 November 1994 and definitively 28 July 1996) 1836 UNTS 3.

[27] US signed the UNCLOS but it hasn't ratified yet. For detailed information for position of the US to the UNCLOS see, John E. Noyes 'The Law of the Sea and the United States', (2014) 47 Revue Belge de Droit Intl. 15, 32.

[28] Mining Code refers that regulations, guidance, recommendations, draft standards and draft exploitation regulations which designed by ISA see, https://www.isa.org.jm/mining-code accessed 17 Dec 2020.

the ISA's regulations, related national legislations, and granting licenses by the ISA, and related national legislation[29].

B) MANDATE OF THE INTERNATIONAL SEABED AUTHORITY AS A DECISION-MAKER

1- General

The ISA is one of three institutions established by the UNCLOS together with the International Tribunal for the Law of the Sea (ITLOS) and the Commission on the Limits of the Continental Shelf (CLCS). The ISA is an autonomous international organization with a mandate on ABNJ (the Area) its resources[30]. The Assembly, the Council and the Secretariat are the principal organs of the ISA[31]. The Legal and Technical Commission (LTC)[32] and The Economic Planning Commission[33] which are organs of the Council,[34] The Finance Committee, The Enterprise[35] (ISA's mining arm and not operational yet) are formed as subsidiary organs.

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[29] UNCLOS, Art. 154(4), Annex III Art.4(4) (n2); laws and regulations need to be adopted by Sponsoring States. See, national legislation of the Members, <https://www.isa.org.jm/national-legislation-database> (accessed on 28/11/2020): Linlin Sun, 'Dispute Settlement Relating to Deep Seabed Mining: A Participant's Perspective' (2017) 18 Melbourne Journal of International Law 71,75.

[30] Rudiger Wolfrum**,** 'Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations' (2008) 9 German Law Journal 2039, 2039.

[31] UNCLOS (n2) arts. 158(1), 159-162, 166.

[32] UNCLOS (n2), 165.

[33] Functions of Economic Planning Commission are permanently performed by LTC, 1994 Agreement (n26), section.1 para.4.

[34] UNCLOS (n2), art. 163.

[35] UNCLOS (n2), art. 170; 1994 Agreement (n26), Annex, section 2.

The ISA has a particular international administration system and a different decision-making process[36]. The scope of the ISA' mandate is wider compared to other international organizations. It may adopt regulations in such a way to bind member States joining in the activities in the Area[37]. The ISA mainly exercises legislative and executive decisions concerning the Area and its resources.

The ISA is thereto to organise, control carry out the activities in the Area and its resources by its administrative and legislative actions by taking decisions The ISA follows three steps in that manner: 1) adoption of regulations, 2) to control to access to minerals of the deep seabed and 3) ensure compliance with its framework[38].

In terms of adoption of rules, the biggest step of the ISA is to the adoption of Mining Code which contains a comprehensive set of rules, regulations, procedures to regulate prospecting, exploration and, exploitation activities in the Area was adopted by the ISA. Mining Code contains regulations and guidelines about prospecting and exploration of polymetallic nodules, polymetallic sulphides and, cobalt-rich crusts[39].

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36 Wolfrum (n30) 2048.

37 James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) 152.

38 Aline L. Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Brill 2017) 260.

39 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (adopted on 13 July 2000 and updated on 23 July 2013), the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted on 7 May 2010) and the Regulations on Prospecting and Exploration for Cobalt-Rich Crusts (adopted on 27 July 2012). See, https://www.isa.org.jm/mining-code accessed 12

Besides the ISA regulates and issues environmental recommendations governing activities in the Area[40]. Lastly, rules adopted by the ISA are subject to the compulsory jurisdiction of the ITLOS Seabed Disputes Chamber[41].

To achieve the second step, ISA does not only deal with the regulations but also granting licenses about the activities in the Area as well issues work of plans and concludes contracts and those contracts and plans should comply with the rules that have already been adopted by the ISA[42]. At the present, as one of the ISA mandates is granting the licenses and to conclude contracts with contractors which sponsored by one of the member States for exploration purposes in the Area. These contracts have hybrid elements together with miscellaneous public and private fundamentals[43].

According to Article 153(2) (b) of the UNCLOS "*activities in the Area shall be carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by*

October 2020, for recommendations see < https://www.isa.org.jm/mining-code/recommendations> accessed 12 October 2020.

[40] UNCLOS (n2), art137(2).

[41] UNCLOS (n2) Annex III, Art.4(5), UNCLOS (n2), Art.187, 188(2), Şule Anlar Güneş, 'Maden Kaynaklarının Yönetimi Bağlamında Uluslararası Deniz Yatağı Otoritesinin Rolü' (2020) 17 Uluslararası İlişkiler 101,114. Further information for legitimacy of the ISA see, Wolfrum (n30).

[42] UNCLOS (n2), art 137(2); see also UNCLOS (n2), arts 153 and 157(1) and 1994 Agreement (n26), Annex, section 1(1).

[43] Joanna Dingwall, 'International Investment Protection in Deep Seabed Mining Beyond National Jurisdiction' (2018) 19 Journal of World Investment & Trade 890, 913.

such States, or any group of the foregoing which meets the requirements provided in Part XI and Annex III". Also, this regime entitles other actors to participate in the activities in the Area only by being sponsored by a Member States.

During the decision-making process, the ISA considers principles governing of the Area in Section 2 of Part XI of the UNCLOS. The main principle is the common heritage of mankind that contains six fundamental elements, such as the common heritage of mankind, benefit of humankind, equitable sharing of financial and economic benefits First, any actor cannot claim sovereignty and sovereign rights over any parts of the Area and its recourses[44], no one can claim acquisition of ownership minerals recovered from the Area[45], usage of the Area must be only for peaceful purposes[46], equitable sharing of the benefits including financial and other economic benefits derived from the Area via non-discriminatory basis[47], the establishment of a vested international management system which acts on behalf of all humankind[48], protection of the marine environment and human life[49] must be ensured by the ISA[50]. In addition, any amendments of the principle of the common heritage of mankind are prohibited by the UNCLOS[51]. Principle of the common

[44] UNCLOS (n2), art 137(1).
[45] UNCLOS (n2), art 137(3).
[46] UNCLOS (n2), art 141.
[47] UNCLOS (n2), art 141(2).
[48] UNCLOS (n2), art 137(2).
[49] UNCLOS (n2), art 145.
[50] Hüseyin Pazarcı, 'Uluslararası Deniz Yatağı Düzeni ve Sorunları' (1983), 38 Ankara Üniversitesi SBF Dergisi 197,199.; Bektaş, (n14); Guntrip (n18), 387.
[51] UNCLOS (n2), art. 311(6).

heritage of mankind in tandem with Article 137 provides guidance for the policies to be pursued by the International Seabed Authority in the exercise of its competences[52].

Also, the ISA intrinsically acts in the direction of Article 157 of the UNCLOS which is aimed at establishing the ISA, its structure and decision-making process[53]. But objectives of Article 157(1) may consider *prima facie* conflict with the specific purpose of Article 137 of the UNCLOS. On the other hand, Article 137 clearly indicates that the ISA acts benefit of mankind as a whole. On the other hand, per contra 157(1) states that:

> "The Authority is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area, particularly with a view to administering the resources of the Area."

Does it seem possible that merely member States can act benefit of mankind as a whole? The conflict between Article 137 and 157 is getting deeper through the expression in Article 157(3) as follows:

> "The Authority is based on the principle of sovereign equality of all its members."

The conflict between the Articles exists only in appearance even though it might be anticipated as a legal dispute. According to UNCLOS and the ISA Article 137, the ISA is meant to recognize that mankind exists beyond the control of State Parties. States are undoubtedly the primary

52 Wolfrum (n30), 2047.

53 UNCLOS, art 157, Wolfrum (n30), 2042.

actors regarding the administration governing the Area by the ISA[54]. Indeed, Article 137 is one of the vital elements of the legal regime governing the Area. It reconfirms common heritage of all mankind is based beyond the particular interests of individual States.

As adopted to the UNCLOS, States party to the UNCLOS become member States of the ISA *ipso facto*. Consequently, there are 167 member States and the EU acting as a member of the Authority today. Nevertheless, as noted above, membership of the ISA requires a broad membership that does not contain only Party States to the UNCLOS.

To ensure the third mission, the ISA owns two enforcement powers that are monitoring compliance and responsibilities and liabilities of all actors provided by the UNCLOS, Implementation Agreement and ISA's regulations. In addition, the ISA has duty to review the operation of the UNCLOS periodically[55].

2- Decision-Making Role Relating to the Activities in the Area

a) the Area

The Area comprises of "*the seabed and ocean and floor and subsoil thereof beyond national jurisdiction*" as indicated in Article 1 of the UNCLOS. "Resources" are 'all solid, liquid, or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules[56]. Whenever recovered from the Area, they are referred to as

[54] Wolfrum (n30), 2047.
[55] UNCLOS (n2), art. 154.
[56] UNCLOS (n2), art.133(a).

minerals[57]. Even though there are still ongoing discussions, resources do not refer to marine genetic resources[58]. The Area and its resources are considered the "common heritage of mankind"[59] and mining activities in the Area must be performed "for the benefit of mankind as a whole"[60]. The Area is in a privileged situation *vis-à-vis* most global commons in that it is subject to the unique and unusual legal regime. This regime established under the UNCLOS as amended by the 1994 Agreement Relating to the Implementation of Part XI of the UNCLOS (Implementation Agreement)[61].

Before analysing which the activities in the Area are open to Observer States, XI of the UNCLOS and Implementation Agreement should be read as a single document. According to Article 2(1) of Implementation Agreement, it shall prevail over part XI of the UNCLOS in the case of any inconsistency.

The term of activities in the Area contains all activities of exploration and the exploitation of the resources of the Area[62]. According to the Advisory Opinion of the Seabed Chamber of ITLOS (hereinafter Chamber), "activities in the Area", in the context of both exploration and exploita-

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57 UNCLOS (n2), art. 133(b).

58 Examination of this issue is beyond the scope of this paper. For furher information, see N. Matz- Lück 'The Concept of the Common Heritage of Mankind: Its viability as a management tool for Deep-sea Genetic Resources' in Alex G. Oude Elferink, Erik J. Molenaar . (eds), *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments*, (Martinus Nijhoff 2010) 61-76.

59 UNCLOS (n2), art 136.

60 UNCLOS (n2), art 140(1).

61 Jaeckel (n38), 4.

62 UNCLOS, Art. 1(3).

tion, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface[63]. In detail, the Chamber held that "drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other are included activities in the Area"[64]. However, some of DSM processes such as "transporting, processing and marketing are not included in the notion of the activities in the Area"[65].

In this section rights of Observer States regarding marine scientific research, prospecting, exploration and protection of the marine environment will be examined.

b) Marine Scientific Research

Provision related to Marine Scientific Research (MSR) generally falls into Part XIII of the UNCLOS. However, UNCLOS neither define marine scientific research nor the procedural framework for conducting these activities[66]. As Scovazzi noted, marine scientific research could be defined *as an activity that involves collection analysis of information, data or samples aimed at increasing mankind's knowledge of the envi-*

[63] *Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10 (ITLOS Advisory Opinion) para 94.

[64] Further, 'shipboard processing immediately above a mine site of minerals derived from that mine site' is considered as included in 'activities in the Area' pursuant to Annex III, Article 17(2)(f) of the UNCLOS, Yoshifumi Tanaka 'Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011'(2013) 60 Netherlands International Law Review 205, 211. ; Advisory Opinion (n 63) 208.

[65] Advisory Opinion (n63), para. 84.

[66] Ayşe Nur Tütüncü, 'Milletlerarası Hukukta Denizde Bilimsel Araştırmanın Farklı ve Çakışan Deniz Alanlarında Yönetimine Genel Bir Bakış' (2019) 25 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 1358, 1360.

ronment and is not taken with the intent of economic gain[67]. MSR should be carried out by actors for solely peaceful purposes and benefit of the mankind according to Part XII of the UNCLOS[68].

The UNCLOS comprises two provisions pertaining to which actors can conduct MSR in the Area under Articles 143 256. Also, the Implementation Agreement refers to MSR in Section 1(5)(h), and Section 2(1)(b) of the Annex to the Agreement. Article 143(1) provides that MSR in the Area shall be carried out for the benefit of mankind as a whole in accordance with Part XIII of the UNCLOS. There is a contradiction between Articles 143(3) and 256 of the UNCLOS. As follows, Article 256 grants the right of conducting MSR to all States[69]. However, Article 143(3) in Part XI, provides that "States Parties" may carry out MSR in the Area. A question arises as if this means that Non-Party States to the UNCLOS are not allowed to MSR in the Area[70].

Avoiding the wordings between the Articles, MSR in the Area is open to All States as long as they fulfil with the ISA's requirements. It is underlined that provisions of Article 143 cannot prejudice any right of conducting MSR awarded to all State by Article 256[71]. In addition, accord-

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[67] Tullio Scovazzi, Mining Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Seabed Authority, (2004) 19 Journal of Marine and Coastal Law 383,401.

[68] UNCLOS (n2), art. 143(1).

[69] UNCLOS (n2), art. 256 "Marine Scientific Research in the Area All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area."

[70] J. Ashley Roach 'Marine Scientific Research in the Area' in M. Lodge and M. H. Nordquist (eds), *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan* (Martinus Nijhoff Publishers 2014), 270.

[71] Fevzi Topsoy, *Denize İlişkin Bilimsel Araştırmalar (MSR) ve Türkiye* (Turhan Kitabevi 2011) 205.

ing to some scholars, MSR in the Area can only be conducted within the purview genetic resources therein[72].

The ISA also runs an Endowment Fund, which is funded by the Member States, to support qualified scientists and technologists from developing States to maintain effectively marine scientific research[73]. According to documents of the ISA between 2016 and 2019, various Turkish scientists and government officials were sponsored by the Endowment Fund for marine scientific research purposes[74].

c) Prospecting and Exploration

Prospecting is considered the first phase of the exploitation of the deep seabed minerals under the regime established by the UNCLOS. Even though, the UNCLOS does not define prospecting, Regulations on Prospecting and Exploration defines prospecting as *"the search for deposits of polymetallic nodules in the Area, including estimation of the composition, sizes and distributions of deposits of polymetallic nodules and their economic values, without any exclusive rights[75]"*. All States can join

[72] Alex G.Oude Elferink 'The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas' (2007) 22 International Journal of Marine and Coastal Law 143,158.

[73] Humphrey Sipalla, 'Selected Recent Institutional and Rule Making Developments in the Law of the Sea (2015-2016)' (2016) 2 Strathmore Law Journal 189, 191.

[74] The ISA Secretariat, Doc. ISBA/25/A/2, (3 May 2019); ISA Secretariat, Doc.24/A/24/2, (28 May 2018); ISA Secretariat, Doc. ISBA/23/A/2, 5 June 2017; ISA Secretariat, Doc. ISBA/22/A/2, (24 June 2016).

[75] Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, ISBA/19/C/17, Annex, Regulation 1.

prospection activities in the Area only if notified to the ISA[76]. Notification should encapsule all related information of where the research is being conducted and a written undertaking to obey by the Convention rules on environmental protection and provide cooperation with programmes dedicated to training personnel from developing State[77]. That notification does not provide any exclusive rights to the actors[78]. As hereinbelow, engaging in exploration and exploration activities in the Area requires the authorization and licensing by the ISA regardless of prospecting and MSR.

As is mentioned above under the Mining Code, three sets of regulations have been issued by the ISA relating prospecting and exploration activities regarding three particular types of minerals (polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts) in tandem with environmental recommendations. Exploration is defined as *"the searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the use and testing of recovery systems and equipment, processing facilities and transportation systems and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into*

[76] Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, ISBA/19/C/17, Annex, Regulations 2.

[77] Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, ISBA/19/C/17, Annex, Reg. 3.

[78] Robin Rolf Churchill & Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 2th ed, 1999) 188.

account in exploitation."[79] Regulations of the ISA regarding the exploration is a reflection of Article 153(2)(b) of the UNCLOS. In other words, the Non-Party States, as well as the Observer States, cannot apply to the ISA to explore or exploit deep seabed resources in the Area, unless their nationals are sponsored by a party state and effectively controlled by them or their nationals.

Arguably, prohibiting unliteral mining activities[80] may have attained the status of customary law[81]. On the other hand, to restrict unilateral activities in the Area without authorization of the ISA, equitable rights to enjoy deep-sea mining activities in the Area must be provided to all States not depending on acceding to the UNCLOS as long as complying the requirements under Part XI of UNCLOS and its components.

Apart from customary international law status of Part XI, it might not seem realistic that actors especially entities and companies would engage in any mining activities without a legitimate basis and enforceable legal title, given the substantial investment required to establish DSM operations. To achieve such a feat will require credit from banks, support from investors and an expected substantial return on investment. However, if there is any legal uncertainty regarding the deep-sea mining project, hedge funds, creditors and, insurance companies as well as, investors

[79] Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, ISBA/19/C/17, Annex, Regulation 1.

[80] UNCLOS (n2), art 137.

[81] Dingwall (n1) 152.

will instantly abstain due to the possibility of exposing themselves to tremendous risk and massive liability[82].

Conducting mining activities in the Area without authorization of the ISA by any actor means that abstention of the rights of exclusivity and security of tenure. A contract concluded with ISA can afford to the contractors above-mentioned rights[83]. Thus, engaging in deep-sea mining activities under the regime of the UNCLOS and its components is preferable for companies in a practical way. Indeed Lockheed Martin, US defense company, opted for the way to comply with the legal regime of the UNCLOS even though it has two licenses given by the US regarding deep sea mining activities in the Area. In other words, as mentioned above, the US or the US nationals have no right to get ISA's license for exploration unless they ratify the UNCLOS. According to the UNCLOS, the US would be eligible to apply to the ISA for mining rights or to sponsor US entities wishing to obtain approval for any related mining activity in the Area. Thus, it was only by joining UNCLOS that the US could secure a legally recognized, internationally enforceable DSM permit backed by investors safeguarding itself and the rights of its national. After the Declaration of Principle, the US enacted the Deep Seabed Hard Mineral Resources[84] related to exploration and exploitation activities in the Area in 1980. According to this act, the US issued two licenses to the defense company named Lockheed Martin to undergo said activities in

[82] Dingwall (n1), 153.

[83] UNCLOS (n2), 153(6), Annex III art 3(4)(c), art 16.

[84] US Deep Seabed Hard Mineral Resources Act 30 USC §§ 1401–1473 (2002) (USA).

the Area. Subsequently, it was understood by the US that only by ratifying the UNCLOS will Lockheed Martin's license claims be legitimate and recognized internationally[85]. Moreover, it considered that if Lockheed Martin conducted any activities under its license it would be a breach of its license contract.

To avert any drawback from the international community, Lockheed Martin came up with a solution that met all requirements of the UNCLOS. For that purpose, Lockheed Martin in cooperation with UK Seabed Resources Ltd (UKSRL) decided to conduct deep-sea mining activities in the Area according to the framework of the UNCLOS in May 2012. UKSRL which is a wholly owned subsidiary of Lockheed Martin applied to the UK to sponsor its applications under the statue of sponsor State for the exploration of polymetallic nodules in the Area. The way was chosen by Lockheed Martin might be an optional solution for engaging in deep sea mining in the Area in terms of Non-Party States.

d) Exploitation

State Parties are restricted from recognizing mining rights asserted outside the scope of the UNCLOS[86]. In this direction, the ISA has the mandate to grant licenses for exploitation purposes. Currently, exploitation of the deep seabed minerals derived from the Area has not taken place yet within the Area. It is still pending adoption of exploitation regulations by the ISA. There are not only lots of vagueness concerning the

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[85] Dingwall (n1) 153.

[86] Bernard Oxman, 'The New Law of the Sea' (1983) 69 American Bar Association Journal 156,160.

legal arrangements of the Area and profitability of DSM but also lots of serious environmental concerns including the vulnerable marine ecosystem in the deep seabed. The ISA has been working on the Draft Regulation for forthcoming exploitation phase in the Area. The Draft Regulation contains provisions related to grant licenses for the exploitation of the seabed resources in the Area including stipulating to ensure fundamental principles[87].

Various issues need to be discussed especially redistribution of the benefits derived from the Area[88]. ISA needs to create a delicate balance between developing States and actors who engaged in such activities. Also, the interests of land-based mineral producers should be taken into consideration[89]. Besides, the parallel system/site banking was adopted through the UNCLOS regime[90]. The parallel system is used to refer that "the Area could be exploited both by the Enterprise and by contractors". Furthermore, the vagueness of the use of terms and scope according to Draft Regulations on Exploitation of Mineral Resources in the Area needs to be clarified according to UNCLOS[91].

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[87] Draft Regulation (n8), Art.2.

[88] For further information on this issue, see Isabel Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation' (2019) 42 European Journal of International Law 601, 630.

[89] Implementation Agreement (n26), 1(5)(e).

[90] UNCLOS, Art. 153., Annex III, Art.,8, Art.10.

[91] Comments on the draft regulations on the exploitation of mineral resources in the Area, 4 December 2019,ISBA/26/C/2, p.2

Secretary-General of the ISA, Michael Lodge underpinned the importance of the deep seabed minerals for a low carbon future[92]. Those resources are seemed to provide significant opportunity to establish renewable platforms for sustainable future[93]. Similar to the exploration activities, authorization and exploitation licenses from the ISA are required to join exploitation activities. ISA has been working on the Draft Regulations for the forthcoming exploitation phase in collaboration with Stakeholders. Stakeholders[94] submitted their current comments regarding the latest Draft Regulation[95].

e) Protection of the Marine Environment

Deep-sea mining activities which are still at an experimental phase might cause a tremendous environmental disaster or serious harm to the marine environment[96]. There are unknown impacts toward the marine

[92] Un Global Compact Meeting Outlines Demand for Responsibly Sourced Seabed Mineral (*ISA Quarterly*, September,2019).
<https://us20.campaignarchive.com/?u=15eca2158165ac8ca1bf066d0&id=cd6ad69355>

[93] Further information about relationship between the deep seabed minearls and renewable energy *see*, Normon Toro, Pedro Robles, Ricardo I. Jelders ‘Seabed Mineral Resources, An Alternative fort he Future of Renewable Energy: A Crictical Review, (2020) 126 Ore Geology Reviews < https://www.sciencedirect.com/science/article/pii/S0169136820305941> accessed 25 October 2020.

[94] Terms of stakeholder includes State, State entities, private corporations, environmental groups and civil society. See, format of the stakeholder consultation <http://bit.ly/temp-sg-rev.> accessed on 21 October 2020.

[95] Comments from stakeholders, <https://isa.org.jm/files/files/documents/comments-jan2020a_final.pdf> accessed 28 November 2020.

[96] Further information about environmental protection in the deep seabed, see, L.A Levin et al., ‘Defining “Serious Harm” to the Marine Environment in the Context of Deep-Seabed Mining’ (2018) 74 Marine Policy 245. ; Lodge et al., ‘Seabed mining: International Seabed Authority Environmental Management Plan for the Clarion–Clipperton Zone: A Partnership Approach’ (2014) 49 Marine Policy 66; Kristina M.

environment and its ecosystem. Several provisions of the UNCLOS refer to the pivotal role of the ISA regarding the protection of the marine environment[97]. ISA is obliged to adopt rules and regulations to prevent, to reduce and to control pollution and other hazardous accident from harming the marine environment.

Obligations of protection and conversation of the marine environment have *erga omnes* qualification. Both in the Area and the high seas, the obligations related to the protection and conservation of the marine environment are *erga omnes*. *Erga omnes* obligations are aimed at protecting the common interest of mankind. In the event of a violation of *erga omnes* obligations, states that are not directly harmed by this violation also have the right to any claim the necessary measures to cease and not repeat the damaging activity. Furthermore, they have the right to claim compensation and repairment. But the exercise of this right is not easy to implement effectively, as it requires a combination of many conditions[98].

All States have the right to claim any environmental concerns to any actors whose conducting harmful activities or causing damage to the marine environment. For example, Türkiye, as a Non-Party State to the UNCLOS, has the right to claim abovementioned rights even if it is hard to implement those mechanisms. Consequently, environmental regula-

Gjerderde, 'Challenges to Protecting the Marine Environment beyond National Jurisdiction'(2012) 24 The International Journal of Marine and Coastal Law 839.

[97] UNCLOS (n2), Art. 145.

[98] Güneş (n41) 123.

tions in ABNJ spark compelling debates concerning enforcement of domestic and international provisions and liability for wrongful acts[99].

II. PARTICIPATION OF THE OBSERVERS IN THE DECISION-MAKING PROCESS OF THE INTERNATIONAL SEABED AUTHORITY

A) OBSERVER STATUS

According to Article 156(2)[100] of the UNCLOS, States can become a member of the Authority by becoming a party to the UNCLOS. In other words, all States parties to the UNCLOS are *ipso facto* member of the Authority regarding Article 156(2) to the UNCLOS. Following paragraph of Article 156 regulates becoming a member of the Authority as an observer. It states that:

> Observers at the Third United Nations Conference on the Law of the Sea who have signed the Final Act and who are not referred to in Article 305, paragraph 1(c), (d), (e) or (f), shall have the right to participate in the Authority as observers, in accordance with its rules, regulations and procedures.

Besides, Intergovernmental Organizations and Non-Governmental Organizations (NGO) may have observer status provided they fulfil the conditions, where appropriate, and the Guidelines for observer status of non-governmental organizations with the ISA[101].

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[99] Alastair Neil Craik, 'Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining' (2016) International Seabed Authority Discussion Papers 4, 1.

[100] UNCLOS (n2), art 156 (2).

[101] The ISA, 25/A/16 (25 July 2019) 2.

Türkiye became one of the observer states to the Authority due to participating in the Third United Nations Conference on the Law of the Sea. Also, the United States, Republic of Iran, and Israel, which have not ratified to the UNCLOS for different reasons[102], have observer status in the ISA. As of today, the ISA has 92 observers including 30 Observer States[103] together with 32 Intergovernmental Organizations and 30 NGOs since April 2020[104]. However, the Observer Status for Non-Party States exempt them from some fundamental rights is problematic to achieve a more egalitarian society, as it clearly stated in the UNCLOS preamble *"that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind"*.

B) PARTICIPATION OF THE ISA MEETINGS

As mentioned above, to protect the interests of all states, the ISA has the power to adopt rules, regulations and procedures which are subject to a complex set of decision-making procedures through meetings of its organs. This power is shared with four principal organs of the ISA: The Assembly, the Council, LTC and Finance Committee[105]. In this section,

[102] Bektaş (n14) 144.

[103] Observer States: Afghanistan, Andorra, Bhutan, Burundi, Cambodia, Central African Republic, Colombia, Democratic People's Republic of Korea, El Salvador, Eritrea, Ethiopia, Holy See ,Islamic Republic of Iran ,Israel, Kazakhstan, Kyrgyzstan, Libya, Liechtenstein, Peru, Rwanda, San Marino, South Sudan, Syrian Arab Republic, Tajikistan, Türkiye, Turkmenistan, United Arab Emirates ,United States of America, Uzbekistan, Venezuela. <https://www.isa.org.jm/observers> accessed 5 December 2020.

[104] Observers (n103).

[105] Harrison (n37) 117.

the decision-making process of the ISA through the meetings is mentioned as well as related to observers due to its complexity and not to wander from the subject of this article.

Meetings of the LTC is the place where the ISA sensitive issues are discussed. Role of the LTC to examine technical aspects of the regulations and prepare a draft proposal for further consideration by the Council. As the executive organ of the ISA, the Council compromises of 36 members that are elected by the Assembly and represents certain groups of states as consumers, investors and producers, developing states and landlocked states[106]. Assembly in collaboration with the Council establishes general policies of the ISA. However, those meetings are closed to observers and in certain cases for Member States[107]. The LTC held limited open sessions to discuss several problems[108].

Members of the Council examine the Draft Regulations and may amend them. While the Council carries out its activities, it must comply with to promote developing States to engage in activities in the Area. Even though members of the Council are limited to 36 members, the Council meetings are attended by more than its members within observers in some cases. Observers may participate in Council meetings, although only upon the invitation of the Council and on *"questions affecting them*

[106] Election process of the Council Members are detailed in Article 161 of the UNCLOS.
[107] The ISA, Rules of Procedures of the Legal and Technical Commission, rule 6.
[108] Jaeckel (n38) 268.

or within the scope of their activities[109]*."* In consequence, observers including States can only execute a limited role during the sessions.

The Assembly meetings are the last stop for the adoption of regulations are open to all States[110]. The primary mission of the Assembly is to formally adopt decisions through general policies of the ISA in collaboration with the Council[111]. All member States are representing in the Assembly and each State equally has one vote in that manner[112]. The general rule of decision making in the Assembly is to reach consensus. The Observer States have the right to attend the meeting. Those States have the right of speech during the meeting, although they cannot vote accordingly. Nevertheless, many of Observer States actively participate in meetings of the Assembly. For instance, the US as an Observer State has effectively attended most of the Assembly meetings and consultation processes related to Mining Code[113]. To date, Türkiye neither participated the meetings nor submitted it comments during the consultation processes. Türkiye should be one of the Observer States that actively participate the meetings and consultation process.

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[109] Rules of Procedures of the Council of the International Seabed Authority, rule 75 "Observers *referred to in rule 82 of the rules of procedure of the Assembly may designate representatives to participate, without the right to vote, in the deliberations of the Council, upon the invitation of the Council, on questions affecting them or within the scope of their activities.*

Rules of Procedures of the Council of the International Seabed Authority, rule 82, <https://isa.org.jm/files/files/documents/rop_council.pdf> accessed 12 October 2020.

[111] Implementation Agreement (n26), Annex 3(1).

[112] UNCLOS (n2), art 159(6).

[113] Harrison (n37), 128.

Even though there are 168 members of the ISA participation of the Assembly meeting is a considerably extent insufficient. States and entities which have already have interest from deep sea mining activities in the Area attend regularly the Assembly meeting. But this situation can be considered problematic in terms of principles of the DSM.

Therefore, there are crucial questions in place such does the ISA effectively promote even member States to attend such meetings? Or those States can decide in light of the benefit of mankind or just accordingly interest of themselves? As is well known in that situation member States which attend the meeting would consider their benefits. And the Observer States have no mechanism to prevent the adoption of such decisions but only discuss if it can be considered sufficient action to do so.

C) TRANSPARENCY OF THE MEETINGS

According to international law, the transparent decision-making process is an evolving function for effective global governance[114]. It gains more importance when an organization acts and make decisions on behalf of mankind's benefit. Transparent decision making can be divided into two elements: accessibility of information and participation of process. Currently, the ISA puts effort to provide transparency through its DeepData base, recently updated website, stakeholder consultations and its publications[115]. But there is still much significant confidential information concerning the decision-making process. Although environmental data is

[114] Jaeckel (n38), 260.

[115] The Secratary General, 2020 Annual Report<https://www.isa.org.jm/secretary-general-annual-report-2020> accessed on 28 November 2020.

shared with DeepData, geographical data such as survey areas, track lines, bathymetric contours and mineral contents are considered confidential data and are not shared with the public. Yet, exploration contracts and related reports of contracts are keeping as confidential information. To perform of active participation of the decision-making process by the Observer States, efficient transparency should be ensured by the ISA.

In 2018, the transparency between Regional Fisheries Management Organizations (RFMO's) and the ISA was compared in three categories: Availability of the information, participation in decision making and access to outcomes. Results were shown that even though the ISA endeavours a few proper transparency practices, the score of RFMO's, were beyond to score of the ISA in the scoring test (77% against 44%)[116]. Main problems to provide sufficient transparency are confidentiality of the contracts with concluded between the ISA and contractors and its components and limited participation of the Council and the LTC meetings. In lightning of that, in order to increase transparency:

- Transparency of the ISA's decision-making process needs to be increased through concrete policies. Meetings of the LTC and the Council related to activities in the Area could be open for observers especially the Observer States. Also, the ISA should encourage the Observer States to participate effectively and take the floor.

[116] Jeff A. Ardon, 'Transparency in the operations of the International Seabed Authority: An Initial Assessment' (2018) 95 Marine Policy 324,328.

- Mining contracts[117], contractor annual reports, and application of plan of works that submitted to the ISA should be shared.

- Meetings of the LTC could be carried out through video-streaming and shared with all stakeholder. It is important to reach attributed statements, finding out of the nature of the discussions.

In addition, every debate relating to deep sea mining activities that may directly or indirectly affect all States, whether a Party State or not, should be open to all. So, the presence of the Observer States and related Intergovernmental Organizations and NGOs should be taken into account by the ISA.

D) STRENGTHENING THE ACTIVE PARTICIPATION BY OBSERVER STATES IN THE INTERNATIONAL SEABED AUTHORITY: SUGGESTIONS FOR A WAY FORWARD

Good faith and equity are two fundamentals of customary international law. Indeed, these principles are embodied between Article 30 and Article 33 of 1969 Vienna Convention on the Law of Treaties (Vienna Convention)[118] and Article 300 of the UNCLOS. The UNCLOS can also be

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[117] A limited part of some exploration contracts has been released on the ISA's website, see, < https://www.isa.org.jm/exploration-contracts/polymetallic -nodules>, <https://www.isa.org.jm/index.php /exploration-contracts/polymetallic-sulphides>, <https://www.isa.org.jm/index.php/exploration-contracts/cobalt-rich-ferromanganese> accessed 13 October 2020.

[118] 1969 Vienna Convention on the Law of Treaties adopted 23 May 1969 entry into force 27 January 1980, 1155 UNTS 331.

interpreted accordingly with those Articles[119]. Conforming to Article 31(1) of the Vienna Convention, the interpretation and performance of a treaty must be in good faith[120].

Part XI of the UNCLOS entitles States to engage in deep sea mining activities in the Area provided they are party to the UNCLOS. However, Non-Party States are debarred from conducting activities in the Area and are stripped from their voting rights in the decision-making process. Combined with the concept of common heritage of mankind and benefitting mankind as a whole, the exclusion of Non-Party States from engaging in activities in the Area by themselves or their nationals can be considered as an act of discrimination towards these States.

Moreover, all States whether they are party or not should have the right to join deep-sea mining activities in the Area according to good faith and equity. Part XI of UNCLOS has established a unique regime under which the principle of the common heritage of mankind and acting on behalf of mankind as a whole is fundamental. This regime is substantially different from other parts of the UNCLOS. Therefore, the interpretation of Part XI needs to be scrutinized in good faith and equity. In those circumstances, UNCLOS is a framework convention which means there are still controversial and disputable issues which need to be supple-

[119] Roberto Vizo 'The General Rule of Interpretation in the International Jurisprudence Relating to the United Nations Convention on the Law of the Sea' in Angela Del Vecchio and Roberto Vizo (eds.) *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer, 2019) 16.

[120] Vienna Convention (n118), arts 31, 26.

mented by a subsequent agreement[121]. DSM regime of the UNCLOS can be considered as one of the controversial issues and should be supplemented by the inclusion of Non-Party States.

The objective of Part XI of the UNCLOS is to bring together all parties and to unify their conduct. It insists on being the representative of mankind. However, it does not seem fair to rule out the participation of States in the Area, which is considered as common heritage of mankind, based on whether they agree or not with all the provisions of UNCLOS. Non-Party States may have conflicted interests with other provisions of the UNCLOS. For instance, Türkiye sympathises with the provisions of Part XI of the UNCLOS nevertheless it is a persistent objector of the UNCLOS due to its some other provisions. Taking everything into account, Part XI of the UNCLOS should be open and encouraged to all States through a protocol or an agreement. After all, it will be beneficial for everyone to do so as it will bound all parties and unify their actions.

Although the Observer States can attend the Assembly meetings, they do not have the right to vote. Under special circumstances, they may attend the meetings of the Council and the LTC. Participation in the decision-making process does not go beyond attendance and debate. Can the current situation of Observer States be considered as adequate participation in accordance with the mission and value of the ISA as the guardian of the common heritage of mankind?

[121] Vizo (n119), 16.

III. POSITION OF TÜRKİYE TO THE INTERNATIONAL SEA-BED AUTHORITY

The main reason for Türkiye is not party to the UNCLOS is the prohibition of making reservations to the Convention under Article 309 of UNCLOS. In particular, Türkiye is against the provisions related to the width of territorial waters, limitation of territorial waters, limitation of the continental shelf and the regulations of the legal regime of the islands from having legal consequences for itself by making reservations, has therefore not been a party to the UNCLOS until today[122]. In addition, Türkiye remains a persistent objector of the UNCLOS[123]. On the other hand, Türkiye does not against the idea of the common heritage of mankind and governed by an international organization. Although the international organization should encompass humanity including all states.

In recent years, Türkiye has initiated its "blue homeland" policy covering its national jurisdiction and beyond. Blue Homeland refers to come into play at the utmost level begins with its seas and beyond. Türkiye has declared that its scientific, technologic, military, legal and political

[122] Nasıh Sarp Ergüven, 1982 Tarihli Birleşmiş Milletler Deniz Hukuku Sözleşmesi'ne Karşı Türkiye'nin Tutumu" in *Doğu Akdeniz Sempozyumu: Doğu Akdeniz Sorunlarına Hukuki ve Siyasi Yaklaşım ile Türkiye Büyük Millet Meclisinin Çözümdeki Muhtemel Rolü*, Ankara 2021, 186.

[123] Further information about Türkiye persistent objector situation see, James A. *Green, The Persisten Objector Rule in International Law* (Oxford University Press 2016).

movements start with the Mediterranean Sea with the understanding of a maritime nation throughout its constituted policy in 2011[124].

Reflection of this movement embodied the doctrine of the Blue Homeland[125]. It forms the Blue homeland of all the world's seas, over which Türkiye may exercise sovereign rights to the extent authorized by international law. Those maritime zones cover all seas where Türkiye has a coastline. The content of Türkiye's sovereign rights in different maritime zones varies depending on the legal nature of the maritime zone and which activity is carried out there. Blue homeland, differs from a land Nation, is not formed in a single geographical structure, the scope of sovereign rights that can be used depends on the types of maritime zone. Even Turkish-flagged ships where the use of sovereign rights is allowed, no matter where they are located in the World's Oceans, are considered a part of the Blue homeland[126].

According to its policy, Türkiye might plan to join deep-sea mining activities in the Area. As mentioned by both Turkish ambassadors regarding the legal regime of the Area and principle of common heritage of mankind, hypothetically, if Türkiye becomes a party to the UNCLOS, the legal regime which provided by the UNCLOS might be useful for

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124 Meclis'te 'Doğu Akdeniz' için Yetki Alanları Kanunu Çağrısı (*Milliyet*,10 Dec 2020) <https://www.milliyet.com.tr/siyaset/mecliste-dogu-akdeniz-icin-yetki-alanlari-kanunu-cagrisi6376654> accessed 28 December 2020.

125 Hakan Karan and Berilşah Kocabıyık, Neden ve Neresi Mavi Vatan? in *Doğu Akdeniz Sempozyumu: Doğu Akdeniz Sorunlarına Hukuki ve Siyasi Yaklaşım ile Türkiye Büyük Millet Meclisinin Çözümdeki Muhtemel Rolü,* (Ankara 2021) 4.

126 Karan and Kocabıyık (n125) 7.

Türkiye to attend deep sea mining activities in the Area in future[127]. Despite that, allocation of seabed resources in the Area as the common heritage of mankind and prospecting, exploration and exploitation is carried out in the benefit of mankind have paved the way for Türkiye to benefit from these resources without becoming a party to the UNCLOS[128].

As previously stated, rights of exploration and exploitation are only given to the Member States or actors sponsored by member States pertaining to the rules of the UNCLOS. Part XI of the UNCLOS should be interpreted accordingly with good faith and equity. In lightening of that, Türkiye and the other Non-Party States to the UNCLOS shall not omit from deep-sea mining activities in the Area. Substantive Agreement or Protocol should be created that allows to Non- Party States to become a party to Part XI of the UNCLOS or a member to the ISA. Because as mentioned earlier, Part XI of the UNCLOS adopts unusual and unique legal regime for the Area concerning acts on the benefit of mankind as a whole and principle of common heritage of mankind. Omitting from deep-sea mining activities and decision-making process without voting rights be surely considered discrimination of Non-Party States. Bear in mind that, the Non-Party States undoubtedly and surely have rights under the Area and its resources according to principles governing the Area. In that direction, the ISA should create a gateway for such States to attend deep sea mining activities in order to prevent discrimination and unfair situations and to perform in good faith.

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[127] Korkut (n27) 118.

[128] Selami Kuran, *Uluslararası Deniz Hukuku* (İstanbul 2014) 216.

Otherwise, Non-Party States may have the right to join activities in the Area without authorization of the ISA as long as they comply with international customary law including *erga omnes* obligations. In that direction, Türkiye may enact its own deep seabed mining code in that manner as the US did. This code could contain not only provisions concerning granting licenses for exploration and exploitation activities but also provisions relating to the protection of the marine environment and human life. In other words, if there is no way to attend such activities without acceding to the UNCLOS, Türkiye could enjoy deep-sea mining activities in the Area by itself because they have equal rights from the Area and its recourses as much as the Party States. Since exclusion from deep-sea mining activities in the Area without becoming a party to the UNCLOS is surely against good faith and equity, it would not be a violation of international law for Türkiye to enjoy deep-sea mining activities in the Area on its own. However, as a result of such action, Türkiye will face sanctions by States. In order to prevent such troubles, there are mainly three possible scenarios in Türkiye's perspective:

First, Türkiye could become a party to UNCLOS, thus Türkiye and its nationals would have the right to join the activities in the Area pending approval of the ISA. Moreover, Türkiye could become a sponsoring State to its contractors. After becoming a party as a developing State, Türkiye would enjoy many advantages from privileges offered to the developing States under UNCLOS and Implementation Agreement. As mentioned above, Türkiye showed its support to the idea of the common heritage of mankind during the UNCLOS III. Consequently, those provi-

sions which adopted by the UNCLOS and amended by the Implementation Agreement could be in favour of Türkiye. But this option would not be taken due to Türkiye's all reservations against the UNCLOS.

Secondly, if Türkiye having economic self-sufficiency and sufficient technology to mine the deep seabed would not be a party to the UNCLOS as now, Türkiye could establish a subsidiary company for exploration purposes in the Area via one of the party-States sponsoring, especially developing party-State. This procedure may be carried out by General Directorate of Mineral Research and Exploration (MTA)[129]. Since Türkiye has no regulation concerning deep-sea mining in the beyond national jurisdiction, Law of the General Directorate of Mineral Research and Exploration may be applicable for exploration activities in the Area. Additional Article 1 of the Act grants the right to the establishment of a company for deep-sea mining activities according to purposes of MTA which is provided by Article 2 of the Act. Establishment of a company in one of the developing party States may be better for Türkiye to take advantage of financial support awarded to that developing States by the UNCLOS as well as engaging in exploration activities in reserved areas. For instance, Nauru, one of the developing party States, paves the way of becoming a sponsoring State for companies due to its economic benefits[130]. After that, as the company comply with the procedure of sponsoring state in that State, the company may submit its application to explore the Area to the ISA. When the ISA approves its

[129] 2804 numbered Law of General Directorate of Mineral Research and Exploration, Official Gazette, 22/06/1935.

[130] Feichtner (n88) 622.

application, the company would have the right to explore minerals in the determined area. After application by the ISA, the company will be obliged to adhere to the regime of the UNCLOS and the ISA's regulations. Whether Türkiye is a party State or not, application for exploration or forthcoming exploitation licence as a contractor is complex and requires an extensive period of time. Therefore, as of this writing, thirty-one 15-year contracts for exploration have been concluded between contractors and the ISA[131].

Finally, Türkiye could apply for licenses in nations that are blessed with mineral deposits on their seabed. In other words, Türkiye will bypass any royalty fee to the ISA and complex bureaucracy and engage in deep-sea mining activities in specified maritime zones without becoming a party to UNCLOS. For instance, Tonga and Cook Islands had declared conducting deep-sea mining activities in exclusive economic maritime zones to alleviate their dependence on other industries[132].

Whether Türkiye is part of DSM in the Area process or not, Turkish representatives should participate the ISA's Assembly meetings and consultation process on draft exploitation regulations and be active participants in the process. At present, research centers such Center for Oceans Law and Policy, University of Virginia School of Law which was established in the US and Center for Polar and Deep Ocean Development are ob-

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[131] See all contractors < https://isa.org.jm/index.php/exploration-contracts> accessed 14 December 2020.

[132] Rakhyun.E. Kim, 'Should Deep seabed Mining Be Allowed?'(2017) 82 Marine Policy 135, 137.

server members of the ISA[133]. To effectively, closely and legally consider the activities in the Area regarding the benefit of humankind as a whole within Türkiye, Ankara University National Centre for the Sea and Maritime Law (DEHUKAM) should initiate the necessary procedure to become an observer to the ISA. As Feichtner has noted that international lawyers, it might be understood as scholars also, "*should take up the ISA's invitation and make their voices heard. Because the process of the making of a mining code appears as a unique opportunity for international lawyers and scholars as well to recognize that here a political economy is being co-constructed with law. In order to question what constitutes value in seabed mining and to offer alternative valuations and procedures for public debate on what might be a 'fair share'*"[134].

CONCLUSION

The legal regime of the Area is the result of compromises between developing and developed States via their opposed ideologies. Still, there are lots of issues to be resolved. ISA as a governing body is currently working on a draft resolution related to exploitation activities. When it is done, it would be easy to consider the equitable sharing system for the benefits derived from the Area. However, there are also various environmental concerns in place. It should keep in mind, the knowledge concerning the deep-sea ecosystem is not sufficient yet. To conduct exploitation activities without considering all possibilities concerning the pro-

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[133] <https://www.isa.org.jm/observers> accessed 27 December 2020.
[134] Feichtner (n88) 602.

tection of the marine environment might irrecoverably harm the deep-sea ecosystem.

Transparency of the ISA especially the participation by the Observer States to the meetings of the Council and the LTC should be improved. All States should have the right to attend all the ISA's meetings. In addition, exploration contracts issued by the ISA, contracts annual reports should not be confidential and share with the public. Eventually, the Area and its resources belong to all humanity including the next generations.

According to activities in the Area, all States have the right to conduct marine scientific research and prospecting activities. However, exploration and exploitation activities are subject to have a license issued by the ISA. Concerning to protection of the marine environment, all States have the right to claim any environmental concerns to any actors conducting harmful activities or causing damage to the marine environment.

The objective of Part XI of the UNCLOS is to bring together all parties and to unify their conduct. It insists on being the representative of mankind. However, it does not seem fair to rule out the participation of States in the Area, which is considered as common heritage of mankind, based on whether they agree or not with all the provisions of UNCLOS. Part XI of the UNCLOS should be interpreted in good faith and equity.

As a concept, the common heritage of mankind, the Area and its resources belong to all humanity whether they are contracting Parties to the UNCLOS or not. In that purpose, there must be a protocol to allow

Non-Party States to UNCLOS to accept Part XI of the UNCLOS and become member States unless those States do not have any objection to the Part XI of the UNCLOS. In addition, Observer States should be considered members of the ISA and they should have voting right in the ISA's meeting.

According to Türkiye's Blue Homeland policy, deep-sea mining activities might be in Türkiye's schedule in the close future. Different scenarios for Türkiye relating to conduct exploration and exploitation activities are illustrated. As follows:

First, take into account the principle of the common heritage of mankind, Türkiye has the right to conduct exploration and exploitation activities in the Area. Türkiye may conduct such activities without authorization by the ISA. However, as a result of this action, Türkiye probably will face sanctions by States.

Second, Türkiye could establish a company in one of the member States. With a sponsorship of such States, Türkiye could conduct activities in the Area pending approval of the ISA.

Third, Türkiye could apply for DSM licenses in the nations' maritime zones that are blessed with mineral deposits on their seabed.

In conclusion, Türkiye should initiate the necessary process for membership of the ISA. Admittedly, Türkiye is part of mankind and as such Türkiye should be able to participate in such discussions and be considered as a Member State of the ISA and not as just an observer state with limited rights. In the meantime, DEHUKAM should take a seat as an ob-

server research institution and examine the legal process of deep-sea mining activities in the perspective of Türkiye.

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