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"What if" revisited: Open legal questions in light of the two-year rule at the International Seabed Authority

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Summary

The invocation of a treaty provision known as the "two-year rule" at the International Seabed Authority effectively placed a deadline on the Authority to complete the adoption of regulations for exploitation activities within two years, i.e. by 9 July 2023. However, it is not a hard "deadline" and it is likely that the Authority might miss this deadline. In recent months, the member states of the Authority have commenced discussions on what would happen if the deadline is missed (or the "what if scenario"). It follows that missing the deadline will give rise to a host of open legal questions. Building on previous work, this discussion paper attempts to provide some insights and possible interpretations to answer some of those questions.

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1. Introduction

1.1 General remarks

The 'two-year rule', also known as the 'trigger' to those familiar with the work of the International Seabed Authority (the Authority), is not found in the 1982 UN Convention on the Law of the Sea (UNCLOS).¹ Rather, the provision is housed in the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS (1994 Implementing Agreement),² which substantially modified the framework regime for deep seabed mining in the Area that was initially established under Part XI of UNCLOS, in the form of section 1(15) to the Annex of the 1994 Implementing Agreement. Section 1(15) provides as follows:

The Authority shall elaborate and adopt, in accordance with article 162, paragraph 2(o)(ii), of the Convention, rules, regulations and procedures based on the principles contained in sections 2, 5, 6, 7 and 8 of this Annex, as well as any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploration or exploitation, in accordance with the following subparagraphs:

(a) The Council may undertake such elaboration any time it deems that all or any of such rules, regulations or procedures are required for the conduct of activities in the Area, or when it determines that commercial exploitation is imminent, or at the request of a State whose national intends to apply for approval of a plan of work for exploitation;

(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.

In late June 2021, the Republic of Nauru submitted a request to the Authority pursuant to section 1(15), subparagraph (a).³ Consequently, and in accordance with subparagraph (b) of the same, a so-called deadline was placed on the Authority to complete the adoption of the regulations for exploitation activities by 9 July 2023 (which is barely four months away at the time of writing). Building on the previous works of the author on the very topic,⁴ this discussion paper aims to revisit the circumstances

¹ UNCLOS, 1833 UNTS 397.

² 1994 Implementing Agreement, 1836 UNTS 3.

³ Letter dated 30 June 2021 from the President of the Council, ISBA/26/C/38.

⁴ Pradeep Singh, "The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications", *International Journal of Marine and Coastal Law*, 2022, 37:3, 375-412; Pradeep Singh, "What Are the Next Steps for the International Seabed Authority after the Invocation of the 'Two-year Rule'?", *International Journal of Marine and Coastal Law*, 2022, 37:1, 152-165; Pradeep Singh, "The two-year deadline to complete the International Seabed Authority's Mining Code: Key outstanding matters that still need to be resolved", *Marine Policy*, 2021, 134, 104804; Pradeep Singh, "Two-year Countdown for Deep Seabed Mining", *RIFS News*, August 2022,

behind the insertion of the two-year rule in the 1994 Implementing Agreement and the legal implications surrounding its recent invocation at the Authority. Bearing in mind the many open legal questions that remain unanswered, this paper aspires to offer some insights and potential interpretations. But first, this discussion paper will highlight some recent developments at the Authority that specifically concern the consequences of missing the now fast approaching 'deadline' of 9 July 2023.

1.2 Status of the negotiations and recent discussions on "what if" at the Authority

Deliberations on the draft text of the exploitation regulations are currently ongoing at the Authority, with negotiations having formally started in 2019 at the Council. After an abrupt hiatus since February/March 2020 due to the COVID-19 pandemic, followed by the Republic of Nauru's invocation of the two-year rule in late June 2021, negotiations resumed after the Council met in December 2021. The Council met three times in 2022 (21 March to 1 April, 18 to 29 July, and 31 October to 11 November), where textual deliberations progressed through Council open-ended and informal working groups as well as in plenary. At the end of the November 2022 meeting, the extent of progress varied across the different groups, with some having completed a second round of reading while others completed first readings or are only halfway through the first readings of their respective texts under the draft regulations. Following the meeting, member states, observers and stakeholders were invited to submit specific text proposals until 15 January 2023.⁵ At the time of writing, the co-facilitators/President were in the midst of finalizing a new set of revised texts within their respective working groups/plenary. These will be then form the basis of the next round of negotiations at the Council, which will meet from 16 to 31 March 2023 (and scheduled to subsequently meet only after the deadline expires, from 10 to 21 July and 30 October to 8 November).

Alongside the negotiations on the regulations, member states of the Authority have also in recent months started discussing the possibility that the Council might not be able to complete the adoption of the regulations by 9 July 2023 and the potential consequences that might follow should that increasingly likely event happen. Indeed, at the insistence of a group of member states, the Council dedicated a full day during its last meeting to discuss this topic. The morning session of the Council meeting on 4 November 2023 was dedicated to review the Council's progress on the development of the regulations while a preliminary exchange of views on the consequences of missing the deadline (colloquially called the "what-if" scenario) took place in the afternoon. As noted by the President of the Council, "there was consensus among delegations that no exploitation should proceed until the legal framework for mining had been finalized, with the completion and adoption of the regulations on exploitation and the relevant accompanying standards, especially environmental standards".⁶ A sizeable number of member states voiced their concern that it would be near impossible for the Council to meet the deadline, especially if the priority of the Council remains the same, namely to adopt and implement a robust and effective set of regulations before the commencement of any exploitation activities.

Belgium, intervening to state that the work of the Council on developing the exploitation regulations should not be constrained by artificial deadlines (of which the chances of meeting is "close to zero" anyway) and that the Council should already start preparing to brace for any ensuing consequences of missing the deadline,⁷ proposed to continue discussions on the topic through an intersessional informal

<https://www.rifs-potsdam.de/en/news/two-year-countdown-deep-seabed-mining>; Pradeep Singh, "Commentary: Can the invocation of the 'two-year rule' at the International Seabed Authority be challenged?", DSM Observer, September 2021, <https://dsmobserver.com/2021/09/commentary-can-the-invocation-of-the-two-year-rule-at-the-international-seabed-authority-be-challenged/>.

⁵ Statement by the President of the Council on the work of the Council during the third part of the twenty-seventh session, ISBA/27/C/21/Add.2, paragraphs 4-9.

⁶ Ibid, paragraphs 10-11.

⁷ Statement by Belgium in ISA Council regarding the roadmap 2023, 4 November 2022, https://www.isa.org.jm/wp-content/uploads/2022/12/Statement_Belgium_roadmap_9NOV22.pdf.

dialogue (IID). A draft decision to this effect, submitted by Belgium, was subsequently adopted at the Council by consensus.⁸ The IID, co-facilitated by Belgium and Singapore, will soon take place in the form of a webinar on 8 March 2023. Ahead of the webinar, the co-facilitators issued a note to explain that the purpose of the IID is to discuss the possible situation that the Council could end up at, if it misses the deadline, pursuant to subparagraph (c) of section 1(15).⁹ The aim of the IID, as the co-facilitators explain, is to explore “commonalities in possible approaches and legal interpretations in this respect, with a view to finding a consensus within the Council”.¹⁰ In order to get things started, the co-facilitators posed three broad questions and invited responses, which are:¹¹

- (1) *What is the meaning of the phrase ‘consider and provisionally approve’ in subparagraph (c)? Can the Council disapprove a plan of work after having considered it? Can the consideration of a pending application be postponed until certain conditions are met? Does the use of the word ‘elaboration’ in subparagraph (c) carry any legal significance?*
- (2) *What is the procedure and what are the criteria to be applied in the consideration and provisional approval of a pending application under subparagraph (c), in the light of, amongst others, article 145 of UNCLOS? In this regard, what roles do the Council and the Legal and Technical Commission (LTC) respectively play?*
- (3) *What are the consequences of the Council provisionally approving a plan of work under subparagraph (c)? Does provisional approval of a plan of work equate to the conclusion of an exploitation contract?*

On a related note, the Council also reviewed its progress on the exploitation regulations during its last meeting on 4 November 2022. Given the numerous interventions from member states expressing genuine doubts over the ability of the Council to adopt the regulations in July 2023, the Council’s ‘roadmap’ for 2023, which previously had July 2023 listed down for adoption of the regulations, was revised. The roadmap now states the following for July 2023 instead: “Review of progress and adoption of regulations in the event that they are ready for adoption”.¹² Interestingly, in the provisional agenda for the Council for 2023 that the Secretary-General recently prepared (and will come up for adoption at the Council on the first day of its upcoming March meeting),¹³ agenda item 10 states the following: “Consideration, with a view to adoption, of the draft regulations on exploitation of mineral resources in the Area”.¹⁴ Similar wording has been used in Council agenda items in the past with respect to the exploration regulations, but given the current circumstances where many key outstanding matters remain in the negotiations, such wording here might seem a little obtrusive.¹⁵ Perhaps this agenda item should be slightly amended by the Council as follows: “Consideration, with a view to adoption *if ready* ...” [emphasis added], which would be more attuned to the position taken by the Council as reflected in the roadmap for 2023.

⁸ Decision of the Council relating to the possible scenarios and any other pertinent legal considerations in connection with section 1(15), ISBA/27/C/45.

⁹ Co-Facilitators’ Note on the webinar in the context of the informal intersessional dialogue to facilitate further discussion on the possible scenarios and any other pertinent legal considerations in connection with section 1(15), <https://www.isa.org.jm/wp-content/uploads/2023/02/Co-Facilitators-Note-Webinar-Informal-Intersessional-Dialogue.pdf>.

¹⁰ Ibid, paragraph 7 (see also ISBA/27/C/45).

¹¹ Ibid, paragraph 8.

¹² Statement by the President of the Council, fn. 5 above, at paragraph 15 and Annex II (at the bottom of page 19 of the document).

¹³ As per Rule 11 of the Rules of Procedure of the Council, the Secretary-General is responsible for drawing up the provisional agenda for the Council. Rule 14 of the same provides that at “the beginning of each session, the Council shall adopt its agenda for the session on the basis of the provisional agenda”.

¹⁴ Provisional agenda of the Council, ISBA/28/C/L.1.

¹⁵ Indeed, such wording seems to have been prompted by the July 2023 deadline under the two-year rule. Had that not been invoked, it seems plausible that similar wording that was used over the last few years in the Council’s agenda for this item, i.e. “Draft regulations on exploitation of mineral resources in the Area” (see ISBA/25/C/1, item 11; ISBA/26/C/1, item 12; and ISBA/27/C/1, item 12), may have been maintained for this year’s agenda.

2. "What if" scenario: Open legal questions

2.1 The two-year rule: Underlying rationale and its application in present day

It is important to understand why the two-year rule was inserted in the 1994 Implementation Agreement in order to determine the extent of its application in present day. Hence, some additional background information is necessary to fully grasp the genesis and underlying rationale behind the two-year rule.¹⁶

The current regulatory framework is clear in that all mineral-related activities in the Area must conform to the relevant rules, regulations and procedures (RRPs) established by the Authority.¹⁷ RRP's relating to exploration and exploitation shall first be developed and adopted at the Council before these are sent to the consideration and approval by the Assembly.¹⁸ However, having been already adopted by the Council, such RRP's will already "remain in effect on a provisional basis until approved by the Assembly or until amended by the Council in the light of any views expressed by the Assembly".¹⁹ Pursuant to UNCLOS, RRP's relating exploration and exploitation in the Area shall be adopted by consensus at the Council, which legally means in the absence of any formal objection.²⁰ In other words, the existence of one formal objection by just one Council member state would block the adoption of the RRP's in question, which meant that the intended activity could not proceed. Indeed, this potentiality under UNCLOS was unacceptable to a sizeable number of states, whereby the vast majority of the Council could be held to ransom by a single or small minority, and led to the birth of the two-year rule.

The two-year rule, inserted in the 1994 Implementing Agreement, seeks to address such a potential 'deadlock' situation,²¹ and in this sense, provides a small window of exception to the rule. If the conditions under section 1(15) have been met, i.e. the submission of a request from a member state and the expiry of the prescribed time of two years, an application that happens to be pending shall still be considered notwithstanding the absence of the relevant RRP's. Put differently, the introduction of the two-year rule effectively meant that a sole Council member or small group of members, dissatisfied with any RRP's that are up for adoption before the Council, would not be able to stop the consideration of any plans of work for exploitation by simply blocking the adoption of the applicable RRP's. In fact, the two-year rule generates a disincentive to object and cause a 'standoff' situation where it is just a single or small number of Council members that are opposed to adopting the regulations. This is because the majority can simply still proceed to consider (and perhaps eventually to provisionally approve) an application for exploitation under a compromised setting where the regulations are absent.

¹⁶ For more throughout discussions, see references in fn. 4.

¹⁷ Articles 3(3) and (4) of Annex III to UNCLOS.

¹⁸ Article 162(2)(o)(ii) and Article 162(2)(f)(ii) of UNCLOS.

¹⁹ Article 162(2)(o)(ii) of UNCLOS.

²⁰ Article 161(8)(d) of UNCLOS.

²¹ Michael Lodge, 'Opening remarks: Third Annual Consultative Meeting between Contractors' (10 October 2019), at p. 4, available at https://isa.org.jm/files/documents/EN/SG-Stats/10_October_2019.pdf: "[...] the architects of the 1994 Agreement [stipulated] provisions to prevent deadlock in the Council in the form of the two-year trigger clause [...]".

Having considered the genesis and underlying rationale behind the two-year rule, it is now necessary to turn to the extent of its application in present day. It is obvious that member states are in the midst of conspicuously negotiating the draft exploitation regulations in good faith, and while there remains many outstanding members to resolve, there has been no situation of deadlock or any attempts to frustrate the progress at the negotiating table. In contrast to the circumstances that led to its insertion, the two-year rule now appears to be used by a minority group to compel the Council to complete the adoption of the regulations by 9 July 2023 or be prepared to consider an application in their absence. In this respect, the Republic of Nauru may have acted within its rights to invoke the provision despite the above. Conversely, the member states are also well within their rights in determining their response. Given the political nature of the matter at hand, the positions and responses of the majority of Council members would have a significant bearing on how the numerous legal questions arising from the invocation of the two-year rule at the Authority will be answered.

2.2 Open legal questions in light of the "what if" scenario

This section attempts to offer some insights and potential legal interpretation options to answer some of open legal questions that arise in light of the two-year rule, specifically with respect to the “what if” scenario where the Council misses the deadline of 9 July 2023. The list of questions below is non-exhaustive and the questions are largely extracted from earlier works of the author.²²

2.2.1 What are the essential components anticipated under the RRP of the Authority for exploitation and how do things stand with the invocation of the two-year rule?

The main paragraph (or chapeau) of section 1(15) requires the RRP of the Authority to be developed based on the principles contained in sections 2, 5, 6, 7 and 8 of the Annex to the 1994 Implementing Agreement. These refer to provisions relating to the Enterprise, transfer of technology, commercial production policies, economic assistance to developing countries reliant on terrestrial mining whose economies are adversely affected because of activities in the Area, and the financial terms of exploitation contracts, respectively. As such, these may be considered as among the essential components anticipated under the RRP of the Authority. In addition to the above, this discussion paper will discuss two other essential components: environmental requirements, and the design of a mechanism for the equitable sharing of benefits.

On environmental requirements, UNCLOS requires the Authority to take necessary measures to ensure the effective protection of the marine environment from the harmful effects of mining activities, and entrusts the Authority to develop RRP to secure such effective protection.²³ Indeed, there was agreement among the negotiators of the 1994 Implementing Agreement that “environmental considerations were of the utmost importance” and that the high standards imposed by UNCLOS “would be further elaborated by the Authority” once it comes into existence.²⁴ Not surprisingly, the 1994 Implementing Agreement stipulates that “between the entry into force of [UNCLOS] and the approval of the first plan of work for exploitation, the Authority shall concentrate on”, among others:

- “The adoption of rules, regulations and procedures necessary for the conduct of activities in the Area as they progress”;

²² See again, fn. 4. Due to space constraints, some questions that were extensively discussed there have been omitted from the discussion here.

²³ Article 145, read together with Article 17 of Annex III, of UNCLOS.

²⁴ David Anderson, “Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea”, *The International and Comparative Law Quarterly*, 1993, 42:3, 654-664, 660.

- “The adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment”; and
- “Timely elaboration of rules, regulations and procedures for exploitation, including those relating to the protection and preservation of the marine environment”.²⁵

Two observations can be made in this respect. First, there is a clear expectation under UNCLOS that RRP as well as environmental standards must be in place before any application to conduct exploitation activities is approved. Indeed, it has been noted that “environmental protection is front and centre of the Authority’s responsibilities under [UNCLOS]. Seabed mineral exploitation cannot be permitted to proceed unless the Authority is satisfied that rigorous environmental safeguards are in place through globally applicable regulations that are binding upon member States”.²⁶ Second, while closely related, there seems to be a plausible though subtle distinction between RRP for exploitation activities in the Area and RRP (incorporating standards) for the protection of the marine environment.²⁷ If this is the case, it may be arguable that subparagraph (c) only applies to an instance where RRP relating to environmental matters are already in place (such as those adopted and provisionally applied by the Council pending approval by the Assembly) but RRP relating to exploitation activities are still under negotiation. Indeed, the main paragraph of the two-year rule recognizes that there may be more than one set of RRP that would apply to exploitation activities, but only singles out RRP relating to exploitation activities in subparagraph (c). Moreover, subparagraph (c) recognizes the possibility of there being other applicable RRP “that the Council may have adopted provisionally”. Such an interpretation, where the existence of environmental regulations (that are at least adopted by the Council and would provisionally apply) are a prerequisite to subparagraph (c) applying, would certainly give effect to the clear and shared position at the Council that “no exploitation should proceed until the legal framework for mining had been finalized, with the completion and adoption of the regulations on exploitation and the relevant accompanying standards, especially environmental standards”.²⁸

On benefit sharing, subparagraph (b) interestingly refers to Article 162(2)(o) of UNCLOS as a whole, which suggests that the Council shall not only develop RRP that fall under Article 162(2)(o)(ii), but also RRP referred to in Article 162(2)(o)(i), which deals with the equitable sharing of financial and other economic benefits. As such, it is arguable that the design of a mechanism to enable the equitable sharing of benefits is an integral and indispensable component of the exploitation regime, without which, any application for exploitation activities should not be approved. This is important, because if the Authority, acting on behalf of humankind, “fails to get it right with the payment mechanism, it will not get it right with the entire ISA deep seabed mining regime”.²⁹ Similar to the above line of reasoning with respect to RRP for environmental protection, an argument could be made that subparagraph (c) would only come into operation if RRP on benefit sharing are already in place. Effectively, this would mean that the Council is not obliged to consider any pending applications under the two-

²⁵ Section 1(5) to the Annex of the 1994 Implementing Agreement, specifically, paragraphs (f), (g) and (k), but see also paragraphs (h), (i) and (j).

²⁶ Michael Lodge, ‘Keynote speech: Sustainable Blue Economy Conference in Nairobi, Kenya’ (27 November 2018) available at https://isa.org.jm/files/documents/EN/SG-Stats/27_November_2018.pdf.

²⁷ In fact, while developing the initial drafts for the exploitation regime, two separate documents were prepared by the Secretariat for the Legal and Technical Commission (LTC). One was entitled “Draft regulations on exploitation of mineral resources in the Area” while the other was called “A discussion paper on the development and drafting of Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters)”. The decision was eventually taken to merge both streams into one set of regulations, however, this initial approach could support an interpretation whereby rules, regulations and procedures for environmental protection can take a distinct form than rules, regulations and procedures for exploitation activities.

²⁸ See President of the Council’s statement, fn. 5 above, at paragraphs 11.

²⁹ Pradeep Singh, as quoted in RIFS, “Launch of IASS-UBA Policy Brief entitled “A comprehensive approach to the payment mechanism for deep seabed mining” (25 March 2021), available at <https://www.rifs-potsdam.de/en/events/launch-iass-uba-policy-brief-entitled-comprehensive-approach-payment-mechanism-deep-sea-bed>.

year rule while the RRP on exploitation remain absent until after RRP relating to environment protection and benefit sharing are in place. In any case, even if these arguments are not persuasive from a legal sense, they may carry significant weight from a political perspective.

Finally, the interchanging use between the words “elaborate/elaboration” and “adopt/adoption” throughout section 1(15) appears to be deliberate, and if so, arguably carries legal implications. Subparagraph (b) speaks to the adoption of the RRP within the prescribed time, however, subparagraph (c) provides the implications that arise if the elaboration of the exploitation RRP are not completed. This gives rise to a possible interpretation that the Council may decide that the elaboration of the regulations are completed but to postpone their adoption until, for example, when the necessary standards and guidelines to accompany and give effect to the regulations (as identified under phase one by the LTC) are also ready for adoption. Such an approach would also give effect to the longstanding understanding at the Council that “nothing is agreed until everything is agreed”.³⁰

2.2.2 Must an application be submitted by the entity on whose behalf the provision was invoked? Can any other entity submit an application?

At the outset, it is important to note that the prescribed time of two years under subparagraph (b) is arguably not a “hard” deadline. This is obvious because subparagraph (c) goes on to provide for the implications that could occur should the Council miss the deadline. Moreover, it is also clear that there are no real legal consequences of missing the deadline, strictly speaking, up until an application for the approval of a plan of work is submitted. On this note, there is no compulsion under section 1(15) for the entity on whose behalf the provision was invoked to submit an application. Indeed, the provision itself does not impose any such requirement and the entity concerned may choose to not submit an application or defer it for whatever reason. Conversely, it does appear that any other applicant may submit an application, since subparagraph (c) does not limit the category of applicants and it does not make any cross-reference to subparagraph (a).³¹

Perhaps more crucially, there is likewise no obligation under UNCLOS or the 1994 Implementing Agreement for the member state concerned, the Republic of Nauru, to sponsor an application by the entity on whose behalf the provision was invoked. In fact, Nauru or any other member state considering to sponsor an application for exploitation might be deterred from doing so while the regulations remain absent. Given that states sponsoring activities in the Area expose themselves to potential liability under international law, it would seem to be a much heightened risk for a state to sponsor an exploitation plan of work while the regulations have not been finalized. Indeed, the exploitation regulations once finalized will serve many purposes, but it will also provide clarity on the roles of sponsoring states and offer protection to them. Since there is no compulsion, at least under UNCLOS and the 1994 Agreement, to sponsor an application for the approval of a plan of work for exploitation especially in the case where the regulations are non-existent, member states may not wish to take on this risk of indeterminable liability or even reputational harm.

2.2.3 Is it an automated approval process or can an application be considered and rejected? What is the applicable procedure and evaluation criteria in considering an application?

The use of the phrase “consider and provisionally approve” in subparagraph (c) raises many issues, which will be discussed here. First, it raises the question of whether approval is automatic. As argued before, the phrase should not be interpreted to mean that approval is automatic. Indeed, where the phrase “consider and approve” is used elsewhere is used in UNCLOS to refer to the organs of the Authority, it is clear that such positive framing does not mean that approval is a mere formality. For

³⁰ For a more throughout consideration of this matter, see again fn. 4.

³¹ As opposed to subparagraph (b) where a cross-reference is made to subparagraph (a).

example, UNCLOS allows any of its state parties to propose an amendment to Part XI, which will then be debated at the Council, and if approved, will be sent to the Assembly for approval.³² UNCLOS stipulates that “those organs shall have full powers to *consider and approve* the proposed amendment” [emphasis added].³³ It is obvious that the use of the phrase “consider and approve” here does not mean that the approval of any proposed amendment to Part XI of UNCLOS is a mere formality. In fact, as the subject-matter of an amendment to Part XI also requires consensus at the Council (i.e. the absence of any formal objection),³⁴ it is highly challenging for proposed amendments of any significant nature to be adopted at the Council. Consequently, the phrase “consider and provisionally approve” in subparagraph (c) should also be treated similarly, and such an application can be disapproved.

Second, even though “consider” and “provisionally approve” appear side by side in subparagraph (c) and are connected with the word “and”, there is room to argue that these are separate processes. In other words, the application must first be considered before a decision can be taken on whether to approve or disapprove it. Moreover, it is interesting to note how subparagraph (c) differs from Article 162(2)(j) of UNCLOS (which no longer applies owing to the 1994 Implementing Agreement³⁵), where only the word “approve” is used (and not “consider and approve”) in connection with the Council dealing with mining applications (which have been reviewed by the LTC). The 1994 Implementing Agreement also does not use the word “consider” and only uses “approve” when prescribing the decision-making process at the Council for the approval of plans of work following the review and recommendations of the LTC. While this is not to say that there is no element of consideration at the Council under such circumstances, it is arguable that the insertion of the word “consider” in subparagraph (c) is deliberate and requires the Council to play a more engaged role in the process. This is not surprising, given that dealing with an application in the absence of RRP is a very delicate matter (and laced with political considerations) that obviously requires greater attention at the Council.

The third issue, which is closely connected to the above, pertains to the roles of the Council and its subsidiary body, the LTC in the consideration and approval process under subparagraph (c). This is important, because the voting rules at the Council on the approval of an application depend on whether the LTC plays a formal role in the process where it makes a recommendation to the Council, as well as on the nature of such recommendations. Assuming the LTC is involved and recommends the approve of a plan of work, the Council shall approve the same “unless 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 decides to disapprove a plan of work”. If the LTC “recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work” with a “two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers”.³⁶

On the one hand, subparagraph (c) only speaks to the Council and is silent on the role of the LTC. Moreover, as explained earlier, the inclusion of the word “consider” in subparagraph (c) appears to be deliberate. This could be interpreted to mean that the Council should play a more active role in situations arising under the two-year rule as opposed to a more passive role under ordinary circumstances where RRP are in place and an application is submitted. In addition, subparagraph (c) could have been more specific or prescriptive on the role of the LTC under the two-year rule if the intention was indeed to place such responsibilities on it. It is certainly quite intriguing that the 1994 Implementing Agreement, in contrast, was very prescriptive on the role of the LTC with respect to exploration activities, as seen in the provisions below:

³² Article 314 of UNCLOS.

³³ *Ibid.*

³⁴ Article 161(8)(d) of UNCLOS.

³⁵ Section 3(11)(b) of the Annex to the 1994 Implementing Agreement.

³⁶ Section 3(11)(a) of the Annex to the 1994 Implementing Agreement.

- “An application for approval of a plan of work for exploration shall be considered by the Council following the receipt of a recommendation on the application from the Legal and Technical Commission”.³⁷
- “The approval of a plan of work for exploration shall be in accordance with article 153, paragraph 3, of the Convention”.³⁸
- “An application for approval of a plan of work for exploration, subject to paragraph 6(a)(i) or (ii), shall be processed in accordance with the procedures set out in section 3, paragraph 11, of this Annex”.³⁹

While all the above quite convincingly speaks to excluding or limiting the role of the LTC to a more informal one, there are also reasons to support an argument on the other hand that the LTC plays its usual role in evaluating such applications and providing formal recommendations to the Council. Indeed, UNCLOS does provide that all applications for activities in the Area “shall be approved by the Council *after review by the Legal and Technical Commission*” [emphasis added],⁴⁰ whereby the negotiators of the 1994 Implementing Agreement would have been well aware of this provision. Likewise, the LTC is the technical body established for the purpose of advising the Council, including on plans of work, and the negotiators of both UNCLOS and the 1994 Implementing Agreement were mindful that decisions on plans of work should not be a subject matter that is politicized (i.e. where certain countries can be targeted for extraneous reasons). Moreover, a mining application contains a lot of confidential information, which remains protected at the LTC, but could be compromised if the application is considered at the Council, whereby members are not subjected to confidentiality rules and all formal Council documents are anyway public documents. Finally, seeing that the 1994 Implementing Agreement does, on numerous instances, make explicit that certain provisions under UNCLOS do not apply, it could be argued that the negotiators have easily done so in this instance if the intention was to exclude or limit the role of the LTC.

In this respect, UNCLOS and the 1994 Implementing Agreement are to be read as one single instrument, and where there are any inconsistencies, the 1994 Implementing Agreement shall have priority. Further, as per general treaty interpretation rules, the specific provision will prevail over the general provision. However, it is also obvious that both instruments will need to be interpreted in a way that ensures harmony and coherence with each other, and only if such an interpretation is not possible, could it be said that there is inconsistency between the two instruments. In any case, it is clear that the decision-making process under subparagraph (c) is an open question with convincing arguments on both sides. However, it is not just the procedural aspect that requires more clarity, but also the more substantive aspect of what criteria to apply in evaluating such applications. Indeed, as explained elsewhere,⁴¹ this task would be near impossible without the relevant RRP, especially ones relating to environmental protection, which UNCLOS and the 1994 Implementing Agreement expects to be in place before the approval of any plans of work for exploitation. Such legal gaps arising from subparagraph (c) is concerning and the Council would need to address the ambiguities. There is indeed a precedent where the Council had to step in to fill gaps arising from UNCLOS and the 1994 Implementing Agreement, namely, with the procedures and evaluation criteria for extending existing exploration plans of work through an extension of the contract. While the 1994 Implementing Agreement allows contractors to apply for such an extension,⁴² it was largely silent on the procedures and evaluation criteria that are involved. In order to deal with that, the Council, acting on recommendations by

³⁷ Section 1(6)(a) of the Annex to the 1994 Implementing Agreement.

³⁸ Section 1(6)(b) of the Annex to the 1994 Implementing Agreement.

³⁹ Section 1(8) of the Annex to the 1994 Implementing Agreement.

⁴⁰ Article 153(3) of UNCLOS.

⁴¹ See fn. 4.

⁴² Section 1(9) of the Annex to the 1994 Implementing Agreement.

the LTC, adopted a decision to establish the applicable procedures and applicable criteria,⁴³ including to clarify the role of the LTC⁴⁴ and the decision-making process at the Council.⁴⁵

The present situation, faced with perhaps even more legal gaps and questions, demands a similar response. Through a Council decision, the Council could clarify the role of the LTC, including to designate it with a more informal role of providing views or opinions and not to provide formal recommendations.⁴⁶ The Council could also issue directives to the LTC,⁴⁷ including with instructions to not provide any formal recommendations if certain conditions are not met, or to give directions that it would not be appropriate for the LTC to make recommendations in the absence of RRP.⁴⁸ However, it should be noted that attaining such a decision to clarify the procedures and evaluation criteria under subparagraph (c) in itself would be a challenging task. It would seem that if there were no agreement to take such a decision, the voting procedure at the Council would likely be considered as a matter of substance, even though there are procedural elements within such a decision.⁴⁹ However, it could also be argued that such a decision requires consensus (i.e. the absence of any formal objection) at the Council, as it is quintessentially a form of rules, regulations or procedures that relates to exploitation. As UNCLOS stipulates, if there is a doubt in relation to which voting rules apply, the question shall be treated as one "requiring the higher or highest majority or consensus as the case may be".⁵⁰

Finally, there does seem to be room, albeit limited, for the consideration of an application to be deferred or delayed. As an example, the Council may decide that applications should not be considered until RRP are in place, or at least to defer such consideration until a set of procedures and evaluation criteria to assess applications in the absence of RRP under the two-year rule has been established by the Council. Alternatively, the consideration process may commence but the Council could decide to defer the decision on whether to approve or disapprove the application until such time in future. For instance, if the LTC is involved and makes a recommendation to approve a plan of work, the Council could decide to extend the default period of 60 days under section 3(11)(a) of the Annex to the 1994 Implementing Agreement for it to take a decision. Here, the Council could, for instance, decide to postpone the consideration of the recommendations to its next meeting (and could, theoretically, do so indefinitely). Indeed, the Council may choose 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",⁵¹ which certainly applies in the present situation as well.

⁴³ Decision of the Council relating to the procedures and criteria for the extension of an approved plan of work for exploration pursuant to section 1(9) of the Annex to the 1994 Implementing Agreement, ISBA/21/C/19.

⁴⁴ *Ibid.*, paragraphs 8-13.

⁴⁵ *Ibid.*, paragraphs 14-15. Notably, the decision explicitly refers to section 3(11) of the Annex to the 1994 Implementing Agreement as being applicable.

⁴⁶ This would negate the application of section 3(11) of the Annex to the 1994 Implementing Agreement.

⁴⁷ The Council is empowered to issue guidelines or directives to its subsidiary organs under Article 163(9) of UNCLOS, which the LTC would have to exercise its functions in accordance with and comply.

⁴⁸ As provided under Article 165(2)(b), the LTC in reviewing plans of work shall "submit appropriate recommendations to the Council", which include the nature of recommendations anticipated under section 3(11) of the Annex to the 1994 Implementing Agreement but possibly also beyond.

⁴⁹ As a general rule, section 3(2) of the Annex to the 1994 Implementing Agreement provides that all decisions at the Authority, including the Council, should be taken by consensus. If all efforts to achieve consensus as been exhausted, as per section 3(5) of the Annex to the 1994 Implementing Agreement, "decisions by voting in the Council on questions of procedure shall be taken by a majority of members present and voting, and decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers".

⁵⁰ Article 161(8)(g) of UNCLOS.

⁵¹ Section 3(6) of the Annex to the 1994 Implementing Agreement.

2.2.4 What are the legal effects of a provisional approval of a plan of work for exploitation? Does provisional approval equate to the award of a contract?

Before going into further detail in answering this question, it is necessary to explain that subparagraph (c) uses the word “provisional” twice and in two different contexts. First, it refers to the ability of the Council to “provisionally” approve a plan of work for exploitation that is pending despite RRP for exploitation being absent, and second, that the consideration of the application shall be based, among others, on any RRP that the Council may have adopted “provisionally”. While seemingly connected, it is suggested that there is a distinction between the two. The first use of “provisionally” in subparagraph (c) speaks to the status of such a plan of work if approved, while the second use of “provisionally” refers to the status of any RRP that happen to be adopted by the Council but is pending approval from the Assembly. In other words, a plan of work can be provisionally approved under subparagraph (c) without there being any RRP at all, or, if any, based on RRP that the Council has decided to adopt and apply provisionally. As argued elsewhere, the wording used here seems to suggest that the status of a provisionally approved plan of work for exploitation is conditional, temporary and tentative in nature.⁵² As such, it should be treated distinctly from a contract for exploitation, which provides security of tenure, bearing in mind that it is trite that there can be no exploration or exploitation activities in the Area without a contract with the Authority.⁵³

Indeed, it seems to be arguable that while an application may be considered and provisionally approved under subparagraph (c), the default position would be that contracts may only be concluded after the relevant RRP for exploitation are in place (which means, at the very least, that they have been adopted by the Council and provisionally applied pending the Assembly’s approval). In fact, this argument is supported by the early practice of the Authority in the case of the pioneer investors regime. While such plans of work for exploration were deemed to be approved several years earlier, the then Secretary-General could only conclude the contracts after the exploration regulations (for polymetallic nodules) were adopted by the Council by consensus. This is reflected in a report prepared by the then Secretary-General as follows: “Once adopted by the Council, the regulations will be provisionally applied pending approval by the Assembly in accordance with article 162, paragraph 2(o), of the Convention. The Secretary-General will also then be able to issue contracts to the seven registered pioneer investors whose plans of work for exploration were considered to be approved by the Council on 27 August 1997”.⁵⁴ The Council adopted the exploration regulations for polymetallic nodules on 13 July 2020 (and notably, while the Council adopted and decided by consensus to apply the regulations provisionally pending the approval of the Assembly, the Assembly met and approved the said regulations on the same day).⁵⁵ Thereafter, the contracts with the former pioneer investors were respectively negotiated and concluded accordingly

Another point to note is the practice of the Council, in approving plans of work, always contains a direction to the Secretary-General to enter into negotiations and conclude the contract with the successful applicant. In the case of the former pioneer investors, where the plans of work were considered to be approved in a decision by the Council, there was an operative paragraph on this point. The paragraph provided that the Council: “Requests the Secretary-General of the Authority to take the necessary steps to issue the plans of work in the form of contracts, incorporating the applicable obligations under the provisions of the Convention and the Implementation Agreement and resolution II and *in accordance with the regulations on prospecting and exploration for polymetallic nodules in the Area*

⁵² Though this does not mean that it is without value, since it could be used as an instrument to borrow, or to attract investors, as well as confers an expectation to a contract (for which the successful applicant, now a “prospective contractor”, would have standing to invoke the dispute resolution process under Part XI (see again fn. 4).

⁵³ See again, fn. 4.

⁵⁴ Report of the Secretary-General of the Authority under Article 166(4) of UNCLOS, ISBA/6/A/9.

⁵⁵ See Statement by the President of the Council (ISBA/6/C/13, paragraph 7) and Statement by the President of the Assembly (ISBA/6/A/19, paragraph 15) relating to the 6th Session of the Authority.

and a standard form of contract to be approved by the Council" [emphasis added].⁵⁶ In this instance, it was made clear in the Council decision that the contracts must be concluded in accordance with regulations and a standard form of contract that was still to be approved by the Council. Accordingly, "in accordance with the directive of the Council, it became incumbent upon the Secretary-General to prepare draft contracts for exploration in respect of each of the seven registered pioneer investors and accordingly draft contracts were prepared and submitted to each of the registered pioneer investors in August 2000".⁵⁷ Indeed, aside from the decision of the Council directing the Secretary-General to conclude contracts with the former pioneer investors once the exploration regulations are in place, all subsequent decisions of the Council in approving a plan of work contained an operative paragraph at the end requesting the Secretary-General to conclude contracts, in accordance with the applicable regulations that have been adopted, with the successful applicants.⁵⁸

Thus, it is clear that the approval of a plan of work by the Council and the conclusion of a contract between the successful applicant and the Secretary-General (on behalf of the Authority) are two separate processes, although the former is necessary in order for the latter to be negotiated and signed. With this in mind, it is now time to turn to the two-year rule. Subparagraph (c) speaks about the provisional approval of a plan of work but does not mention a contract or incorporate the typical phrase used both in UNCLOS and in the 1994 Implementing Agreement, i.e. "in the form of a contract". This gives room to contend that the negotiators of the 1994 Implementing Agreement deliberately made this distinction (although it is also now clear that all approved plans of work, including those by the Enterprise, must take the form of a contract). It seems apparent that if the Council decides to provisionally approve a plan of work for exploitation under subparagraph (c), it would also be required to insert an operational paragraph in the decision regarding the eventual conclusion of a contract. It would appear that the Council has some discretion in this respect (and could even direct the Secretary-General to conclude a contract based on the provisionally approved plan of work and notwithstanding the absence of the relevant regulations), although the earlier discussed precedent from the approval of the plans of works by former pioneer investors is arguably instructive. However, such a maneuver would seemingly be in direct contradiction with the legal framework for activities in the Area. Indeed, it is the contract that would bind the mining operator and be enforceable against it, and not the approved plan of work. Likewise, the responsibilities of the sponsoring state over the mining entity is also dependent on the contractual obligations of the contract. In this respect, it is clear that contracts must conform to the applicable RRP, UNCLOS and the 1994 Implementing Agreement. Moreover, the standard terms as well as financial terms for an exploitation contract are being currently being negotiated as part of the exploitation RRP, which will be impossible for the Secretary-General to incorporate into any contract for as long as they remain absent. Consequently, directing the Secretary-General to conclude a contract based on a provisionally approved plan of work for exploitation in the absence of the applicable RRP is not only risky but may also be illegal.⁵⁹

⁵⁶ Decision of the Council on requests for approval of plans of work for exploration (by pioneer investors), ISBA/3/C/9, paragraph 3.

⁵⁷ Report of the Secretary-General on status of contracts for exploration, ISBA/7/C/4, paragraph 4.

⁵⁸ See ISBA/11/C/10 (paragraph 4), ISBA/18/C/24 (paragraph 3) and ISBA/19/C/13 (paragraph 3) among others.

⁵⁹ Nevertheless, the Council may choose to legalize this by developing an interim or transitional stage between exploration and commercial exploitation, which could house such pre-exploitation conditional contracts that have been awarded based on provisionally approved plans of work for exploitation under the two-year rule (see fn. 4 and ISA Technical Study 11, 2013). However, even this would take the form of RRP that would arguably require consensus at the Council, and thus, easier said than done.

3. Conclusion and Next Steps

The two-year rule should not be given effect in a way that accelerates mining activities, especially not at this point in time simply to accommodate the interest of a small group of states or private actors. The invocation of this provision has given member states an opportunity to reflect on the state-of-affairs and to shape the Council's response to the invocation of the two year rule as it moves forward. Indeed, exchanges on the "what if" scenario at the Council so far has shown that there is broad agreement that there should be no mining without the regulations, and an increasingly shared view that the Council should be allowed to work on the regulations without any deadlines. It is crucial to ensure that the regulations are not adopted until they are comprehensive, robust, enforceable and able to ensure the effective protection of the marine environment as well as deliver for the benefit of humankind. The invocation of the two year rule should not change this ambition, particularly bearing in mind the rationale behind which the provision was inserted in the first place. There is currently no deadlock at the Council, rather, it is obvious that the Council and its member states are conspicuously negotiating the regulations, and will soon negotiate the accompanying standards and guidelines, benefit sharing mechanisms and compensation to terrestrial mining developing countries, as well as other intrinsically related matters. This process takes time, and it is not the case that states are procrastinating or dragging their feet. Accordingly, as its solidarity is being tested, it is important to ensure that the Council remains in control of the situation and does not succumb to pressure from a handful of actors primarily coming from industry and not driven by states.

As for next steps, it would be crucial for the Council to explore ways to find commonalities in views and to develop its own legal responses and interpretation of the two-year rule and its implications. The IID webinar on 8 March 2023 will contribute towards consensus building at the Council, although much work remains and the next few sessions of the Council will be critical. In more immediate terms, the Council should attempt to seek agreement on how to approach the "what if" scenario, including to develop a set of procedures and evaluation criteria to clarify the roles of the organs involved when dealing with applications that happen to be submitted under subparagraph (c). Ideally, such a decision should have the default outcome of disapproving an application or deferring its consideration and approval until the appropriate RRP and other essential components are in place. This may take time and the rate of acceptance would largely depend on the nature of the document. At the very least, the Council should promptly agree on a "backstop" decision that no applications submitted pursuant to subparagraph (c) will be entertained until the Council has first decided on the applicable procedures and evaluation criteria to deal with them.

While the Council should be able to find agreement on some broader issues on the two-year rule (such as on the possibility of the Council to reject an application), other issues will almost certainly be contested (including the role of the LTC and meaning of "provisional approval"). Resolving them will entail a significant degree of legal convincing and political diplomacy. Before or while compromises are being put on the table, it seems like recourse to the Seabed Disputes Chamber of ITLOS for an advisory opinion on the open questions (including for the purposes of verifying the legality of any approach the Council may decide to take) will be inevitable. Finally, while the "what if" scenario is primarily being discussed at the Council, it seems appropriate to have similar conversations at the Assembly in order to solicit the views and concerns of all member states. Indeed, "in taking decisions the Council shall seek to promote the interests of all the members of the Authority",⁶⁰ and a debate at the Assembly will help feed into meeting this requirement. This should apply with full force to discussions relating to the "what if" scenario, as how the Authority responds to the two-year rule and other contemporary challenges is a matter that will affect all kind, both present and future.

⁶⁰ Section 3(5) of the Annex to the 1994 Implementing Agreement.

4. About the author

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