7 March 2023

Comments from The Ocean Foundation in response to the Co-Facilitators' request for written submissions on the informal intersessional dialogue to facilitate further discussion on the possible scenarios and any other pertinent legal considerations in connection with section 1, paragraph 15, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea

The Ocean Foundation thanks the Co-Facilitators for convening this intercessional dialogue.

TOF supports the comments submitted by the Pew Charitable Trusts.

Regarding Question 2:
*What is the procedure and what are the **criteria** to be applied in the consideration and provisional approval of a pending application under subparagraph (c), in the light of, amongst others, article 145 of UNCLOS? In this regard, what roles do the Council and the Legal and Technical Commission (LTC) respectively play?*

TOF would like to emphasize that, far from mandating approval of a plan of work, UNCLOS mandates that States Parties do not enable exploitation of the Area in the absence of a regulatory framework and sufficient institutional capacity. It would further be a violation of obligations under UNCLOS to enable exploitation of the Area given the lack of environmental and scientific baselines (not to mention lack of understanding of the underwater cultural heritage at stake).

Further to the relevant criteria, the Member States of the Council are informed in these decisions, as elsewhere, by the breadth of their international law obligations. Pursuant to the Vienna Convention, both UNCLOS and the 1994 Agreement must be read in the context of any relevant rules of international law. The precautionary principle, biodiversity commitments (including via the Convention on Biological Diversity and the recently concluded Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction), human rights commitments (including both substantive rights such as the right to a clean and healthy environment and intergenerational rights as well as procedural rights related to the ability to have one's voice heard and Free, Prior, and Informed Consent) must all inform the work of the Member States.

Regarding Question 3:
What are the consequences of the Council provisionally approving a plan of work under subparagraph (c)? Does provisional approval of a plan of work equate to the conclusion of an exploitation contract?

Regarding consequences, were the Council to provisionally approve a plan of work, TOF is concerned that Nauru Ocean Resources, Inc. (through its parent The Metals Company (TMC)) may move ahead with exploitation of the Area, even if such an approval were "provisional" and even if an organ, or organs, of the ISA made clear that such approval were not permanent, and did not authorize immediate mining.

This concern is a direct response to comments by TMC. TMC has stated clearly their intention to submit a plan of work in 2023, and to begin commercial production in 2024.

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TOF is concerned about the mischaracterization by TMC of processes at the ISA. For example, on 1 February 2023, during an investor call, ***TMC told investors*** in response to a question about potential delays in timeline that "there is a process in place that gives certainty to us and so at the end of that two year period, ***if the International Seabed Authority has not completed the adoption of the rules and regulations as they were directed to do, they are required to accept and provisionally approve a plan of work that is submitted to them***."

TOF finds the above statement, and similar statements made by TMC, extremely concerning, and urges Member States to consider TMC's position – and the potential implications thereof – when deciding on a path forward.