

**BRIEFING NOTE FROM THE PEW CHARITABLE TRUSTS:**

**RATIONALE FOR THE ISA COUNCIL TO DIRECT THE ISA LEGAL AND TECHNICAL COMMISSION NOT TO RECOMMEND APPROVAL OF A PLAN OF WORK IN THE ABSENCE OF RULES, REGULATIONS, AND PROCEDURES**

1. **Common ground:** From recent discussions amongst Council member States, there appears to be general agreement that no exploitation in the Area should be permitted in the absence of relevant Rules, Regulations and Procedures (RRPs) adopted by Council<sup>1</sup>.

It is clear also that the ISA's RRP for exploitation cannot be completed and adopted at the forthcoming July 2023 Council and Assembly sessions.

2. **The issue:** A member State has indicated their intention to sponsor an application for a plan of work for exploitation after July 2023<sup>2</sup>, triggering the provision of the 1994 Agreement that requires the Council's consideration of that application even if received in the absence of adopted RRP<sup>3</sup>.

UNCLOS generally requires that the Legal and Technical Commission of the ISA ('the LTC') reviews any new application for a plan of work, and submits appropriate recommendations to Council<sup>4</sup>. The 1994 Agreement added a specific voting rule whereby, if the LTC recommends approval for a plan of work, the Council would require a 2/3<sup>rd</sup> majority against that recommendation (and a majority in each voting chamber), in order to reject the application<sup>5</sup>. This 'super majority' voting procedure has potential to force the Council's approval of a plan of work for exploitation in the absence of RRP, even where the vast majority of Council members are opposed to that decision<sup>6</sup>.

3. **The proposal to address the issue:** With the aim to pre-empt this circumstance, and to prevent the super-majority voting procedure even arising during the absence of RRP, it has been proposed that the Council could instruct the LTC<sup>7</sup>:

- only to give a comprehensive report to the Council on the proposed plan of work, but not a recommendation, or
- that appropriate recommendations in these circumstances must not include a recommendation to approve or disapprove the plan of work.

Alternatively but similarly, it has been suggested that the Council has responsibility to determine applicable process and role of the LTC where an application is received in the absence of RRP, and can do so in such a way to avoid the situation in which Council is unable to prevent the approval of a plan

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<sup>1</sup> Council decision March 2023: "Considering that the commercial exploitation of mineral resources in the Area should not be carried out in absence of such RRP." <https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf>

<sup>2</sup> [https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA\\_26\\_C\\_38-2108753E.pdf](https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_26_C_38-2108753E.pdf)

<sup>3</sup> 1994 Implementation Agreement, Annex, Section 1(15).

<sup>4</sup> UNCLOS Articles 165(2)(b).

<sup>5</sup> 1994 Implementation Agreement, Annex, Section 3(11)(a).

<sup>6</sup> For example, Council's voting chambers A, B and C each contain four members. If all members are in attendance, two countries abstaining or voting against, would be enough to prevent the Council from rejecting an approval of a plan of work for exploitation received in the absence of RRP, where the LTC has recommended approval. (If fewer members were in attendance, just one abstention or vote could have this effect).

<sup>7</sup> As proposed in a joint written submission from Germany and the Netherlands (<https://www.isa.org.jm/wp-content/uploads/2023/03/intersessional-webinar-before-germany-netherlands.pdf>) and as summarised in the March 2023 Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45 ([https://www.isa.org.jm/wp-content/uploads/2023/03/Co\\_Facilitators\\_Briefing\\_Note.pdf](https://www.isa.org.jm/wp-content/uploads/2023/03/Co_Facilitators_Briefing_Note.pdf)).

of work. This could include a guideline or directive to clarify the conditions that must be met before plan of work can be approved, such as: the existence of RRP<sup>8</sup>.

Several delegations raised or supported these proposals during the recent intersessional informal dialogue, and the subsequent March 2023 Council session.<sup>9</sup>

4. **Legal grounding for the proposal:** The possibility for the LTC *not* to make a recommendation is clear from UNCLOS, and this point was emphasised in a March 2023 decision of Council<sup>10</sup>. The same Council decision also recalled that UNCLOS expressly gives the Council the responsibility and the power to guide and direct the work of the LTC<sup>11</sup>. Such a guideline or directive<sup>12</sup> could therefore be issued by the Council to prevent the LTC making a specific recommendation for approval or disapproval for any application for a plan of work for exploitation received before adoption of the relevant RRP.

Some delegates have noted that a similar result could also be achieved by way of a ‘specific policy’ of the Council<sup>13</sup>.

Yet another option would be for the Council to approve a rule of procedure for the LTC on this point<sup>14</sup>. This option would have the advantage of asking the LTC to formulate and submit the proposed rule to the Council for approval, thus ensuring the appropriate degree of autonomy to the LTC in developing such rules.

5. **Rationale provided against the proposal:** Some delegates at the March 2023 Council session raised concerns about the proposal, insofar as it was seen to prevent the LTC having free reign in making a recommendation upon a plan of work<sup>15</sup>. While some also expressed their view that the LTC would not indeed be in any position to recommend approval or disapproval in the absence of RRP<sup>16</sup>, those delegates still preferred that the matter be left to the discretion of the LTC to make this determination themselves.

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<sup>8</sup> Suggestion from Brazil (<https://www.isa.org.jm/wp-content/uploads/2023/04/STATEMENT-BRAZIL.pdf>).

<sup>9</sup> Submissions made in writing, and contemporaneous notes taken during participation in the session, suggest support from, inter alia: Brazil, Canada, Chile, France, Germany, Micronesia, Netherlands, New Zealand, Palau, Portugal, Spain, Switzerland.

<sup>10</sup> Council decision March 2023: “Emphasizes that in submitting appropriate recommendations to the Council, the Commission is under no obligation to recommend approval or disapproval of a plan of work, pursuant to section 3, paragraph 11(a), of the Annex to the Agreement, which provision also envisages a scenario in which the Commission does not make a recommendation.” <https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf>

<sup>11</sup> Operative paragraph 4 of the March 2023 Council decision [www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf](https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf), which reflects and references Article 163(9) of UNCLOS.

<sup>12</sup> In the French language version of UNCLOS, this is ‘principes et directives’; and in the Spanish language version, ‘orientaciones y directrices’.

<sup>13</sup> E.g. written submission of Chile to the informal intersessional dialogue, dated 14 March 2023. UNCLOS Article 162(1) empowers Council to make such specific policies.

<sup>14</sup> UNCLOS Article 163(1) gives Council responsibility to approve the rules and regulations necessary for the efficient conduct of the LTC’s functions. The LTC’s current Rules of Procedure note that “The Commission shall exercise its functions in accordance with these Rules and such guidelines as the Council may adopt from time to time.” (ISBA/6/C/9] 13 July 2000 [https://www.isa.org.jm/wp-content/uploads/2022/06/isba-6c-9\\_1.pdf](https://www.isa.org.jm/wp-content/uploads/2022/06/isba-6c-9_1.pdf)).

<sup>15</sup> Contemporaneous notes taken during the March 2023 Council session identify the following countries as raising concern about any departure from the regular decision-making process involving the LTC’s review and recommendation: Australia, China, Italy, Japan, Korea, Mexico, Nauru, Norway and Singapore.

<sup>16</sup> E.g. written submission of Mexico to the informal intersessional dialogue, and verbal interventions by Japan and Singapore, during the March 2023 Council session.

It was noted that the 1994 Agreement does not specify any departure from the regular decision-making process and the LTC's role in that process, in the event of an application being received before the ISA has adopted RRP<sup>17</sup>. So a primary objection was that it could be a derogation of UNCLOS and the 1994 Agreement, for the Council to impede the LTC's performance of its prescribed functions.

The independence of the LTC was raised, as an important principle not to erode<sup>18</sup>. The LTC's importance was also emphasised, in terms of the Council receiving prior scientific assessment by its designated expert organ – which may be considered even more essential in the absence of RRPs - and in being able to retain confidentiality over relevant parts of the application.

## 6. Further discussion

**6.1** *Origins of the 'super-majority' voting procedure:* ISA members States are understandably anxious to adhere to UNCLOS, while noting that there may be different interpretations<sup>19</sup>. One method to facilitate a shared understanding between member States of specific UNCLOS provisions, is to look at the negotiations and rationale provided during the drafting process.

It is therefore interesting to note that during the negotiations of the 1994 Implementation Agreement there was repeated emphasis that fair, objective and non-discriminatory criteria, established via RRPs, were considered fundamental to the ISA's decision-making process on plans of work.<sup>20</sup> Indeed, there as 'general agreement' amongst States parties for the following reasoning for introducing the super-majority Council voting procedure in Section 3(11)(a) of the Annex the 1994 Agreement:

*“Where the Legal and Technical Commission, **after having reviewed the application on the basis of objective and non-discriminatory criteria established by the rules and regulations of the Authority**, has submitted to the Council a recommendation for the approval of a plan of work, a special procedure is necessary in the Council when dealing with such recommendation. This is already envisaged in the Convention. This procedure should ensure that access would not be denied to applicants who are found by the Legal and Technical Commission to be qualified **under the rules and regulations of the Authority.**”*<sup>21</sup> [emphasis added]

It is of significant relevance to the current issue to see from this excerpt that the super-majority voting rule was never intended to apply in the absence of RRPs. This makes sense. The vision of the drafters was: the Council sets the rules, the LTC applies the rules, and the Council is required to confirm the outcome where the application is objectively found successful according to those rules. This avoids

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<sup>17</sup> E.g. verbal intervention by China, during the March 2023 Council session.

<sup>18</sup> E.g. verbal interventions by China and Norway, during the March 2023 Council session.

<sup>19</sup> A point made, inter alia, by the African Group, Brazil, China, Federated States of Micronesia in verbal interventions during the 'what if' scenario discussions at the March 2023 Council session.

<sup>20</sup> *“Those dealing with the Authority must feel confident that they will be treated fairly and objectively in any decision taken by the Authority which affects their interests” [...] “One of the most important functions of the Legal and Technical Commission is to review plans of work and submit appropriate recommendations to the Council. This is a crucial first step for bona fide deep seabed miners to gain access to the resources of the deep seabed. It is, therefore, important that the criteria established in the rules and regulations of the Authority for reviewing a plan of work are objective and non-discriminatory.”* Information Note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the UN Convention on the Law of the Sea New York, 14-15 October 1991 <https://www.isa.org.jm/wp-content/uploads/2022/06/sg-informconsultations-ae.pdf>.

<sup>21</sup> Information note concerning the Secretary-General's informal consultation on outstanding issues relating to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea New York, 16 – 17 June 1992 <https://www.isa.org.jm/wp-content/uploads/2022/06/sg-informconsultations-ae.pdf>

individual member states seeking to derogate from the fair application of RRP that have been previously agreed and adopted by Council consensus.

But this logical hierarchy falls away, if there are no Council-approved rules. In the absence of RRP, the super-majority voting role serves instead to upset the proper chain of command, by requiring the LTC to set and apply their own rules (as a matter of necessity) when faced with an application to assess, and effectively becoming the ISA's decision-making organ: by binding the Council to follow the subordinate organ's 'recommendation'. That this cannot have been the intention behind section 3(11)(a), is borne out by the travaux préparatoires for the 1994 Agreement, as quoted above.

It is notable too that in the 1994 Agreement negotiations, the rationale for developing the super-majority voting rule specifically focused on the importance of applying 'objective and non-discriminatory criteria'. This can only be done where there are RRP from Council, setting those criteria. For the LTC to review and recommend an application for a plan of work without the Council having provided the LTC such criteria, opens the door to subjective and inconsistent assessments, thus subverting the specific intention behind the decision-making procedures of the ISA organs that were so carefully deliberated in agreeing the Convention and the 1994 Agreement.

**6.2 Independence of the LTC:** Arguments made against eroding the LTC's 'independence' appear misplaced. UNCLOS does not in fact require independence of the LTC from the Council.

There are instances where UNCLOS does expressly require 'independence' of certain actors. These relate to:

- the Enterprise's functioning (e.g. 1994 Agreement, Section 2),
- the members of the Board of the Enterprise (Annex IV, Article 5),
- the auditors of accounts (e.g. Article 175),
- experts asked to assess data submitted by an applicant for a reserved area (Annex III, Article 8),
- members of the International Tribunal for the Law of the Sea (Annex VI, Article 2).

Conversely, the LTC is specifically described as 'an organ of the Council'<sup>22</sup>, and as 'subsidiary' and 'subordinate' to the 'primary' and 'executive' organ, the Council<sup>23</sup>. As such it is hard to see how the LTC could also be 'independent' from Council<sup>24</sup>. While UNCLOS stipulates that members of the LTC are required not to have a financial interest in any activity relating to exploration and exploitation in the Area, in order to avoid conflict of interest<sup>25</sup>, no other statement is made about it operating with any independence from Council. Whilst it is clearly prescribed in UNCLOS that Council is expected to guide and direct the LTC, and that the LTC shall be bound by those directives<sup>26</sup>.

**6.3 What is a 'directive'?:** the term 'directive' is used elsewhere in UNCLOS and the ISA's regime, notably in relation to the Enterprise<sup>27</sup>, as well as in relation to the preparation of the ISA's accounts<sup>28</sup>,

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<sup>22</sup> UNCLOS Article 163(1).

<sup>23</sup> E.g. see UNCLOS Article 158, Article 162(1), Article 162(2)(o)(ii).

<sup>24</sup> This point was made by Chile, and supported by Brazil, in the closing session of the March 2023 Council meeting.

<sup>25</sup> UNCLOS Article 163(8).

<sup>26</sup> UNCLOS Article 163(9), (10), and (11).

<sup>27</sup> E.g. UNCLOS Article 170(2) 'The Enterprise... shall be subject to the directives and control of the Council'.

<sup>28</sup> Financial Regulations of the ISA, approved by the Assembly in March 2000 (ISBA/6/A/3), note that the accounts of the ISA must reflect the financial regulations, budgetary provisions and 'other applicable directives'. <https://www.isa.org.jm/wp-content/uploads/2022/06/isba-6a-3reiss.pdf>

but its precise meaning does not appear to have been the subject of much discussion at the ISA<sup>29</sup>. An ordinary dictionary meaning (“an official or authoritative instruction”, “an official instruction that is given by someone in authority”) appears adequate to understand the meaning of a directive from the Council to the LTC for the purposes of Article 163(9) of UNCLOS.

It may also be helpful to note that, in relation to the Council’s power to issue a directive for the independent functioning of the Enterprise, the Secretary-General reported previously that the specific form and content of the directive appeared to be a matter for the Council’s own discretion<sup>30</sup>. Others have suggested that there may be little distinction between a ‘directive’ and a decision of Council<sup>31</sup>.

**6.4 Council leadership to make legal sense of UNCLOS procedures:** As noted above, the regular procedure for applications for plans of work, is for the LTC to review them and to report to Council. The LTC is specifically required by UNCLOS to ‘base its recommendations solely on the grounds stated in Annex III and shall report fully thereon to the Council’<sup>32</sup>. The Annex III grounds refer multiple times to criteria and requirements contained in ‘**relevant RRP**s’. The LTC therefore cannot in fact discharge the duty to review plans of work, as prescribed by UNCLOS, without those RRP<sup>s</sup><sup>33</sup>. Indeed, one delegation specifically noted during the last Council session, unpredictability about potential liability that could arise from an LTC recommendation taken in the absence of RRP<sup>s</sup><sup>34</sup>.

Similarly, Articles 4 and 6 of Annex III expressly requires an applicant to follow procedures and meet qualification standards that are set out in the **RRPs of the ISA**, and that the ISA should ascertain that this has been done ‘first’ before considering an application further. Without RRP<sup>s</sup>, it would be impossible for an applicant to meet those requirements and make such an undertaking, or for the ISA to ascertain that it has done so.

It would seem irresponsible for the Council, as the executive body of the ISA, not to act proactively to address this matter. The Council is the organ of the ISA with the power to constitute the membership of the LTC, to establish specific policies to be pursued on any matter within the competence of the ISA, and to guide and direct the LTC. It should use those powers to prevent a situation where the ISA or an applicant is placed in the position of being legally required as a matter of international law to follow a process that it is not possible for them to follow.

**6.5 Derogation from UNCLOS:** It seems that those concerned about derogation of UNCLOS were focused on a situation where the LTC is omitted entirely from the decision-making process, which is not the current proposal.

There may have been some similar concern at the scenario where the LTC is requested to make no recommendation to Council. Though these concerns appear to have been assuaged more recently, as Council has now clearly emphasised in a consensus-based decision that UNCLOS places the LTC under

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<sup>29</sup> See footnote 118 in Singh, P.A. 2022). The Invocation of the ‘Two-Year Rule’ at the International Seabed Authority: Legal Consequences and Implications, *The International Journal of Marine and Coastal Law*, 37(3) <https://doi.org/10.1163/15718085-bja10098>

<sup>30</sup> ISBA/19/C/6 Report by Secretary-General to the Council, 19th session of the ISA (July 2013) .

<sup>31</sup> E Egede, M Pal and E Charles, ‘A study related to issues on the operationalization of the Enterprise’, Technical Report 1/2019 (ISA, 2019)

<sup>32</sup> UNCLOS Article 165(2)(b).

<sup>33</sup> This point was also referenced in the March 2023 Co-Facilitators’ Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45 ([https://www.isa.org.jm/wp-content/uploads/2023/03/Co\\_Facilitators\\_Briefing\\_Note.pdf](https://www.isa.org.jm/wp-content/uploads/2023/03/Co_Facilitators_Briefing_Note.pdf)).

<sup>34</sup> Verbal intervention made by Belgium during the March 2023 ISA Council session.

no obligation to recommend approval or disapproval of a plan of work, nor in fact to make any recommendation<sup>35</sup>.

However, should concern regarding circumvention of UNCLOS persist, this could be addressed by the LTC conducting its review and making a recommendation – in accordance with UNCLOS-stipulated procedures - but under the specific policy or instruction from Council that the LTC should not recommend approval (or disapproval) of the plan of work at this time. Indeed this would appear an accurate reflection of the UNCLOS requirement for the LTC to make ‘**appropriate** recommendations to Council’<sup>36</sup> It would also enable the LTC to perform its technical scientific function, and to assist with the ISA’s duty to preserve relevant confidentiality, whilst also alleviating the LTC from then responsibility of an impossible task (see 6.3, above).

Indeed, it may also be considered whether action (or inaction) by the Council that allows the LTC to recommend approval of a plan of work in the absence of RRPs, thus limiting the Council’s ability to disapprove the same, could itself act in derogation of UNCLOS. At the time of drafting UNCLOS, concern was specifically expressed by ‘*developing countries and others*’ about ‘*the importance not to erode the supremacy of the Council over its subsidiary organ*’ i.e. the LTC, with regards to approval of plans of work. Other delegates emphasised that the LTC should ‘*be strictly operational and technical, would have no power of decision and would act on the specific instructions of the organs having decision-making power*’ (Greece) and that there was merit in setting up ‘*a technical body[...] to examine problems in the first instance[...] but care should be taken not to curtail the Council’s powers in that sphere.*’ (Chile)<sup>37</sup> Commentators have noted how the contentious and complex negotiations on the Council’s composition reflected the significant control and decision-making powers bestowed by UNCLOS upon the Council, as opposed to any other organ<sup>38</sup>. This hard-fought agreement would potentially be subverted if rule-making and decision-making powers are effectively passed to the LTC, through Council failure to direct the decision-making procedures to be followed in the absence of RRPs.

**6.6 Efficiency and managing expectations:** UNCLOS Part XI emphasises the importance of equity, efficiency and economy. A full application, review and recommendation procedure by the LTC of an application for a plan of work, and particularly the first plan of work for exploitation, is likely to be a time-consuming and resource-intensive activity for the LTC, and other organs of ISA (as well as for the applicant). The lack of RRPs (or other guidance from the Council) is likely to compound the difficulties faced by the LTC in conducting its review, potentially extending the work, staffing, and time required. As the Council has already decided that “*the commercial exploitation of mineral resources in the Area should not be carried out in absence of such RRPs*”<sup>39</sup>, it would seem inefficient, inequitable and uneconomical to have the LTC continue with the full review and recommendation procedure, on the

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<sup>35</sup> Council decision March 2023: <https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf>

<sup>36</sup> UNCLOS Article 165(2)(b).

<sup>37</sup> [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_13/a\\_conf62\\_c1\\_l27\\_and\\_add1.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_13/a_conf62_c1_l27_and_add1.pdf)

<sup>38</sup> French and Collins (2020) A Guardian of Universal Interest or Increasingly Out of its Depth? The International Seabed Authority turns 25. *International Organizations Law Review*, 17(3) <https://doi.org/10.1163/15723747-2019011>

<sup>39</sup> Council decision March 2023: <https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf>. The written submission from Mexico to the informal intersessional dialogue also noted ‘*that there are neither technical nor legal considerations to review, much less approve a Plan of Work for the award of a Contract, since, otherwise, it would be in contravention of the UNCLOS regulations; its terms and principles, including the due protection and preservation of the marine environment and the principle of non-discrimination*’ (though arguing in favour of the LTC’s full review and recommendation, despite this viewpoint) - <https://www.isa.org.jm/wp-content/uploads/2023/03/Submission-Mexico.pdf>.

basis of an application that is not going to be approved, and which would need to be revised and re-submitted in order to be compliant, once the RRP's are adopted.

7. **Conclusion:** On the basis of the above discussion, it seems helpful to emphasise that:

- The ISA's Council (on behalf of the Assembly) was always intended to retain supremacy as the decision-making body of the ISA for plans of work, with control over activities in the Area – including whether and when an activity is permitted to commence. It would therefore be inappropriate for the Council to allow a situation to arise where it found itself inadvertently unable to reject a plan of work where a vast majority of the Council members wished to do so (or considered it a legal requirement to do so), due to the lack of RRP's combined with the super-majority voting rule (that was only ever intended to apply where RRP's had been adopted).
- There is no requirement or categorisation of the LTC as 'independent' from the Council. It is a subsidiary body that reports to, and is instructed by, the Council. To function effectively and lawfully, the LTC requires direction from the Council, primarily in the form of RRP's, but also in the form of Rules of Procedure, specific policies, and/or guidelines and directives.
- Where the Council has already determined that an application for a plan of work cannot be approved in the absence of RRP's, it would be inefficient and unfair for all involved, to permit a full-scale, complex, and resource-intensive procedure to take place within the ISA, for the review of such an application, effectively for no reason.

On this basis, the Council should take steps during the July 2023 session to approve some form of the current proposal for the Council to issue a directive, policy, or new rule of procedure for the LTC (which can be based on the LTC's own proposal), that prevents the LTC from recommending approval of a plan of work in the absence of RRP's.