REPUBLIC OF NAURU

The Republic of Nauru - Opinion paper on certain issues relating to the interpretation of Paragraph 15(c) of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

PURPOSE

1. The purpose of this Opinion Paper is to address issues related to the process for the consideration and provisional approval of a plan of work for exploitation (a **Plan of Work**) under the United Nations Convention on the Law of the Sea (**the Convention**) and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (**the 1994 Agreement**).

2. Specifically, this Paper address Paragraph 15(c) of the Annex to the 1994 Convention and the "two areas of divergence" between member States "on which a consensus is most urgently needed"[1], namely:

   2.1. Is there a legal basis for the Council to postpone (i) the consideration and/or (ii) the provisional approval of a pending application for a Plan of Work under subparagraph (c), and if so, under what circumstances?[2]

   2.2. What guidelines or directives may the Council give to the Legal and Technical Commission (LTC), and/or what criteria may the Council establish for the LTC, for the purpose of reviewing a plan of work under subparagraph (c)?[3]

BACKGROUND

3. Section 1, Paragraph 15 of the Annex to the 1994 Agreement provides that "*a State whose national intends to apply for approval of a plan of work for exploitation*" may request that the Council adopt all necessary rules, regulations and procedures for exploitation (the **Regulations**) within two years of the request (the **Request**).

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[1] *Co-Facilitators' Note on the Webinar on 30 May 2023 in the context of the informal international dialogue established under Council decision ISBA/27/C/45 and Council decision ISBA/28/C/9* (**Co-Facilitators' May Briefing Note**) at para. 6, available at: https://www.isa.org.jm/wp-content/uploads/2023/05/Co-Facilitator_Note.pdf.

[2] Co-Facilitators' May Briefing Note at para. 6(1).

[3] Co-Facilitators' May Briefing Note at para. 6(2).

4. On 25 June 2021, the Republic of Nauru (**Nauru**) invoked this provision and informed the International Seabed Authority (**ISA**) that Nauru Ocean Resources Inc. (**NORI**), a Nauruan entity sponsored by Nauru, intends to apply for approval of a Plan of Work.

5. The effective date of the Request was 9 July 2021. Therefore, by 9 July 2023, the Council must provisionally adopt the Regulations on exploitation of mineral resources in the Area and any additional rules, regulations and procedures necessary to facilitate the approval of a Plan of Work. Based on the Commission's report contained in ISBA/25/C/19/Add.1 and the Council's decision contained in ISBA/25/C/37, the Legal and Technical Commission (the **Commission**) must also finalise the relevant Guidelines by that date. If the Council and its member States fail to do so and an application for approval of a Plan of Work is pending, Paragraph 15(c) of the Annex to the 1994 Agreement requires as follows:

   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 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.

6. On 11 November 2022,[4] the Council established an informal intersessional dialogue to facilitate further discussion on:

   6.1. The possible scenarios foreseen in Section 1, Paragraph 15, of the Annex to the 1994 Agreement; and

   6.2. "Any other pertinent legal considerations with a view to exploring commonalities in possible approaches and legal interpretations for the Council to consider in this respect".

7. The Co-Facilitators of the dialogue hosted a Webinar on 8 March 2023 (**First Webinar**) to invite and hear oral interventions by member States of the Authority and other attendees. Member States, including Nauru,[5] made both oral and written submissions on the issues under discussion. The Co-Facilitators presented a Briefing Note to the Council on 24 March 2023, summarizing the discussions and presenting initial conclusions.

8. On 31 March 2023, the Council decided to continue the informal intersessional dialogue and progress certain areas of divergence. To that end, the Co-Facilitators scheduled another Webinar for 30 May 2023 (**Second Webinar**) and invited written submissions.

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[4] *Decision of the Council of the International Seabed Authority relating to 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 Se*a, ISBA/27/C/45.

[5] Nauru, *Opinion paper on the regulatory steps and decision-making for a Plan of Work submitted to the Authority pursuant to 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* (8 March 2023) (**Nauru March Submission**), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Nauru_Opinion_Paper.pdf.

9. On 11 May 2023[6], the Co-Facilitators instructed the participants to focus on two areas where divergence existed between the delegates and "on which a consensus is most urgently needed", as specified above in paragraph 2(a)-(b).

10. Nauru appreciates the opportunity to participate in this intersessional dialogue and present its positions. Nauru considers that:

    10.1. There is no legal basis under the Convention, the 1994 Agreement or international law to postpone the consideration and provisional approval of a Plan of Work under Paragraph 15(c).

    10.2. Paragraph 15(c), per established rules of treaty interpretation and settled principles of international law, imposes a mandatory obligation on the ISA to consider and provisionally approve a pending application for a Plan of Work in accordance with the criteria in Paragraph 15(c) and the decision-making framework contained in Section 3, Annex of the 1994 Agreement.

    10.3. Paragraph 15(c) does <u>not</u> permit the Council to postpone consideration and provisional approval of a pending Plan of Work.

    10.4. The customary international law doctrines of good faith and legitimate expectations prohibit the Council from postponing consideration and provisional approval of a pending Plan of Work under Paragraph 15(c).

    10.5. In their March submissions, several member States confirmed that Paragraph 15(c) contains no postponement authority.[7]

    10.6. There are no viable grounds for inferring a postponement power into Paragraph 15(c).

    10.7. Any lawful guidelines or directives issued by the Council to the Commission pursuant to Article 163(9) of the Convention concerning Paragraph 15(c) must assist the Commission in fulfilling its obligations under the Convention and the 1994 Agreement and must not circumvent or alter the explicit roles and functions outlined in the Convention for the Commission, restrict the Commission's work or suggest it adopt a specific recommendation that is *ultra vires* to the Convention.

QUESTION 1 - IS THERE A LEGAL BASIS FOR THE COUNCIL TO POSTPONE (I) THE CONSIDERATION AND/OR (II) THE PROVISIONAL APPROVAL OF A PENDING APPLICATION FOR A PLAN OF WORK UNDER SUBPARAGRAPH (C), AND IF SO, UNDER WHAT CIRCUMSTANCES?

11. If the Council fails to approve the Regulations by the expiration date of Nauru's Request (9 July 2023), Paragraph 15(c) requires that the Council *"shall none the less consider and provisionally approve"* a Plan of Work.

12. ***There is no legal basis to postpone the consideration and provisional approval of a Plan of Work under Paragraph 15(c)***. Such postponement power is not found in the Convention, the 1994 Agreement, any instrument of the Authority or in any relevant or applicable principle of international law.

[6] Co-Facilitators' May Briefing Note at para. 6.

[7] *See, e.g.*, the submissions of Canada, Norway, Argentina, Australia and Japan discussed at para. 33 *infra*.

(a) The 1969 Vienna Convention on the Law of Treaties provides the relevant rules for interpretating the Convention and its associated instruments.

13. As Nauru noted in its March Submission, the Convention and the 1994 Agreement are subject to the 1969 Vienna Convention on the Law of Treaties (the **Vienna Convention**), particularly its rules on treaty interpretation contained in Articles 31 to 33.[8] Among other things:

13.1. Articles 31 to 33 of the Vienna Convention are accepted as customary law and their rules are binding on all acts of treaty interpretation.[9]

13.2. Under the Vienna Convention, treaties must be interpreted 1) in good faith, 2) in accordance with the ordinary meaning of their terms, 3) in context and 4) in light of the treaty's object and purpose.[10] This is a single, cohesive rule of interpretation employed by adjudicators to discern the treaty parties' common intent or will.[11]

13.3. Good faith interpretation requires an honest, fair and reasonable attempt to understand a treaty's terms.[12]

13.4. Discerning ordinary meaning involves interpreting a treaty's terms as they are naturally and usually understood, in the context in which they occur.[13] In practice, as a starting point this primarily involves finding a term's generally accepted meaning or "dictionary" definition.[14]

13.5. A provision's context encompasses a treaty's entire content and structure, including preambles and other sections.[15]

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[8] Nauru March Submission at para. 11.

[9] *See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia* [1971] ICJ Reports para. 94 ("The Rules laid down by the Vienna Convention on the Law of Treaties…may in many respects be considered as a codification of existing customary international law on the subject").

[10] Vienna Convention, Article 31(1).

[11] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24*,* Decision on the Treaty Interpretation Issue, 12 June 2009 at para. 164 ("The International Law Commission has emphasised in relation to Article 31 that there is no legal hierarchy between the various aids to interpretation outlined in that Article. In this regard, the International Law Commission has observed that '[t]he application of the means of interpretation in this article would be a single combined operation' and that '[a] the various elements [terms, context, object and purpose] would be thrown into the crucible, and their interaction would give the legally relevant interpretation'").

[12] J.F. O'Connor, *Good Faith in International Law*, Darmouth, 1991 at 123 ("The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time"); *Veteran Petroleum Limited (Cyprus) v. Russia,* PCA Case No. 2005-05/AA228, Judgment of Court of Appeal in The Hague II, 18 February 2020 at para. 4.2.3 ("That the interpretation must be performed in good faith means that it must comply with the fundamental principle of reasonableness and must not lead to a meaning that is manifestly absurd or unreasonable").

[13] *Conditions of Admission of a State to Membership in the United Nations* [1948], ICJ Reports at 63 ("To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established").

[14] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, [1950] ICJ Reports at 74 (applying ordinary meaning to find that a dispute arises where there is "situation in which the two sides hold clearly opposite views concerning the question of the performance or nonperformance of certain treaty obligations").

[15] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003 at para. 169 (Context "includes the structure and content of the rest of the Treaty"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 at para. 149 ("[T]he specific provisions of a particular Chapter need to be read, not just in relation to each other, but also in the context of the entire structure of [a treaty] if a

13.6. A treaty's "object and purpose" are those reasons for which the treaty exists – the *ratio legis* or the treaty's raison d'être.[16]

13.7. If the meaning of a given provision is ambiguous, obscure or manifestly unreasonable, interpreters can then look to supplementary means of interpretation (like preparatory work) under Article 32 of the Vienna Convention.

14. Treaty interpretation "must be based above all upon the text of the treaty" and the words used by the contracting parties.[17]

(b) Paragraph 15(c) imposes a mandatory obligation to consider and provisionally approve a pending application for a Plan of Work.

15. In Paragraph 15(c), the term "*shall none the less*" imposes a mandatory obligation on the ISA to consider and provisionally approve a pending application for a Plan of Work, even if the Regulations are not yet adopted. Namely:

15.1. The ordinary meaning of the term "*shall*" is a modal verb "used to say that something certainly will or must happen".[18]

15.2. The context of Paragraph 15(c) – namely, the content and structure of the Convention and the 1994 Agreement – establishes that "*shall*" is a mandatory term. The Convention and the 1994 Agreement both use different terms when setting non-mandatory requirements or steps.[19]

15.3. Decisions of various international tribunals can assist in interpreting the Convention and the 1994 Agreement[20] and confirm beyond doubt that "*shall*" denotes a mandatory obligation.[21]

15.4. Furthermore, the ordinary meaning of "*none the less*" is "despite what has just been said or done", confirming that the ISA's obligation in paragraph 15(c) exists even though it "has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time".[22]

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treaty interpreter is to ascertain and understand the real shape and content of the bargain actually struck"); *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award, 13 November 2000 at para. 196 ("The NAFTA provides internal guidance for its interpretation in a number of provisions. In the context of a Chapter 11 dispute, it is appropriate to begin with the Preamble to the treaty…").

[16] Law and Philosophy Library 83, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* at 204; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment, 6 December 2018 at para. 59 (finding that the "object and purpose of the ICSID Convention" is "'assuring the finality of ICSID arbitration awards'").

[17] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Reports at para. 41.

[18] Nauru March Submission at para. 12; Cambridge Dictionary, definition of "shall" (online) https://dictionary.cambridge.org/dictionary/english/shall.

[19] Nauru March Submission at para. 13 n. 6 (citing Section 1 of the 1994 Agreement, para. 12(a), Section 3 of the 1994 Agreement, para. 7, and Article 163(2) of the Convention).

[20] The Seabed Disputes Chamber's Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No 17 (1 February 2011).

[21] *See* Nauru March Submission at n. 7.

[22] Cambridge Dictionary, definition of "nonetheless" (online), available at: https://dictionary.cambridge.org/dictionary/english/nonetheless.

(c) Paragraph 15(c) does not allow the Council to postpone consideration and provisional approval of a pending Plan of Work.

16. As Nauru explained at the 8 March 2023 Session, postponing or preventing the consideration of a Plan of Work circumvents the explicit rights of the applicant contractors and sponsoring States in Paragraph 15(c). It is also untenable to read Paragraph 15(c) as allowing such postponement or prevention as a matter of basic treaty interpretation, for at least four reasons.

17. *First*, there is no reference in the text of Paragraph 15(c) to postponement. Support for postponement is found nowhere else in the Convention or the 1994 Agreement. Postponement flatly contradicts the plain meaning and interpretation of Paragraph 15(c), which mandates consideration and provisional approval of an application for a Plan of Work on a definite timeline.

18. *Second*, the relevant context bars postponement. Pursuant to Article 165(2)(b) of the Convention, the Commission has an explicit treaty obligation to review formal Plans of Work. and submit appropriate recommendations to the Council.[23] The Council's role is also explicit – it can approve or disapprove the Commission's recommendations per the procedures outlined in the 1994 Agreement.[24] The Council is not allowed to postpone, amend, delay, re-open or otherwise change this clear and explicit decision-making procedure. This makes perfect sense. The Authority exists to administer activities in the Area, and the consideration and approval of a Plan of Work is an integral component of that duty. The drafters of the Convention and the 1994 Agreement intended the Commission to operate as the independent expert subsidiary organ, best placed to analyse, consider and issue appropriate recommendations concerning a Plan of Work to the Council. The Council cannot make substantive changes and amendments to the Convention and the 1994 Agreement of its own accord, including postponing or disregarding timelines and procedures detailed in the 1994 Agreement and relied on by applicant contractors and Sponsoring States.

19. Furthermore, the Convention and the 1994 Agreement need to be interpreted and applied as a single instrument.[25] The rationale behind Paragraph 15(c) is to ensure exploitation activities in the Area and the development of applicable Regulations in the event of a Council deadlock.[26] Paragraph 15 acts as a circuit breaker to ensure that a Plan of Work is "*none the less*" considered and provisionally approved in the event the Council fails to complete its legal mandate.[27]

20. *Third*, the object and purpose of the Convention and the 1994 Agreement, taken together, is to promote commercial exploitation of resources in the Area for the benefit of all humankind. The object and purpose of the Annex to the 1994 Agreement (an "integral part" of the

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[23] *See also* Article 153(3) of the Convention (The Council shall approve a formal written Plan of Work "after review by the Legal and Technical Commission").

[24] Annex, Section 3, Paragraph 11(a) of the 1994 Agreement.

[25] Article 2(1) of the 1994 Agreement.

[26] Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994) at 692-693; *see also* Giovanni Ardito & Marzia Rovere, *Racing the clock: Recent developments and open environmental regulatory issues at the International Seabed Authority on the eve of deep-sea mining*, Marine Policy, Volume 140, 2022 (Paragraph 15(c) was proposed "to ensure that the exploitation of the resources of the Area would not remain hostage of the prolonged negotiations required for the finalization of the regulations and that p[ro]spective operators would be given a definite term for the start of mineral extraction and production").

[27] Nauru March Submission at para. 17(d).

Agreement)[28] is to set the procedures of the Authority, which exists to "organize and control activities in the Areas, particularly with a view to administering the resources of the Area".[29] The object and purpose of Paragraph 15(c) is to dictate procedures by instructing the Authority to consider and provisionally approve pending applications for a Plan of Work in the event the Council has failed to provisionally adopt the Regulations.

21. Furthermore, the object and purpose of a treaty are found in "the words in fact used by the parties",[30] and this doctrine cannot generate an interpretation that is contrary to the clear text of the provision in question.[31] Paragraph 15(c) does not mention postponement. Therefore, the Council is not unilaterally permitted to postpone the consideration and provisional approval of an explicit procedure contained in the 1994 Agreement.

22. Indeed, there is a consensus among member States that the Authority must consider a pending application for approval of a Plan of Work under Paragraph 15(c). As the Co-Facilitator's March Briefing Note explains, delegations "noted that subparagraph (c) provides for a decision-making process and that the use of the word 'consider' means that the Council is required to 'evaluate' or 'assess' an application to determine whether it should be approved or disapproved".[32] This is supported by member States' individual submissions.[33]

(d) The customary international law doctrines of good faith and legitimate expectations prohibit the Council from postponing consideration and provisional approval of a pending Plan of Work under Paragraph 15(c).

23. Paragraph 15(c) must be interpreted in light of customary international law, because the Convention and the 1994 Agreement incorporate customary international law. Article 138 of the Convention says as follows:

The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations ***and other rules of international law*** *in the interests of maintaining peace and security and promoting international cooperation and mutual understanding*.

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[28] Article 1(2) of the 1994 Agreement.

[29] Article 157(1) of the Convention.

[30] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 at para. 147.

[31] *Veteran Petroleum Limited (Cyprus) v. Russia*, PCA Case No. 2005-05/AA228, Judgment of Court of Appeal in The Hague II, 18 February 2020 at para. 4.2.3.

[32] *Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45* (**Co-Facilitators' March Briefing Note**) at para. 9, available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Co_Facilitators_Briefing_Note.pdf.

[33] *See, e.g.*, Argentina, *Comments relating to 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* (submitted after 8 March 2023 webinar) (**Argentina March Submission**), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/ARGENTINA-Comments.pdf ("In our understanding, the imperative language used in this article ('*shall none the less*') means that the Council has a mandatory obligation to consider any plan of work (PoW) submitted according to this article…"); Japan, *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* (submitted after 8 March 2023 Webinar) (**Japan March Submission**), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Japan-submission.pdf ("According to subparagraph (c) and the use of the term 'shall', the Council has an obligation to 'consider and provisionally approve' a plan of work for exploitation, even if it has not completed the elaboration of the rules, regulations and procedures relating to exploitation").

24. The term "other rules of international law" includes law "referred to in article 38 of the Statute of the International Court of Justice" (e.g., "international custom" and "the general principles of law recognised by civilised nations"), which captures customary international law.[34] It includes, crucially, international economic law – particularly law concerning the protection of foreign investment. Support for this inclusion is found in the preambles to the Convention (seeking a "just and equitable economic order") and the 1994 Agreement (concerning the "political and economic changes, including market-oriented approaches, affecting the implementation of Part XI."). Further, international economic law contains extensive and well-developed interpretations of two doctrines applicable to Paragraph 15(c) – good faith and legitimate expectations.

25. Good faith, or the principle of *pacta sunt servanda*, means that a treaty is binding on the parties to it[35] and must be performed in a reasonable way to ensure its purpose can be realised.[36] Good faith is mentioned six times in the Convention, including in Article 31, which provides that:

> *States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.*

26. Furthermore, under Article 157(4):

> *All members of the Authority shall fulfil in good faith the obligations assumed by them in accordance with this Part in order to ensure to all of them the rights and benefits resulting from membership.*

27. Legitimate expectations refers to the "reasonable and justifiable" assumptions about a given legal framework that are protected at international law. The doctrine is most developed in the area of investment protection where it forms part of the minimum standard of treatment due to foreign investors under international law. This minimum standard includes, at the very least, protections against treatment amounting to "bad faith" and a "wilful neglect of duty",[37] as well as a "wilful disregard of due process of law".[38]

28. Importantly, the minimum standard of treatment bars treatment "in breach of representations made" by States and other international actors which were "reasonably relied on" by investors[39]. In other words, it protects a party's legitimate expectations. Where a party has "reasonable and justifiable" expectations that a State or collection of States, i.e. an international organisation like the Authority made up of member States, will behave in a certain way under a treaty, a subsequent failure to do so breaches the treaty.[40] These expectations extend to, among other things, the maintenance of a stable and predictable legal

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[34] *See* Articles 74(1) and 83(1) of the Convention.

[35] Article 26 of the Vienna Convention.

[36] *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*) [1997] ICJ Reports at para. 142 ("The principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized").

[37] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Reports of International Arbitral Awards, vol. IV, pp. 60-66, para 4.

[38] *Elettronica Sicula S.P.A (United States of America v. Italy*) [1989] ICJ Reports at para. 128.

[39] *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 at para. 98.

[40] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL, Arbitral Award, 26 January 2006 at para. 147 ("[T]he concept of 'legitimate expectations' relates […] to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act on reliance on said conduct, such that a failure by the [State] to honour those expectations could cause the investor (or the investment) to suffer damages").

framework such as that found throughout Part XI of the Convention, the 1994 Agreement and in Paragraph 15(c).

29. Applicant contractors and their sponsoring States have legitimate expectations that the Authority, the Council and the Commission will perform their obligations under Paragraph 15 in good faith. These include (but are not limited to) expectations that:

    29.1. The Authority will "elaborate and adopt" the necessary Regulations to facilitate the approval of Plan of Work;

    29.2. The Council will complete said provisional adoption within two years of a Request made under Paragraph 15(b);

    29.3. If the Regulations are not adopted in time, the Council will consider and provisionally approve a pending application for a Plan of Work in accordance with Paragraph 15(c) and the standards specified therein;

    29.4. The Authority, its subsidiary bodies and its member States will not deviate from this framework and will not infringe on the rights of applicant contractors and sponsoring States.

30. Paragraph 15's cascading set of responsibilities exists to provide applicant contractors and their sponsoring States legal surety. It guarantees a stable legal framework of procedures that will be followed by the Authority, its subsidiary organs and its member States to the letter. It does not make any provision for postponing consideration and provisional approval under Paragraph 15(c), for the reasons specified above.

31. In preparing their applications for a Plan of Work, applicant contractors are legitimately relying on the framework as contained in the Convention and the 1994 Agreement. If the Authority and its member States elect to depart from that framework and imply authority they do not possess to postpone an explicit procedure specifically guaranteed under the Convention and the 1994 Agreement, they will have breached their treaty obligations and well-settled rules of customary international law.

(e) In their March submissions, member States have confirmed that Paragraph 15(c) contains no postponement authority.

32. The text of Paragraph 15(c) is clear, so there is no need to resort to supplementary means of interpretation or any other interpretive exercise.[41] No legal basis exists for the Council to delay or postpone consideration and provisional approval of an application for a Plan of Work – that is simply the "end of the matter".[42]

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[41] *Conditions of Admission of a State to Membership in the United Nation*s [1948] ICJ Reports at 63 (no need to resort to preparatory work if the text of a convention is "sufficiently clear in itself"); *Canfor Corporation and others v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 at para. 324 (where a treaty's language is "so plain that, for interpretive purposes, there is no occasion for recourse to supplementary sources of evidence under the terms of the Vienna Convention on the Law of Treaties", it must be enforced as written without further inquiry); *Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14, Award, 8 December 2008 at para. 79 ("Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation").

[42] *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* [1991] ICJ Reports at para. 48 ("'If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter'").

33. For completeness and context, however, Nauru notes that many member States have, through their submissions in this intersessional process, already confirmed that Paragraph 15(c) contains no postponement authority.

33.1. Canada: If Regulations are not yet adopted and a Plan of Work is pending, "it is our view that the Council could not postpone the consideration of a plan of work".[43]

33.2. Norway: "Any postponements would need a clear legal basis in the Convention. Norway has thus far not identified any legal grounds for such postponement (beyond the criteria listed in letter c)".[44]

33.3. Argentina**:** "Regarding the possibility for the Council to postpone the consideration of a pending application until certain conditions are met, we fail to find a legal basis for that interpretation".[45]

33.4. Australia: "In the circumstances contemplated by the Implementation Agreement, Annex, Section 1, paragraph 15(c), if an application for a plan of work for exploitation is submitted and [the] Council has not completed the rules, regulations and procedures, then [the] Council is to assess the application…The consideration of the pending application cannot be postponed until certain conditions are met".[46]

33.5. Japan: "In accordance with Art. 6.1 of Annex III, which stipulates that the Authority shall take up for consideration proposed plans of work each fo[u]rth month, the consideration of a pending application cannot be postponed".[47]

34. These positions are correct, and Nauru agrees. The Council has no legal basis to infer additional powers into this framework, including the right to postpone consideration and/or provisional approval. Any contrary interpretation would be inconsistent with the Vienna Convention and well-established rules of international law.

(f) There are no viable grounds for inferring postponement authority into Paragraph 15(c).

35. At the 8 March 2023 Session, a handful of member States and observers suggested various legal theories for allowing the Council to postpone consideration and provisional approval of an application for a Plan of Work, including:

35.1. Section 3(11)(a) of the Annex to the 1994 Agreement;

35.2. Section 3(6) of the Annex to the 1994 Agreement;

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[43] Canada, *Written comments submitted by the delegation of Canada for the Informal intersessional dialogue to facilitate further discussion in connection with section 1, paragraph 15, of the Annex to the Agreement relating to Part XI, UNCLOS* (8 March 2023), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Canada-submission.pdf.

[44] Norway, *Informal Intersessional Dialogue in connection with section 1, paragraph 15, of the annex to the Agreement relating to Part XI UNCLOS* (8 March 2023), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Norway-Submission.pdf.

[45] Argentina March Submission.

[46] Australia*, 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* (submitted after 8 March 2023 Webinar), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Australian-submission.pdf.

[47] Japan March Submission.

35.3. Article 145 of the Convention; and

35.4. the precautionary approach.

36. Nauru does not consider any of these grounds are viable or are supported by the Convention, the 1994 Agreement or principles of international law.

37. Section 3(11)(a) of the Annex to the 1994 Agreement states in relevant part:

If the Council does not take a decision on a recommendation for approval of a plan of work within a prescribed period, the recommendation shall be deemed to have been approved by the Council at the end of that period. The prescribed period shall normally be 60 days unless the Council decides to provide for a longer period.

38. By its clear terms, Section 3(11)(a) applies to the decision on the Commission's recommendation for approval of a Plan of Work. It does not apply to the consideration of a Plan of Work, much less the mandatory consideration and provisional approval of a pending application under Paragraph 15(c). As the 8 March 2023 submissions demonstrate, even stakeholders supporting postponement under Paragraph 15(c) admit there is a difference between "postpon[ing] the *consideration*" of an application and "extend[ing] the prescribed time under the Convention to *decide*" on it.[48]

39. As commentators have noted, the extension provision was added because "[i]t was considered that some delay may be necessitated for technical reasons such as the inability of the Council to meet until the next regular session of the Authority for reasons of cost-effectiveness".[49] Section 3(11)(a) of the Annex to the 1994 Agreement is not a vehicle for the Council to wield independent substantive authority. Section 3(11)(a) of the Annex to the 1994 Agreement was certainly not added to give the Council postponement authority under Paragraph 15(c), in clear violation of the mandatory obligations contained in that clause and its nature as a circuit breaker in the event the Council failed to provisionally adopt the Regulations.

40. Furthermore, the extension provision applies to a different context entirely. Section 3(11)(a) of the Annex to the 1994 Agreement is an exception to the general rule, that a Commission's recommendation "shall be deemed to have been approved" after the Council reviews it for 60 days (providing applicant contractors with a further guarantee that their cases will be reviewed and determined expeditiously).

41. Section 3(6) of the Annex to the 1994 Agreement gives the Council the discretion to "*defer the taking of a decision in order to facilitate further negotiation whenever it appears that all efforts at achieving consensus on a question have not been exhausted*". But Section 3 merely establishes a "general rule" for decision-making at the Authority and the Council on questions that are eligible for such procedures.[50] Consideration and provisional approval of a pending application for a Plan of Work is not eligible – it is governed by the specific strictures of Paragraph 15(c), which impose mandatory obligations on the Authority and leave no room

[48] Research Institute for Sustainability – Helmholtz Centre Potsdam, *Written comments for the informal intersessional dialogue on the possible scenarios and any other pertinent legal considerations in connection with section 1(15)* (8 March 2023), available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Submission_RIFS_IASS.pdf.

[49] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI (**Convention Commentary**) at 454.

[50] Section 3(2), Annex, 1994 Agreement.

whatsoever for deferral. At international law, specific rules prevail over general rules[51] and general rules cannot override clear instructions or impose a dichotomy where none exists.

42. Article 145 of the Convention covers protection of the marine environment and provides that "*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*". It does not support postponement authority, for at least three reasons.

43. *First*, postponing consideration and provisional approval of a pending application for a Plan of Work on the basis of Article 145 prejudges the merits of that Plan of Work (particularly its environmental protection efforts) and infringes due process norms as well as the authority and expertise of the Council and the Commission.

44. *Second*, Article 145 is an important part of the Convention's framework, but it is only a part. There is no legal basis to elevate Article 145 above the rest of the Convention and the 1994 Agreement, which aim to achieve a balance between protecting the marine environment and enabling commercial exploitation of deep seabed resources.[52] Further, Article 145 clearly indicates that necessary measures must be "*in accordance with this Convention*". This language indicates that the obligation under Article 145 is to work within the processes/requirements of the Convention and the 1994 Agreement to take the "necessary measures", not to override any of those provisions or make them redundant. The drafters of the Convention understood that some level of harm to the marine environment would occur due to activities in the Area. The Authority itself has recognised this, including by publicly aligning deep-sea mining activities to the United Nations' Sustainable Development Goals and the implementation of regional environmental management plans.[53]

45. *Third*, Article 145 is contained in Part XI of the Convention, which is interpreted, detailed and in some cases overridden by the 1994 Agreement. The 1994 Agreement was crucial to the widespread adoption of the Convention, as recognised in the Preamble.[54] It is a key reason why the Convention enjoys the status it does today. The 1994 Agreement contains detailed instructions on how to achieve the requisite balance between exploitation and environmental protection. Those instructions cannot be overwritten by Article 145's general requirements, especially where the process for the consideration and provisional approval of a Plan of Work under Paragraph 15 is clear and admits of no contrary interpretation.[55]

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[51] *Beagle Channel Arbitration (Argentina v. Chile)* (1977), Report and Decision of the Court of Arbitration at paras. 36-39; International Law Commission, *Conclusions of Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* at para. 5 ("The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable…between provisions within a single treaty").

[52] Convention Commentary at 192 (Article 145 is "part of the balance achieved in the regime governing the exploration for and exploitation of, the resources of the Area").

[53] *See* International Seabed Authority, *The Contribution of the International Seabed Authority to the Achievement of the 2030 Agenda for Sustainable Development* (2021), available at: https://www.isa.org.jm/wp-content/uploads/2021/02/ISA_Contribution_to_the_SDGs_2021.pdf (Authority-managed deep-sea mining "is an essential contribution to sustainable development as a whole, responding in a cautious and planned way to the projected dramatic increase in the supply of minerals needed for decarbonisation over the next two decades").

[54] Preamble, the 1994 Agreement ("*Wishing* to facilitate universal participation in the Convention").

[55] *Canfor Corporation and others v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006 at para. 179 (General objectives in a treaty may cast interpretive light but "cannot override or supersede a particular provision"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 at para. 147

46. Nauru notes the efforts of a small number of member States and observers to import the precautionary approach as contained in the Rio Declaration through Article 145 of the Convention. At the outset, Nauru notes there is no reference to the precautionary approach in Article 145 of the Convention. The precautionary approach declares that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".[56] The precautionary approach is not customary international law nor has the precautionary approach been recognised by the International Court of Justice or any other international court or tribunal. The Convention and the 1994 Agreement do not mention the approach. It is referenced only twice in the Exploration Regulations,[57] and is expressly limited in each instance.

47. Article 145 of the Convention is intended to ensure that the Authority protects the marine environment as part of the Mining Code and that any measures taken in this regard are in accordance with the Convention. The Authority has already applied the precautionary approach when issuing exploration contracts and detailed recommendations for conducting test mining projects. Necessary measures to protect the marine environment are also reflected throughout the draft Regulations and the procedure for the development of regional environmental management plans. Importing the precautionary approach through Article 145 of the Convention to block an explicit mandate of the Authority to consider and provisionally approve a Plan of Work submitted pursuant to Paragraph 15(c) is not in accordance with the Convention and is simply an untenable position under international law and principles of treaty interpretation.

48. In any event, deploying the precautionary approach to postpone consideration and provisional approval of a Plan of Work prejudges the merits of that Plan of Work. As noted above, the Council and the Commission must afford applicant contractors and their sponsoring States proper due process rights under Paragraph 15 and must assess their applications in accordance with the clear criteria laid out in Paragraph 15(c).

49. ***In sum, there is no legal basis to postpone the consideration of a Plan of Work under Paragraph 15(c).*** Inferring postponement powers where none exists is clearly *ultra vires* to the Convention and the 1994 Agreement.

("We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis.* The former may frequently cast light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter").

[56] The 1992 Rio Declaration on Environment and Development, Principle 15, A/CONF.151/26 (Vol. I).

[57] Exploration Regulations, Regs. 2(e)(ii) and 44(a).

QUESTION 2 - WHAT GUIDELINES OR DIRECTIVES MAY THE COUNCIL GIVE TO THE COMMISSION, AND/OR WHAT CRITERIA MAY THE COUNCIL ESTABLISH FOR THE COMMISSION, FOR THE PURPOSE OF REVIEWING A PLAN OF WORK UNDER SUBPARAGRAPH (C)?

50. ***Nauru considers any guidelines or directives issued by the Council to the Commission are to assist the Commission solely in fulfilling its obligations under the Convention and the 1994 Agreement***. ***The Council cannot issue guidelines or directives that are intended to prevent or postpone the Commission from fulfilling its obligations under the Convention and the 1994 Agreement. Nor can the Council issue guidelines or directives that prejudice the Commission's independence or direct the Commission to issue a specific recommendation*****.**

(a) The Council and the Commission have specific roles under the Convention and the 1994 Agreement when considering an application for a Plan of Work.

51. The Commission plays an independent and critical role in first considering and issuing appropriate recommendations for approval of a Plan of Work, including a Plan of Work submitted under Paragraph 15(c). There is now consensus amongst members of the Council on this issue.

52. The Commission is the independent technical subsidiary body of the Council, and it is the only organ with the necessary expertise to adequately review a Plan of Work and issue appropriate recommendations. Should the Commission require further expertise, the Commission is empowered under Article 165(2) of the Convention to appoint its own expert(s). The Convention and the 1994 Agreement establish the Commission's role and function in the Plan of Work approval process.[58] As the 8 March 2023 Session confirmed, there is broad agreement among the member States that the Commission's work under Paragraph 15(c) is active and important.

53. As outlined above, the 1994 Agreement explicitly sets out the Council's role in the overall consideration and approval of a Plan of Work. Per Section 3(11)(a) of the Annex to the 1994 Agreement, if the Commission recommends approval of a Plan of Work, the Council can only disapprove such a plan "*by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambers of the Council.*" The Council's obligations under Paragraph 15(c) are mandatory and restricted to the consideration and provisional approval of a pending application for a Plan of Work.

54. Article 163(9) of the Convention permits the Council to adopt guidelines and directives concerning the functions exercised by the Commission.

55. Paragraph 15(c) sets out the criteria to be considered by the Commission when exercising its functions to assess a Plan of Work under Paragraph 15. This is an exhaustive criterion and the sources contained are the only matters the Commission is empowered to consider when assessing a Plan of Work under Paragraph 15. No other guidelines or directives are relevant to the Commission's work under Paragraph 15(c). Therefore, any guidelines or directions issued by the Council to the Commission for the purpose of considering a Plan of Work under

[58] Annex 153(3) of the Convention; Article 165(2)(b) of the Convention; Annex, Section 3, Paragraph 11(a) of the 1994 Agreement; *see also* Nauru March Submission at para. 20 ("The combined effect of Articles 153(3) and 165(2)(b) of the Convention and Annex, Section 3, Paragraph 11(a) of the […] 1994 Agreement, is that an application for a plan of work *must* first be reviewed by the Commission and a recommendation concerning the approval of the plan of work submitted to the Council. This is an explicit role of the Commission contained in the Convention and the 1994 Agreement and cannot be derogated or amended unilaterally by the Council").

Paragraph 15(c) must be consistent with Paragraph 15, the Convention and the 1994 Agreement.

56. We consider any guidelines or directives issued to the Commission pursuant to Article 163(9) of the Convention cannot:

56.1. prevent the Commission from fulfilling its explicit mandate under the Convention, including to review and issue appropriate recommendations concerning a Plan of Work submitted under Paragraph 15;

56.2. circumvent or alter the explicit roles and functions outlined in the Convention for the Commission; or

56.3. restrict the Commission's work or suggest it: (i) adopt a specific recommendation; or (ii) take a specific course in the assessment of an application for a Plan of Work.

57. As a subsidiary body of an international organization, the Commission has clear delineated authority. The Commission cannot violate international law, including the Convention and the 1994 Agreement.[59] The Commission's work and any recommendations issued by the Commission must be "in accordance" with its constituent instruments, any rules and procedures adopted under those instruments, and the established practice of the Authority and its member States.[60] The Commission's permitted conduct "depend[s] upon its purposes and functions as specified or implied in its constituent documents and developed in practice".[61]

58. Interpreting Article 163(9) in good faith and in accordance with the objects and purpose of Part XI of the Convention requires that any guidelines or directives that are issued by the Council assist or facilitate the Commission in exercising its explicit functions. Any guidelines or directions issued by the Council cannot guide or direct the Commission to commit a breach of its obligations under the Convention and the 1994 Agreement.

59. Nauru notes the recent May 2023 joint submission from Germany and the Netherlands suggesting that it is appropriate the Council issue guidelines or directives to the Commission because Article 6(3), Annex III of the Convention requires that "[…] *all proposed plans of work have to comply with and are governed by the relevant provisions of this Convention and the rules, regulations and procedures of the Authority* […]" and in the absence of such rules, regulations and procedures "[…] *the Commission will not have been enabled in accordance with the grounds stated in Annex III of the Convention to perform its review function and*

[59] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1950], ICJ Reports at para. 37 ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties").

[60] International Law Commission, *Draft Articles on Responsibility of International Organisations*, Article 2(b); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [1996], ICJ Reports at para. 19 ("[T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties").

[61] *Reparation for Injuries Suffered in the Service of the United Nations*, [1949], ICJ Reports at 180.

consequently will not be in a position to submit a recommendation for approval to the Council". Nauru does not agree.

60. As outlined above, Paragraph 15 contains an explicit and specific framework for the consideration and provisional approval of a plan of work for exploitation in the absence of the rules, regulations, and procedures for exploitation. For this reason, it was necessary for the drafters of the 1994 Agreement to outline criteria for the plan of work to be considered and provisionally approved under Paragraph 15(c). Nauru considers that Article 6(3), Annex III of the Convention requires the plan of work to comply with any existing rules, regulations, and procedures of the Authority. This is consistent with Paragraph 15(c) which requires the plan of work be considered and provisionally approved based on "[…] *any rules, regulations, and procedures the Council may have adopted provisionally* […]".

61. Nauru's interpretation of Article 6(3), Annex III of the Convention is also consistent with the past practice of the Authority whereby the Authority approved and considered plans of work for exploration for pioneer investors in the absence of rules, regulations, and procedures for exploration.[62] The Authority did not consider at that time that Article 6(3), Annex III of the Convention prevented the consideration and approval of plans of work for exploration nor does Nauru consider it prevents it now.

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

62. At this time, Nauru does not consider it necessary that the Council issue guidelines or directives concerning the criteria to be considered by the Commission should a Plan of Work be submitted pursuant to Paragraph 15. The criteria to be considered by the Commission is already clearly outlined in Paragraph 15.

63. If a Plan of Work is submitted pursuant to Paragraph 15, and the Commission is unable to interpret the criteria contained in Paragraph 15, at that juncture, and at the request of the Commission, it might be appropriate for the Council to issue guidelines or directives expanding on the criteria in Paragraph 15 to assist the Commission in understanding the procedure for its consideration of the Plan of Work and to fulfil its mandate. Nauru considers that any directions or guidelines issued by the Council concerning the procedure to be followed by the Commission in the consideration and provisional approval of a plan of work for exploitation under Paragraph 15 is a "*procedure*" for the purposes of Article 162(2)(o)(ii) of the Convention and therefore requires the consensus of the Council for adoption.

64. Any guidelines or directives that prevent, circumvent or restrict the mandate of the Commission set a dangerous precedent that not only is *ultra vires* to the Convention and the 1994 Agreement, but undermines the clear separation of powers of the organs and subsidiary organs of the Authority.

65. At this juncture, Nauru considers it premature for the Council to issue any guidelines or directives to assist the Commission in the consideration of a Plan of Work under Paragraph 15 when there is presently no Plan of Work before the Commission.

[62] Status of contracts for exploration issued in accordance with the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/7/C/4.