GREENPEACE Briefing

Greenpeace International written submission to the 30 May Informal Intersessional Dialogue on Section 1, paragraph 15 of the 1994 Agreement[1]

May 2023

The oceans are in crisis. So is our Planet, currently facing a climate emergency of unprecedented scale. Addressing this crisis requires moving away from the growth addicted, profit driven system that is causing it. The deep ocean must remain off limits to the mining industry to prevent serious and irreversible harm to the oceans, further biodiversity loss and potentially damaging a critical carbon sink. Deep seabed mining would open a whole new frontier of resource exploitation, at the heart of the largest ecosystem on Earth. In bringing in a new source of minerals, deep seabed mining would rather provide an incentive not to address the fundamental issues of overconsumption and extremely inefficient resource use and an escape route to avoid facing the limits imposed by the finite nature of mineral resources.

A single mining company forcing Governments' hands

The future of one of the largest biomes on the Planet is at stake. The current situation where the very functioning of the ISA and the work of its parties is determined by the pressure exerted by a single mining company and its intention to mine the deep sea as soon as possible is unacceptable.[2]

The possibility of having plans of work approved as soon as any time from 9 July 2023 is deeply troubling. Greenpeace urges members of the Council to use the opportunity provided by this Informal Dialogue to ensure that the Council fully exerts its powers under the 1994 Agreement and reaches an agreement that prevents plans of work to be approved under the two-year loophole.

UNCLOS parties responsibilities and the two-year rule

Greenpeace concurs with the views expressed by numerous delegations, both at the previous Session of the ISA Council and at the First Intersessional Dialogue of 8 March, that

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[1] International Informal Dialogue established under Council decision ISBA/27/C/45 and Council decision ISBA/28/C/9, to facilitate further discussion on the possible scenarios, 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.

[2] See The Metals Company's update to investors, detailing that regarding its wholly-owned subsidiary NORI's application for an exploitation contract, "*the Company expects to have [this] ready for submission in the second half of 2023*" https://investors.metals.co/news-releases/news-release-details/metals-company-engages-bechtel-support-noris-commercial-contract

article 145 and other UNCLOS provisions related to the protection and preservation of the marine environment are a fundamental part of the legal considerations related to the approval of any plan of work.[3] It follows from there that **provisionally approving any plan of work in the current circumstances, not only prior to the adoption of regulations, rules and procedures (RRPs), but also because of the current lack of scientific knowledge and understanding of the consequences of mining on deep sea ecosystems,[4] would be in breach of the Convention obligations to prevent harm to the marine environment**, as well as the precautionary principle and runs contrary to existing obligations under other international treaties such as the Convention on Biological Diversity or the provisions of the recently agreed Ocean Treaty.[5]

Greenpeace welcomes that **there is wide agreement that neither UNCLOS nor the 1994 Agreement explicitly requires the LTC to recommend approving or disapproving a plan of work.**[6] In consequence, we call on the Council to exercise its powers and ensure that the obligations under the Convention to protect and prevent harm to the marine environment are upheld in the event that a plan of work is submitted after 9 July.

The Informal Intersessional Dialogue of 30 May and the two-year rule

On 31st March 2023, the Council decided "*to continue the informal intersessional dialogue, in the absence of an agreement made during Council discussions.*" To that effect, the Co-Facilitators will co-host a follow-up Webinar on 30 May 2023. Delegations and observers are invited to focus on discussing the two areas of divergence on which a consensus is most urgently needed:

(1) Is there a legal basis for the Council to postpone (i) the consideration and/or (ii) the provisional approval of a pending application of a plan of work under subparagraph (c), and if so, under what circumstances?

The Council is within its rights to adopt preliminary procedures, which could include postponing the consideration of a plan of work. The possibility to extend the deadline for consideration of the plan of work is already provided by the 1994 Agreement.[7]

(2) What guidelines or directives may the Council give to the LTC, and/or what criteria may the Council establish for the LTC, for the purpose of reviewing a plan of work under subparagraph (c)?

It is reassuring that numerous delegations have recently supported that the Council could issue guidelines or directives to the LTC "*including instructions to not provide any recommendation to approve or disapprove a plan of work*" or "*ask the LTC to limit its intervention to highlighting the relevant factors for the Council to consider when reviewing an*

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[3] See paragraphs 18 and 19 of the Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45.

[4] As an example, new research published last 25 May estimates that, in the Clarion-Clipperton Zone, between 88% and 92% of benthic species are still undescribed and thousands more remain undiscovered. Rabone, M. et al. How many metazoan species live in the world's largest mineral exploration region? Current Biology 33 (June 2023). https://www.cell.com/curre.../fulltext/S0960-9822(23)00534-1

[5] International legally binding instrument 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.

[6] See paragraph 15 of the Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45.

[7] Paragraph 11(a) of Section 3 of the Annex to the 1994 Agreement establishes that if the Council does not act within 60 days, the plan of work is deemed to be adopted once the deadline has passed, while the Council can extend the deadline by a majority of the members present.

application for a plan of work, or to giving a comprehensive report on the proposed plan of work to the Council".[8]

The role of the LTC is decisive as it determines the voting procedure to be followed at the Council, following an LTC recommendation on any plan of work. As expressed by Professor Hervé Ascensio on his recent Legal Note,[9] the absence of RRPs "*makes it difficult, if not impossible, for the LTC to make a firm recommendation for a plan of work. While the LTC could draw on its ongoing regulatory work to assess the application, it cannot substitute itself for the Council in setting benchmarks. It would therefore be particularly questionable for it to recommend a plan of work approval without a sufficient legal basis, given the procedural effects of such a "recommendation". **The transmission of its opinion to the Council could only be done, at best, without a recommendation*** [emphasis added]."[10]

According to article 163(9) of UNCLOS, the LTC "*shall exercise its functions in accordance with such guidelines and directives as the Council may adopt*." The Council could therefore issue guidelines or directives so that the LTC would not provide any recommendation, acknowledging that it lacks the basis to do so. Such guidelines or directives "*would be based on the Council's power to establish (…) the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.*" [11]

Conclusion

There is an urgent need to address the unprecedented situation created by the triggering of the 2 year loophole with a specific decision of the Council on what to do if a mining application arrives with no rules in place. The Council must not accept the risk that exploitation could start at any time from the 9th July 2023 under current circumstances. Should that happen it would be failing on its obligations to ensure the protection of the marine environment.

The weight of the decision to allow or not the first ever commercial mining licence must not be left in the hands of the LTC, a subsidiary and technical body. Rather, this highly political question needs to be a decision of the Council, a decision taken by States. Even more so, when the majority of States speaking in Council have expressed their opposition to deep sea mining going ahead in the absence of a mining code.

Granting commercial deep sea mining licences when there is not even a mining code, is a clear reputational risk for the ISA as an institution and for its member States.

Allowing exploitation to start without a mining code in place would also seriously undermine the credibility of the member states of the ISA Council regarding their recent commitments to protect the marine environment, address biodiversity loss and climate change. It would be in total contradiction with their commitment at the CBD COP15 in Montréal in December to halt species loss and expand nature protection, and the adoption of the Global Ocean Treaty to protect the high seas in New York in March. It is also not consistent with the precautionary principle and ecosystem approach regarding managing human activities.

Irrespective of the lack of RRPs, Greenpeace reiterates its opposition to deep sea mining, which risks causing serious and irreversible damage to the deep ocean.

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[8] See paragraph 16 of the Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45.

[9] This legal note, commissioned by Greenpeace France, is attached as an appendix for reference.

[10] Paragraph 15, Ascensio, Hervé. Legal note of 16 February 2023.

[11] Paragraph 16, Ascensio, Hervé. Legal note of 16 February 2023.

Appendix

Professor Hervé ASCENSIO Paris, 16 February 2023
44, rue Alexandre Dumas
75011 Paris
France
(herve.ascensio@univ-paris1.fr / herveascensio@orange.fr)

LEGAL NOTE (ENGLISH TRANSLATION)

PLEASE NOTE THAT THIS LEGAL NOTE WAS ORIGINALLY WRITTEN IN FRENCH

INTRODUCTORY INFORMATION

The undersigned, author of the legal note, is a professor at the University Paris 1 Panthéon Sorbonne (Sorbonne Law School). He teaches public international law, including international economic law and investment arbitration. He is the director of the *Global Business Law and Governance* master's degree, a partnership with the universities of Columbia (New York), City University of Hong Kong and Melbourne. He is the author of numerous publications on general public international law, international economic law and international criminal law and co-edits the *Annuaire français de droit international*. He has acted as counsel in several cases before international courts, including the International Court of Justice. He has been appointed as a party's expert in several cases before investment arbitration tribunals and as an arbitrator in an ICSID arbitration. He has been appointed by France as a member of the OSCE Court of Conciliation and Arbitration, as an alternate arbitrator, and as a national expert in the OSCE human dimension mechanism. In January 2022, he taught a special course at The Hague Academy of International Law on "the responsibility of business entreprises in international law".

This legal note has been drafted at the request of Greenpeace France on certain aspects of the legal regime of the seabed and subsoil beyond the limits of national jurisdiction (hereinafter "the Area"), as established by the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), including the powers conferred on the International Seabed Authority (hereinafter "ISA") and the International Tribunal for the Law of the Sea (hereinafter "ITLOS"). The questions asked, divided into three themes, are as follows:

I. DOES THE EXPIRY OF THE TWO-YEAR CLAUSE IN THE UNCLOS ACTIVATED BY NAURU ALLOW THE LAUNCH OF COMMERCIAL EXPLOITATION OF THE SEABED BY NAURU OCEAN RESOURCES INC, A SUBSIDIARY OF THE METALS COMPANY?

- ➔ If so, under what conditions and within what timeframe?
- ➔ Which body within the ISA is supposed to validate this start of commercial operation? What would be the relevant procedures and voting rules in the Council for determining such an application? Does the Legal and Technical Commission have a role in assessing a permit application under the two-year clause?
- ➔ Which operating licences would be affected?
- ➔ What are the legal effects of a provisional approval of a working plan for the operation?
- ➔ Is the two-year rule drafted in such a way that there can be doubt as to its scope?
- ➔ Are there any provisions in the UNCLOS or in the 1994 Agreement that allow the Council or the ISA Assembly to circumvent the two-year clause?

II. What would be the appropriate legal framework for a moratorium or ban on deep seabed mining?

- ➔ France has called for a "*legal framework to stop deep sea mining and not to allow new activities that would endanger ocean ecosystems*". President Emmanuel Macron, at the 27th conference of the parties to the United Nations Framework Convention on Climate Change (COP27), confirmed the will to ban mining. How can this be done legally? Several avenues have been mentioned: a resolution at the UN, as a favorable political signal; revision of the UNCLOS or an *implementing agreement* of the text of the Convention or the 1994 Agreement without revising or amending the UNCLOS.
- ➔ What would be the legal basis in the UNCLOS for a moratorium or ban on mining in the Area?
- ➔ Could the ISA establish a moratorium on seabed mining without a revision of the UNCLOS or an agreement on its implementation?

III. What are the powers of the International Tribunal for the Law of the Sea (ITLOS) in relation to the exploitation of the area?

- ➔ Does ITLOS have jurisdiction to decide on differing interpretations of the rules relating to the ISA?
- ➔ Do ITLOS rulings and opinions to date favor the commercial interests of mining companies?

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Abbreviations

1994 Agreement (or Implementing Agreement): Agreement relating to the implementation of Part XI of the United Nations Convention on the law of the sea of 10 December 1982

ISA: International Seabed Authority

LTC: Legal and Technical Committee

UNCLOS: United Nations Convention on the Law of the Sea

ITLOS: International Tribunal for the Law of the Sea

The Area: "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (Art. 1, par. 1(1) UNCLOS).

LEGAL NOTE
ON THE COMMERCIAL EXPLOITATION OF THE ZONE

Introduction: reminder of the legal framework

1. The United Nations Convention on the Law of the Sea (UNCLOS), also known as the "Montego Bay Convention", which was adopted on 10 December 1982 and entered into force on 16 November 1994 (168 parties[12]), establishes a highly original legal regime for the area known as the "Area". The Area includes all the seabed and subsoil beyond the limits of national jurisdiction, i.e. beyond the seabed and subsoil under the sovereignty of States (territorial sea and archipelagic waters) or their sovereign rights (continental shelf).

2. The Area and its resources are proclaimed the "*common heritage of mankind*";[13] all rights therein belong to mankind. An international organisation, the International Seabed Authority (ISA), based in Kingston, Jamaica, acts "*on behalf*" of mankind.[14] It is in particular responsible for organising, conducting and controlling the exploration and exploitation of the resources of the Area,[15] either directly through one of its bodies called the "Enterprise" – not yet established – or in association with a State or a person sponsored by a State Party. Annex III of the Convention sets out the "*basic conditions of prospecting, exploration and exploitation*" in the Area.

3. The entry into force of the Convention was uncertain for a long time due to a number of States, mainly developed countries, having strong reservations about the regime for the Area, which was considered insufficiently conducive to its commercial exploitation. In order to allow the entry into force of the Convention, the United Nations General Assembly adopted an agreement modifying this regime so as to facilitate the exploration and exploitation of the Area and to avoid any institutional blockage: the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, adopted in New York on 28 July 1994, which entered into force provisionally on 16 November 1994 and definitively on 28 July 1996 (151 parties) ("1994 Agreement"). The Annex to this Agreement amends certain provisions of the Montego Bay Convention relating to the operation of the ISA and the regime for the exploration and exploitation of resources in the Area. This unusual process of amending a treaty that was not yet in force enabled the rapid achievement of the ratifications necessary for the entry into force of the UNCLOS.

4. The International Seabed Authority has the power to adopt secondary legislation, including rules of general application specifying the modalities of exploration or exploitation in the Area and forming a mining code,[16] as well as decisions approving concession contracts, known as "*plans of work*", with a State Party or an entity sponsored by a State Party. Since the simultaneous entry into force of the UNCLOS and the 1994 Agreement, the ISA has

[12] 167 States and the European Union.
[13] UNCLOS, Art. 136.
[14] UNCLOS, Art. 137.
[15] UNCLOS, Art. 153.
[16] UNCLOS, Art. 160 (2) (f) (ii) and 162 (2) (o) (ii); Annex III, Art. 17. For texts adopted, in respect of exploration, or under discussion, in respect of exploitation: <https://www.isa.org.jm/mining-code>

adopted a mining code for the exploration of the Area only and has approved 31 plans of work for the exploration of parts of the Area over a period of 15 years, of which 6 were contracted with States and 25 with entities sponsored by a State Party. The "sponsored entities" are mainly private or public limited companies, sometimes public institutions, and are nationals of a State Party to the UNCLOS. Some plans of work have expired; some have been renewed; others are still underway.[17]

5. To date, no general text has been formally adopted to govern the exploitation of the Area; a preliminary work was initiated in 2017 to this end and a "*Draft Regulation for the Exploitation of Mineral Resources in the Area*"[18] as well as a set of complementary draft technical standards and guidelines[19] were developed by the ISA Legal and Technical Commission. This Commission is an organ of the Council, the executive body of the ISA. According to the procedure organised by the UNCLOS and the 1994 Agreement, the next step is the provisional adoption of these drafts by the Council, by consensus only.[20] The Council then recommends them to the ISA Assembly, the plenary body, for final adoption by consensus or, failing that, by a two-thirds majority.[21] However, the Assembly may refuse to adopt the text and refer it back to the Council for reconsideration.[22] In the meantime and as long as the two bodies remain in disagreement, the texts adopted by the Council are fully applicable on a provisional basis.[23] The Council's action is thus decisive in the standard-setting process.[24]

6. To date, no plan of work for the exploitation of the Area has been approved, but one of the States Parties, Nauru, notified the ISA on 25 June 2021 that Nauru Ocean Resources Inc (NORI), an entity incorporated and sponsored by Nauru, intended to file an application.[25] In accordance with the 1994 Agreement, this notification triggered an obligation for the Council to adopt within two years the "*rules, regulations and procedures*" for the exploitation of the Area ("two-year clause"),[26] failing which it will have to decide on the application on the basis of treaty provisions alone.[27] Without such notification by Nauru or another State Party, no application could have been considered in the absence of secondary legislation specifying the regime for the exploitation of the Area.

7. If a plan of work were to be approved for the first time under this procedure, it would open the exploitation phase of the Area's resources. At the same time, some States and representatives of international civil society have taken a position in favour of a moratorium

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[17] See the list on the ISA website: <https://www.isa.org.jm/exploration-contracts>

[18] For these texts in their latest state: <https://isa.org.jm/mining-code/standards-and-guidelines>

[19] Draft 22 March 2019, ISBA/25/C/WP.1: <https://www.isa.org.jm/node/19311>

[20] Art. 162 (2) (o) (ii) UNCLOS, for provisional adoption, and Art. 161 (8) (d) and (e) UNCLOS, for the voting rule.

[21] Art. 160 (2) (f) (ii) UNCLOS and 1994 Agreement, Annex, Section 3, par. 3.

[22] 1994 Agreement, Annex, Section 3 § 4.

[23] Art. 162 (2) (o) (ii) UNCLOS.

[24] On the whole procedure, see in particular Joanna Dingwall, *International Law and Corporate Actors in Deep Seabed Mining*, OUP, 2021, pp. 116-121.

[25] This Nauruan company, a subsidiary of the Canadian company The Metals Company, is currently a co-contractor in a plan of work for the exploration for polymetallic nodules in the Clarion-Clipperton fracture zone for the period 22 July 2011 to 21 July 2016.

[26] 1994 Agreement, Annex, Section 1, par. 15(b).

[27] 1994 Agreement, Annex, Section 1, par. 15(c).

on deep-sea exploitation in order to protect this fragile ecosystem. In this context, this note will study the effects of the triggering of the two-year clause (I), then consider the options for a possible moratorium or a ban on commercial exploitation of the Area (II), and finally consider the possible role of the International Tribunal for the Law of the Sea (III).

I. THE EFFECTS OF THE TRIGGERING OF THE TWO-YEAR CLAUSE ON THE COMMERCIAL OPERATION OF THE ZONE

8. Nauru's triggering of the "two-year clause" in June 2021 poses the risk of a rapid approval of a first work plan under the UNCLOS procedure as amended by the 1994 Agreement, even in the absence of the adoption of regulations for the operation of the Area.

9. In order to understand the effects of the clause, one has to refer to two subparagraphs of the same paragraph of the 1994 Agreement which show an alternative (Annex, Section 1, paragraph 15 (b) and (c)). They are worded as follows:

> "*(b) If a request is made by a State referred to in subparagraph (a) the Council shall, in accordance with article 162, paragraph 2(o), of the Convention, complete the adoption of such rules, regulations and procedures within two years of the request;*
>
> *(c) If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending, it shall none the less consider and provisionally approve such plan of work based on the provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors*."

10. The first consequence of the request made by Nauru[28] was therefore to oblige the ISA Council to complete the mining code with regard to the exploitation of the mineral resources of the Area within a timeframe that will expire after 24 June 2023. However, the text provides for the eventuality of the non-adoption of these texts by the Council, either through inertia or blockage due to the *a priori* demanding rule of adoption – consensus of its members. To this end, paragraph 15(c) sets up a substitution procedure which raises several difficulties of interpretation.

11. First, it should be noted that this substitution procedure presupposes the formal filing with the ISA of a draft work plan, which would thus be "*pending*". A cursory reading might then suggest automatic approval of the contract so requested, because of the phrase "*it shall ... provisionally approve such plan of work*". This would, however, be inconsistent with the general rule of interpretation of the law of treaties, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, according to which terms are to be understood both according to their ordinary meaning, in their context and in the light of the object and purpose of the treaty. Here, the words make sense when the sentence is read as a whole: if an approval must be given after examination and on the basis of a number of texts, which lay down *at least* some principles and conditions to be respected, it is because it is by no means

[28] The State referred to in subparagraph a), in this case Nauru, is the State of which the entity intending to file an application is a national, in this case NORI.

automatic. The contribution of this phrase is rather that the approval would then be provisional and based on the reference standards.

12. In the absence of existing regulations for the exploitation of the Area, the reference standards would be either texts adopted by the Council on a provisional basis, i.e. pending their final adoption by the Assembly, or "*norms contained in the Convention and the terms and principles contained in [the Annex to the 1994 Agreement] as well as the principle of non discrimination among contractors*" (Annex, Section 1, paragraph 15(c)). For the time being, no text on exploitation has been provisionally adopted by the Council. If this were to continue, then only the UNCLOS and the 1994 Agreement would serve as a reference – and the principle of non-discrimination between contractors which is also contained therein. However, while the Convention contains numerous details on financial and technical conditions and non discrimination,[29] the same cannot be said of environmental protection: the Convention provisions on exploitation only mention the overall objective of protecting the marine environment and the obligation to carry out an environmental impact assessment.[30] It is therefore questionable whether the body in charge of considering the application would be able to make a decision without violating Article 145 of the UNCLOS, according to which, "*necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities*". However, such questioning requires a parallel examination of the procedure and voting rules within the ISA.

13. The paragraph containing the two-year clause does not specify the details of the procedure to be followed with regard to the review and possible approval by the Council of the plan of work for exploitation, whereas the equivalent paragraph relating to exploration is more precise and underlines the preparatory role of the Legal and Technical Commission, directly and by reference.[31] It is therefore questionable whether the Council would act alone in this case or should also decide on the basis of a recommendation of the Legal and Technical Commission, as provided for in the UNCLOS.[32] The second option seems to be more in line with an overall reading of the 1994 Agreement, as the two-year clause does not expressly modify the UNCLOS on this point and even refers to it. Moreover, another provision of the 1994 Agreement, dealing with decision-making in the Council, refers to the said Commission for any "*plan of work*", without distinguishing between exploration and exploitation.[33]

14. Therefore, whether or not the Council completes the Mining Code in relation to the exploitation of the resources of the Area, the procedural rules for the approval of plans of work are the same. The Council decides on the basis of a proposal from the Legal and

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[29] See UNCLOS, Annex III, Art. 4 (qualifications of applicants), Art. 5 (transfer of technology) as amended by the 1994 Agreement (Annex, Section 5), Art. 13 (financial terms of contracts) as substantially amended by the 1994 Agreement (Annex, Section 8 – par. 3-10 of Annex III no longer apply), Art. 17 (2) (criteria for exploitation). For non-discrimination: UNCLOS, Annex III, Art. 6, par. 4-5, and Art. 7, par. 2-3.

[30] UNCLOS, Annex III, Art. 17 (2) (f): reference to "*protection of the marine environment*", with reference to secondary legislation for implementation. Similar to: 1994 Agreement, Annex, Section 1, par. 5 (g) and (k). For the environmental impact assessment to be attached to any application for a plan of work: 1994 Agreement, Annex, Section 1, par. 7, with reference to secondary legislation.

[31] 1994 Agreement, Annex, Section 1, par. 6 (a) and (b).

[32] UNCLOS, Art. 153 (3).

[33] 1994 Agreement, Annex, Section 3, par. 11 (a).

Technical Commission.[34] There are two possibilities for the voting rules as modified by the 1994 Agreement, with very different probabilities of adoption of the plan of work. If the Legal and Technical Commission makes a recommendation for the approval of the plan of work, it is automatically approved unless rejected by a two-thirds majority of the members present and voting and with a majority in each group of States forming a chamber.[35] Moreover, if the Council does not act within 60 days, the plan of work is deemed to be adopted once the deadline has passed. While the Council can extend the deadline by a majority of the members present and voting,[36] it would be inconsistent with the object and purpose of the text if such an extension were to become a *de facto* moratorium. In the other option, if the Legal and Technical Commission transmits the application to the Council without a recommendation or against the approval of the plan of work, the application is automatically rejected unless the Council approves it by a two-thirds majority and in the absence of opposition from the majority in each chamber.[37] The probability of adoption is therefore lower in this second case.

15. The role of the Legal and Technical Commission (LTC) is thus decisive.[38] This body decides by a simple majority of its members present and voting,[39] and only verifies compliance with the conditions set out in Annex III of the UNCLOS.[40] These relate to the application procedure and the qualification of applicants, including their financial and technical capacity, but also more broadly to the compliance of the application with the relevant provisions of the UNCLOS and the secondary legislation forming the Mining Code.[41] Annex III itself only provides details on certain points, such as qualification, choice between applicants, reserved areas, financial clauses and transfer of techniques, but very little on environmental matters, whereas all the bodies of the ISA must, in accordance with Article 145 of the UNCLOS, ensure effective protection of the marine environment. This brings us back to the difficulty identified *above* in relation to reference standards (No. 12): in the absence of a regulation on the exploitation of deep-sea resources, compliance with certain major conditions for the conformity of an application with the UNCLOS cannot be verified. This makes it difficult, if not impossible, for the LTC to make a firm recommendation for a plan of work. While the LTC could draw on its ongoing regulatory work to assess the application,[42] it cannot substitute itself for the Council in setting benchmarks. It would therefore be particularly questionable for it to recommend a plan of work approval without a sufficient legal basis, given the procedural effects of such a "recommendation". The transmission of its opinion to the Council could only be done, at best, without a recommendation (cf. no. 14).

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[34] UNCLOS, Art. 153 (3).

[35] 1994 Agreement, Annex, Section 3, par. 11 (a) and Art. 56 (2) of the Council's Rules of Procedure.

[36] The author of this note considers this to be a procedural rather than a substantive issue.

[37] 1994 Agreement, Annex, Section 3, par. 11 (a) and Art. 56 (2) of the Council's Rules of Procedure.

[38] Joanna Dingwall, *op. cit.* note (13), pp. 123-124. On the importance of the Legal and Technical Commission, see also Michael Lodge, "11. The Deap Seabed", *in* D. Roswell and others (ed.), *Oxford Handbook on the Law of the Sea*, OUP, 2015, pp. 235-236.

[39] 1994 Agreement, Annex, Section 3, par. 13.

[40] UNCLOS, Art. 165 (2) (b).

[41] UNCLOS, Annex III, Art. 6 (3).

[42] Draft regulations on the exploitation of mineral resources in the Area, ISBA/25/C/WP.1. With regard to the requirement for the submission of an environmental plan: art. 11 and Part IV, in particular arts. 47 and 48. The draft also sets out a requirement that the draft plan of work "*contribute to the realisation of benefits for all mankind*" (Art. 12 (3)).

16. In view of these uncertainties, it would also be possible for the Council to frame the work of the LTC by means of guidelines that would explain in which cases it should make a favourable or unfavourable recommendation, or not make any recommendation at all (cf. no. 15). One could also imagine different proposals depending on the subject matter: questions of technical and financial capacity, questions relating to the operations and areas envisaged, questions of preservation of the marine environment. Such guidelines would be based on the Council's power "*to establish (…) the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority*".[43]

17. The specificity of the two-year clause must also be taken into account when interpreting another provision of Annex III to the UNCLOS, which rather narrowly limits the possibilities of rejecting a request for a plan of work (Art. 6(3)). Its application supposes that the LTC has first been provided with all the necessary reference standards – *quid non* for the time being – and has issued a favourable recommendation – *quid non* for the time being. The Council may then refuse to approve the plan of work on one of three possible grounds, which correspond to possible overlaps or incompatibilities with previously approved plans of work; these grounds would probably not be applicable for the NORI application due to the area considered.[44] However, even then, it would still be possible to justify a refusal on the basis of the introductory phrase that "*the proposed plans of work shall comply with and be governed by the relevant provisions of this Convention*".[45] Among the relevant provisions is that "*the Council shall: (x) disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment*".[46] It would therefore still be possible at this stage to justify a refusal on the grounds that the risk of harm was not sufficiently taken into account by NORI's draft plan of work. The voting rule would nevertheless be demanding (see n°14).

18. The last interpretive difficulty concerns the provisional nature of the approval and, as a consequence, of the plan of work. In the absence of any conventional precision, at least two interpretations are possible. According to the first, the provisionally approved plan of work would be fundamentally precarious and would have to be re-approved after an operating regulation has been adopted by the Council. Such a lack of legal certainty should logically discourage any economic operator from engaging in the commercial exploitation of the Zone. According to the second, the provisional plan of work would only differ from other plans of work in the procedure followed to approve it – a substitution procedure under the two-year clause – without the need for confirmation. It could probably be modified later by the ISA, after adoption of a regulation reflecting any new conditions, but without affecting the contractual balance. This would provide greater legal certainty.

19. Furthermore, the duration of the exploitation contract is not specified either. It is generally uncertain, as both the UNCLOS and the 1994 Agreement are silent on the duration of plans of

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[43] UNCLOS, Art. 162 (1).

[44] UNCLOS, Annex III, Art. 6 (3).

[45] *Ibid*, 2nd sentence.

[46] UNCLOS, Art. 162 (2) (x). Because of its general character, the provision can serve as a basis for environmental protection for the entire regime of deep-sea exploration and commercial exploitation. In this sense, Erick van Doorn, "Article 162", *in* Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea - A Commentary*, C.H. Beck / Hart / Nomos, München / Oxford / Baden-Baden, 2017, p. 1166.

work for exploitation – unlike those for exploration.[47] The Council is only required to apply the criteria of a "*sufficient duration to permit commercial extraction of minerals of the area*" and "*short enough*" to allow for modifications at the time of a possible renewal. [48]But it should be noted that these criteria are supposed to be contained in the exploitation regulation – not yet adopted – and therefore relate to ordinary "plans of work", not provisional plans of work. To date, the draft regulation prepared by the LTC provides for a maximum initial duration of 30 years under the ordinary procedure, with possible renewals for periods of up to 10 years.[49]

20. On these two points relating to provisionally approved work plans, the choice between interpretations lies with the Council itself, as the authority responsible for applying the two year clause. There is no indication that it is within the powers of the LTC to determine the legal regime of a provisional plan of work. The Assembly could also intervene in this respect, to give an interpretation of the two-year clause; the International Tribunal for the Law of the Sea would be called upon to give an opinion in the event of a request for an opinion (see III).

II. Options for a moratorium or ban on commercial exploitation of the Area

21. A moratorium would mean a general suspension, for a definite or indefinite period of time, of all exploitation projects in the Area. The main precedent for a moratorium on the protection of the marine environment is the moratorium on commercial whaling adopted in 1982 – with effect from 1986 – under the International Convention for the Regulation of Whaling.[50] As for a ban, it would be distinct from the moratorium by its definitive nature.

22. Whether it is a moratorium or a ban, the idea must be examined with the utmost care in order to avoid clashing with the terms of the UNCLOS and, even more directly, with those of the 1994 Agreement.[51] Several options deserve to be considered: the adoption of a secondary legislation (a), the use of the amendment procedure provided for by the UNCLOS (b), the adoption of a treaty amending the UNCLOS (c), unilateral State commitments (d).

a) The adoption of a secondary legislation by the ISA

23. The Assembly and the Council have the power to adopt secondary legislation not only to establish a mining code, but also to determine the Authority's "policies", general or specific, in relation to the Area. Building on its power to make "*specific policies*",[52] the Council adopted a decision in 2012 establishing a "*network of areas of particular environmental interest*" for the preservation of the marine environment under the environmental management plan for the Clarion-Clipperton Zone, which implies that no further plans of work for exploration and

[47] 1994 Agreement, Annex, Section 1, par. 9 (15 years with possible renewal for a maximum of 5 years).
[48] UNCLOS, Annex III, Art. 17 (2) (b)(iii).
[49] Draft Regulations on the Exploitation of Mineral Resources in the Area, ISBA/25/C/WP.1, Art. 20 (1) and (7).
[50] International Convention for the Regulation of Whaling, adopted in Washington on 2 December 1946 (*UNTS* vol. 161, p. 75), entered into force on 10 November 1948 (93 States Parties). The "moratorium" is the result of an amendment to the *Schedule* to the Convention, adopted in 1982 by the International Whaling Commission.
[51] The 1994 Agreement was drafted to facilitate the exploration and exploitation of the Area in light of "*political and economic changes, including market-based orientations*" (Preamble to the 1994 Agreement, 5th paragraph).
[52] UNCLOS, Art. 162 (1).

exploitation of these areas will be issued.[53] Four more "*areas of particular environmental interest*" have been added in 2021 for the Clarion-Clipperton Zone,[54] while others are under consideration for other parts of the Area.[55] This is a kind of moratorium, but for limited parts of the Area. The aim is twofold: to preserve the marine environment in these areas, which are considered particularly sensitive, and to serve as benchmarks for environmental preservation in the areas covered by the plans of work.

24. This practice suggests that a generalised moratorium, or one covering large parts of the Area, would not necessarily be unthinkable; but it would more likely be a "general policy" of the ISA, adopted by the Assembly[45]. The Assembly should develop the policy "*in collaboration with the Council*", i.e. after preparatory work involving both bodies, and adopt it by consensus or, failing that, by a two-thirds majority of the members present and voting.[56] If it is considered that the subject also falls within the competence of the Council – which is likely –, the Council should first issue a recommendation to this effect, adopted by consensus or, failing that, by a two-thirds majority and in the absence of opposition from a majority within one of the groups of States forming a chamber.[57]

25. However, there are two obstacles, one political and one legal. The first is the objectives currently adopted by the Assembly: the strategic plan for the period 2019-2023 aims to reconcile the imminent exploitation of the Area's resources with environmental concerns, not to suspend them, in line with the logic of sustainable development.[58] The adoption of a new strategic plan for the period after 2023 would therefore require a major reorientation, which would be binding on all ISA bodies. The second obstacle is a legal one: a generalised moratorium adopted by a secondary legislation raises a problem of hierarchy of norms, as the UNCLOS and the 1994 Agreement establish a legal regime designed precisely to exploit the Area for the benefit of humanity. However, the main bodies of the ISA have a significant degree of discretion (see *infra* no. 32).

26. Using the analogy with the moratorium on commercial whaling (see *supra* no. 21), it will be recalled that the risk of violating the provisions of the 1946 Whaling Convention was similarly raised by Japan during the 1982 discussions. In the end, this did not prevent the International Whaling Commission from adopting it, in the form of an amendment of the Treaty's annex, reducing the number of authorised catches to zero. To justify this, the International Whaling Commission relied on the evolution of scientific information on whale populations from the bodies of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Similar arguments, related to environmental risk and/or

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[53] Decision of the Council of the International Seabed Authority on the Environmental Management Plan for the Clarion-Clipperton Zone, ISBA/18/C/22, 26 July 2012, at (6).

[54] Decision of the Council of the International Seabed Authority relating to the review of the environmental management plan for the Clarion-Clipperton Zone, ISBA/26/C/58, 10 December 2021.

[55] See generally <https://www.isa.org.jm/minerals/environmental-management-plan-clarion-clipperton-zone> [45] UNCLOS, Art. 160 (1).

[56] 1994 Agreement, Annex, Section 3, par. 1-3.

[57] *Ibid*, Section 3, par. 4-5.

[58] Decision of the Assembly of the International Seabed Authority on its strategic plan for the period 2019-2023, ISBA/24/A/10, 27 July 2018. The document cites the Sustainable Development Goals formulated by the United Nations General Assembly in 2015 (A/RES/70/1, "Transforming our world: the 2030 Agenda for Sustainable Development", 21 October 2015).

other multilateral conventions,[59] would probably be needed to justify a general moratorium on the exploitation of resources in the Area, or a moratorium on certain types of resources. As for a complete ban, its compatibility with the UNCLOS regime would be much more difficult to justify. It is important to note, however, that the practice of any international organisation can be taken into account in interpreting its constitutive act, thus contributing to the evolution of its meaning.[60]

b) The use of the amendment procedure under the UNCLOS

27. The problem of compatibility with the provisions of the treaty would disappear if it were possible to amend it directly. Several amendment procedures are provided for by the UNCLOS – they are the same for the 1994 Agreement –[61] but only one concerns amendments "*relating exclusively to activities in the Area*".[62] This is the only procedure that would be applicable to a moratorium on the exploitation of the resources of the Area, let *alone* to their prohibition.

28. Under this procedure, the amendment is submitted by a State Party and must be approved by the Council and then by the Assembly. The usual voting rules, i.e. as specified by the 1994 Agreement, apply for both bodies: consensus and, failing that, a two-thirds majority – in the absence of a majority opposition in the chambers for the Council. This amendment procedure has a welcome originality: the entry into force of the amendment, which is subject to ratification or adhesion by three quarters of the States Parties, is then binding for all Parties to the UNCLOS and not only for those that have consented to it.[63]

29. However, the amendment option faces an obstacle that is difficult to overcome because of a substantive condition: the Council and the Assembly must, before approving it, ensure "*that it does not prejudice the system of exploration for and exploitation of the resources of the Area*",[64] and that pending a review conference to be convened by the Assembly fifteen years after the beginning of commercial exploitation based on an approved plan of work.[65] It is highly unlikely that a generalised moratorium could overcome this obstacle, unless it is adopted for a short period of time or limited to certain categories of mineral resources or certain areas larger than the current "*network of areas of particular environmental interest*".

c) The adoption of an agreement amending the UNCLOS and/or the 1994 Agreement

30. The third option is a treaty amending the UNCLOS and/or the 1994 Agreement. The UNCLOS itself allows for the modification or suspension of its application between certain parties, "*applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of*

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[59] One can think of the decisions taken in the framework of the 1992 UN Convention on Biological Diversity, or the ongoing negotiations at the UN on marine biodiversity in areas beyond national jurisdiction ("BBNJ").
[60] United Nations International Law Commission, Draft Conclusions on Subsequent Agreements and Practice in the Context of the Interpretation of Treaties, *Ann. ILC*, 2018, vol. II(2), conclusion 12 ("constituent instruments of international organizations").
[61] 1994 Agreement, Art. 2 (2).
[62] UNCLOS, Art. 314.
[63] UNCLOS, Art. 316 (5).
[64] UNCLOS, Art. 314 (2).
[65] UNCLOS, Art. 155.

the object and purpose of this Convention", nor affect "*the application of the basic principles embodied herein*", nor the rights and obligations of other parties to the UNCLOS, nor respect for the "*basic principle relating to the common heritage of mankind*".[66] A moratorium would probably satisfy these conditions as it would aim at the protection of the marine environment; but it should not affect the rights of the UNCLOS parties wishing to exploit the Area in accordance with its current legal regime. The relative effect of treaties would thus limit the scope of a moratorium or ban imposed by a new agreement. Another limitation would be the slow process of negotiation and adoption of such an agreement.

31. To overcome some of these difficulties, it would be possible to draw on the techniques used by the 1994 Agreement, the content of which significantly altered the institutional balance and modalities of exploitation of the Area provided for in Part XI of the UNCLOS without this being considered contrary to its object and purpose.[67] The UN Secretary General had taken up the difficulties associated with the reluctance of developed countries to accept Part XI of the UNCLOS and, in less than a year, had conducted consultations leading to a draft agreement, which was then adopted by the UN General Assembly, without the need for a conference of plenipotentiaries. A number of highly original clauses helped to unify rapidly the participation in the two treaties – the UNCLOS and the 1994 Agreement –, in particular a clause presuming a State's consent to the provisional entry into force of the agreement solely on the basis of its affirmative vote in the General Assembly.[68] All of this, however, would presuppose a broad movement in favour of the moratorium among States Parties and a strong involvement of the UN General Assembly.

d) Unilateral commitments by States

32. The last option would be non-exploitation commitments in the form of unilateral acts of States Parties to the UNCLOS, issued by a national authority in terms and context demonstrating clear intention to produce legal effects. However, this method suffers from a certain precariousness, as the unilateral act can be withdrawn by a contrary act. Above all, the moratorium would only concern the self-limiting State; this State would remain bound by the UNCLOS and could not oppose exploitation of the Area by other parties.

33. Whether it is the third or fourth option, it should be stressed that a moratorium is likely to have limited or very significant effects depending on its content. In a limited version, the subscribing State would renounce exploitation for itself and for companies it controls; in a more ambitious version, the State would commit not to sponsor its nationals or any company effectively controlled by its nationals. However, it would be useful at this point to reopen the discussion on "*effective control*" of mining companies,[69] a notion that is currently interpreted by the ISA in a way that is very favourable to the commercial exploitation of the Zone.[70]

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[66] UNCLOS, Art. 311 (3) and (6).

[67] On the methods used for the 1994 Agreement and the speed of the process: Louis B. Sohn, "The Effectiveness of the Agreement's Arrangements under International Law", *AJIL*, vol. 88, Issue 4, 1994, pp. 700-705.

[68] 1994 Agreement, Art. 7 (1) (a).

[69] See UNCLOS, Art. 153 (2) (b) and Annex III, Art. 4 (3) and (9).

[70] According to the ISA, effective control should be left for interpretation to national law, thus referring to the State ensuring regulatory control of a legal person, even if it is a subsidiary of a foreign company (Report of the Chairman of the Legal and Technical Committee to the Council, 20ème ISA session, Doc. ISBA/20C/20, 16 July 2014, par. 25-29); it would therefore not be defined by the control exercised by the parent company over its foreign subsidiary. As a result, the State sponsoring the subsidiary and the State "effectively controlling" it are

Under this condition, if the states adhering to the moratorium were those with a mining industry capable of exploiting the Area, this would in practice impede the exploitation of the Area by all States.

34. The intervention of the UN General Assembly in the form of a resolution would be of certain interest but would vary according to its terms and options. It would strengthen the first option, that of the secondary legislation adopted by the ISA, if it affirmed the existence of a very high environmental risk for any form of exploitation of the Area, taking into account current scientific knowledge, and if it insisted on the precautionary principle. It would be highly desirable for the third option, that of a new agreement, as it would facilitate the negotiation and lead to the early adoption of an agreement amending the UNCLOS and/or the 1994 Agreement.

III. The role of the International Tribunal for the Law of the Sea (ITLOS) in relation to the commercial exploitation of the Area

35. The International Tribunal for the Law of the Sea (ITLOS) was established by the UNCLOS and is one of the dispute settlement mechanisms provided for in the Convention. For disputes other than those relating to the legal regime of the Area, the parties have a choice between several judicial or arbitral procedures;[71] ITLOS has jurisdiction on unilateral referral only for emergency procedures.[72] This explains the moderate number of cases it has dealt with so far, most of which have concerned the prompt release of a vessel or its crew and requests for provisional measures. In disputes concerning the legal regime of the Area, ITLOS has a much more important role, although practice has so far been limited to one advisory opinion.[73] The Convention confers on a specialised chamber of ITLOS, the Seabed Disputes Chamber (hereinafter "the Chamber"), a large part of jurisdiction in contentious proceedings, as well as jurisdiction in advisory proceedings at the initiative of the main bodies of the ISA.

36. Under Article 187 of the UNCLOS, the Chamber has jurisdiction to decide on several categories of disputes related to activities in the Area: disputes between States Parties on the interpretation or application of Part XI of the UNCLOS; disputes between States Parties and the ISA concerning acts or omissions of the ISA; disputes between parties to a contract concerning its interpretation or performance, but only in respect of possible questions of interpretation of the UNCLOS;[74] disputes relating to the refusal to contract or to the negotiation of a contract; disputes relating to the liability of the ISA.

37. Two points are worth noting. First, the rejection of a plan of work for the exploitation of the resources of the Area by the Council could give rise to a dispute at the initiative of the

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the same one. This makes it easier for a mining group to set up a subsidiary in any State party to the UNCLOS. However, this interpretation is highly questionable.

[71] UNCLOS, Art. 287. In case of different choices or no choice, Annex VII arbitration is the default procedure.

[72] UNCLOS, Art. 292 and Art. 290 (5) respectively.

[73] ITLOS, Seabed Disputes Chamber, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Case No. 17, Advisory Opinion of 1er February 2011.

[74] For disputes relating to the interpretation or performance of a contract – in particular a plan of work – Article 188 UNCLOS provides for international commercial arbitration; but the arbitration tribunal could not rule on the interpretation of the Convention and would have to refer a preliminary question to the Chamber. The jurisdiction of the Chamber is therefore limited to answering questions of interpretation of the UNCLOS.

applicant.[75] Secondly, a "*limitation of jurisdiction*" clause prohibits the Chamber from encroaching on the discretionary power of the ISA and from reviewing the legality of its secondary legislation of general application.[76] Only decisions related to "*specific cases*" may be subject to review, to ensure that they are not incompatible with the contractual or treaty obligations of the parties to the dispute or do not raise a jurisdiction issue or misuse of powers. The interpretation of such a provision is not easy. It could be inferred that a general moratorium adopted by the Assembly would not be subject to judicial review and could not be cancelled. The Chamber could, however, rule on the plea of illegality, for example in a dispute concerning the rejection of an application for a plan of work on the grounds of such a moratorium; but the review would then be restricted. In any case, the clause reflects a recognition of the breadth of discretionary power conferred on the ISA.

38. The advisory jurisdiction of the Chamber is based on two distinct provisions, which correspond to different grounds for requesting an opinion. The first concerns the conformity with the UNCLOS of a proposal submitted to the Assembly; the request for an opinion is then made by the Assembly on the initiative of at least one quarter of its members.[77] Such a request for an opinion would be conceivable if the adoption of a moratorium by the Assembly was faced with opposition, or doubts, from a sufficient number of Parties. The second advisory procedure allows the Assembly or the Council to request an opinion "*on legal questions arising within the scope of their activities*".[78] It is presented as a quasi-alternative to the lack of review of the lawfulness of the general acts of the ISA, but the initiative lies solely with the main bodies of the ISA.[79] The 2011 opinion on sponsoring State liability was requested by the Council on this basis. In this opinion, the Chamber provided numerous clarifications on the due diligence obligations of sponsoring States, including by emphasising the effect of certain UNCLOS provisions in the light of customary international law or new scientific knowledge.[80]

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Conclusions

39. The conclusions of this note are as follows:

> **i/ The triggering of the two-year clause will oblige the ISA to consider NORI's application for commercial exploitation even if the draft regulation on the exploitation of the resources of the Area is not adopted in the meantime. Approval of the application will not be automatic: it will depend on the assessment of the Legal and Technical Commission (LTC) and then on the Council. However, there are grey areas in the procedure, reinforced by the inadequacy of the reference standards. This should lead the LTC to refrain from**

[75] UNCLOS, Art. 187 (d) and 1994 Agreement, Annex, Section 3, par. 12.

[76] UNCLOS, Art. 189. Among the difficulties: only "rules, regulations and procedures" are expressly mentioned. General or specific policies are not.

[77] UNCLOS, Art. 159 (10).

[78] UNCLOS, Art. 191.

[79] UNCLOS, Art. 189 ("without prejudice to Article 191").

[80] Advisory Opinion of 1er February 2011, *op. cit*. footnote 63, especially par. 117 (new scientific knowledge), par. 122 (precautionary approach); par. 180 (*erga omnes* obligations and implicit empowerment of the ISA to act as a remedy), par. 222 (evolutionary vision of the obligation to adopt national measures).

making any recommendations, thus leaving the Council with a greater margin of appreciation.

ii/ Among the four options for a moratorium, the adoption of a general policy by the ISA Assembly (option 1) or the adoption of an agreement similar to the 1994 Agreement (option 2) are to be preferred over an amendment to the UNCLOS (option 3) or unilateral State commitments (option 4). The first option implies an interpretation along the lines of a strong discretionary power of the Convention's principal organs. The second option implies a strong mobilisation of the international community, preferably within the framework of the UN General Assembly.

iii/ ITLOS has a Seabed Disputes Chamber which would have jurisdiction in the event of a dispute over a refusal to grant a plan of work to NORI. This chamber can also, and quite easily, be asked by the Assembly or the Council for an advisory opinion, so as to enlighten them on certain problems of interpretation of the Convention. So far, its only advisory opinion has significantly strengthened the obligations of sponsoring States and set out the basis for defining their respective liability for damage.

Done in Paris, 16 February 2023

Hervé ASCENSIO