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# RIFS DISCUSSION PAPER

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## A “Deadline” Expires: *Quo Vadis*, International Seabed Authority?

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# Summary

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In mid-2021, the Republic of Nauru invoked a treaty provision at the International Seabed Authority known as the “two-year rule”. This effectively imposed a deadline on the Council of the International Seabed Authority to complete the elaboration and adoption of regulations for the exploitation of seabed minerals in the international seabed Area by 9 July 2023. Come 10 July 2023, the Authority would be presented with a new legal situation, whereby applications for mining activities may be submitted despite the absence of applicable regulations. There remain many outstanding matters in the negotiations and, considering that the regulations for exploitation must be adopted by consensus at the Council, it would appear that there is still a long and winding road ahead before an agreement is reached among member states – if this is at all possible. In light of this, the Council clearly needs to discuss what would occur if an application for the approval of a plan of work for exploitation activities happens to be submitted in the absence of applicable regulations. While the open legal questions that arise from the invocation of the two-year rule and upon the expiration of the deadline have been analysed elsewhere, this discussion paper examines the new political reality that the Authority finds itself in following the expiry of the deadline on 9 July 2023. Building on previous work by the author, this discussion paper attempts to underscore what is at stake at the Authority and explores how member states should approach this situation.

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## 1. Introduction: A “deadline” expires

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Making use of a treaty provision in mid-2021, the Republic of Nauru requested the Council of the International Seabed Authority to complete the elaboration and adoption of regulations for the exploitation of mineral resources in the Area within a two-year period.<sup>1</sup> The “deadline” imposed under the “two-year rule” provision to adopt the regulations expires on 9 July 2023 and the Council only meets the next day on 10 July 2023 to resume negotiations. While it was clear from the outset of the invocation by Nauru in 2021 that it would be virtually impossible to complete the adoption of the regulations within the prescribed time given the numerous outstanding matters to resolve,<sup>2</sup> the Authority now finds itself past the expiration date with there still being a long and winding road remaining in the negotiations.

An update on the state-of-play in the negotiations at the Council and discussions pertaining to addressing the “two-year rule” provision up until the last meeting of the Council in March 2023 have been discussed elsewhere.<sup>3</sup> During the March 2023 meeting, the Council members had several informal meetings during lunch behind closed doors and two discussions in the plenary to discuss the so-called deadline and the implications of missing it. In the end, the Council managed to adopt a key decision by consensus.<sup>4</sup> Some of the salient outcomes of that decision are as follows:

- An acknowledgment that Article 145 of UNCLOS applies with full weight under the two-year rule, bearing in mind that the Authority has a strong environmental responsibility and is obligated to develop rules, regulations and procedures to ensure the effective protection of the marine environment from the harmful effect of mining activities in the Area.
- A clear stance that “the commercial exploitation of mineral resources in the Area should not be carried out in the absence of such rules, regulations and procedures” and that “activities in the Area shall be carried out for the benefit of humankind as a whole”.
- A recognition that the Legal and Technical Commission plays an independent role in the review of plans of work for exploitation and provides appropriate recommendations. In this respect, the Commission is “under no obligation to recommend approval or disapproval of a plan of work”, and importantly, could also decide to not make a recommendation. However, the Commission shall exercise its functions in this regard in accordance with any guidelines and directives that the Council may impose on it.
- An understanding that upon receiving appropriate recommendations from the Legal and Technical Commission, the Council is obliged to consider a plan of work but has the capacity to decide whether or not to provisionally approve it.
- An agreement to continue informal discussions and extend the mandate of the intersessional dialogue that was established by the Council in November 2022 to allow for further exchanges of views in order to find commonalities in positions of member states.

<sup>1</sup> Institute for Advanced Sustainability Studies, “The two-year countdown for deep seabed mining”. Phys.org, 26 August 2022. <https://phys.org/news/2022-08-two-year-countdown-deep-seabed.html>.

<sup>2</sup> 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, Vol. 134. <https://doi.org/10.1016/j.marpol.2021.104804>

<sup>3</sup> Pradeep Singh, “What if’ revisited: Open legal questions in light of the two-year rule at the International Seabed Authority”. RIFS Discussion Paper, March 2023. [https://publications.rifs-potsdam.de/rest/items/item\\_6002727\\_1/component/file\\_6002728/content](https://publications.rifs-potsdam.de/rest/items/item_6002727_1/component/file_6002728/content)

<sup>4</sup> ISBA/28/C/9. 31 March 2023. <https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf>

With respect to the final point, the co-facilitators of the intersessional dialogue called for the submission of written comments from member states and observers. A webinar was held on 30 May 2023 with over one hundred participants in attendance, where member states and observers seized the opportunity to make oral comments. The co-facilitators prepared a briefing note to summarize these discussions,<sup>5</sup> which will be discussed during the July meeting of the Council. Meanwhile, there is also a proposal to discuss the implications of the two-year rule at the Assembly.<sup>6</sup>

An extensive analysis of the legal consequences of the two-year rule and the implications of missing the deadline, as well as other relevant background details and policy pathways, can be found elsewhere.<sup>7</sup> This discussion paper builds upon those earlier works but takes a more reflective tone. It sets out to discuss what exactly is at stake and explain why it is important for the Authority to respond strongly to the invocation of the two-year rule, for example, by adopting pre-emptive measures that allow it to take charge of the process and impose safeguards so that it is not cornered into allowing unregulated mining to occur (unless that it is the will of the majority of states).

<sup>5</sup> Co-Facilitators' Second Briefing Note to the Council on the informal intersessional dialogue established under Council decision ISBA/27/C/45 and Council decision ISBA/28/C/9. 7 July 2023. <https://www.isa.org.jm/wp-content/uploads/2023/07/Co-Facilitators-Second-Briefing-Note.pdf>.

<sup>6</sup> ISBA/28/A/INF/8. 27 June 2023. <https://www.isa.org.jm/wp-content/uploads/2023/07/REV-ISBA-28-A-INF-8.pdf>.

<sup>7</sup> 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; and 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/>.

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## 2. From “What if” to “Now that”

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Having missed the so-called deadline, the Authority now finds itself in a new legal phase with many uncertainties. This includes the process that would apply to the consideration of mining applications that happen to be submitted while the exploitation regulations remain absent. In other words, the Authority has moved from the “what if” scenario (i.e. what if the prescribed time has expired and application is submitted) to the “now that” scenario (i.e. now that the prescribed time has expired, how should any applications that happen to be submitted be treated). What is actually at stake – to put it in blunt and simple terms – is the risk of the Authority being cornered into allowing unregulated mining to occur (that is to say, mining occurring in the absence of the very regulations needed to govern such activities), against the will of most member states and contrary to the best interest of humankind as a whole, by virtue of the two-year rule being used in a manner that was not its intended purpose.

### 2.1 At stake: The risk of unregulated mining

The UN Convention on the Law of the Sea (UNCLOS), also widely regarded as the ‘constitution for the ocean’, specifies through Part XI (read together with Part XII and Annex III) a governance framework for the mineral resources located in seabed areas beyond national jurisdiction (which have been legally designated as the common heritage of humankind). Having prescribed such a framework, the ocean constitution delegates the responsibility to develop, agree and adopt detailed rules, regulations and procedures for exploration and exploitation of such minerals to the Authority and its member states, entrusted to act on behalf of and for the benefit of humankind as a whole. The importance of such rules, regulations and procedures cannot be understated – their adoption requires consensus at the Council (where just one formal objection from a Council member state would prevent them from being adopted) and the need for them to be approved by the Assembly (although the Council may already provisionally apply them pending such approval).

Indeed, UNCLOS does not anticipate mining related activities commencing in the absence of regulations. On the contrary, legal requirements for the development of specific rules, regulations and procedures is found consistently and throughout UNCLOS. The following are among the pertinent provisions in Part XI and Annex III of UNCLOS (emphasis added):

- Article 137(2): “All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance *with this Part and the rules, regulations and procedures of the Authority.*”
- Article 137(3): “No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance *with this Part.* Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.”
- Article 139(1): “States Parties shall have the responsibility to ensure that activities in the Area [...] shall be carried out in conformity with this Part.”
- Article 140(1): “Activities in the Area shall, as specifically provided for *in this Part*, be carried out for the benefit of mankind as a whole [...].”
- Article 145: 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. To this end the Authority shall adopt appropriate *rules, regulations and procedures* for [...].”

- Article 146: “With respect to activities in the Area, necessary measures shall be taken to ensure effective protection of human life. To this end the Authority shall adopt appropriate *rules, regulations and procedures* to supplement existing international law as embodied in relevant treaties.”
- Article 153(1): “Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole in accordance with this article as well as other relevant provisions of this Part and the relevant Annexes, and the *rules, regulations and procedures of the Authority*.”
- Article 153(3): “Activities in the Area shall be carried out in accordance with a formal written plan of work drawn up in accordance with *Annex III* [...]”
- Article 153(4): “The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the *rules, regulations and procedures* of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.”
- Article 157(1): “The Authority is the organization through which States Parties shall, in accordance with *this Part*, organize and control activities in the Area, particularly with a view to administering the resources of the Area.”
- Article 160(2)(f)(i): [The Assembly shall] “consider and approve, upon the recommendation of the Council, the *rules, regulations and procedures* on the equitable sharing of financial and other economic benefits derived from activities in the Area.”
- Article 160(2)(f)(ii): [The Assembly shall] “consider and approve the *rules, regulations and procedures* of the Authority, and any amendments thereto, provisionally adopted by the Council pursuant to article 162, paragraph 2 (o)(ii). These *rules, regulations and procedures* shall relate to prospecting, exploration and exploitation in the Area [...]”
- Article 160(2)(g): [The Assembly shall] “decide upon the equitable sharing of financial and other economic benefits derived from activities in the Area, consistent with this Convention and the *rules, regulations and procedures* of the Authority.”
- Article 162(2)(l): [The Council shall] “exercise control over activities in the Area in accordance with article 153, paragraph 4, and the *rules, regulations and procedures* of the Authority.”
- Article 162(2)(o)(i): [The Council shall] “recommend to the Assembly *rules, regulations and procedures* on the equitable sharing of financial and other economic benefits derived from activities in the Area.”
- Article 162(2)(o)(ii): [The Council shall] “adopt and apply provisionally, pending approval by the Assembly, the *rules, regulations and procedures* of the Authority [that] relate to prospecting, exploration and exploitation in the Area [...]”
- Article 162(2)(z): [The Council shall] “establish appropriate mechanisms for directing and supervising a staff of inspectors who shall inspect activities in the Area to determine whether this Part, the *rules, regulations and procedures* of the Authority, and the terms and conditions of any contract with the Authority are being complied with.”
- Article 163(11): The decision-making procedures of the [subsidiary organs of the Council] shall be established by the *rules, regulations and procedures* of the Authority.”
- Article 165(2)(b): [The Legal and Technical Commission shall] “review formal written plans of work for activities in the Area in accordance with article 153, paragraph 3, and submit appropriate recommendations to the Council. The Commission shall base its recommendations solely on the grounds stated in Annex III and shall report fully thereon to the Council.”
- Article 165(2)(f): [The Legal and Technical Commission shall] “formulate and submit to the Council the *rules, regulations and procedures* referred to in article 162, paragraph 2(o), taking into account all relevant factors including assessments of the environmental implications of activities in the Area.”

- Article 165(2)(g): [The Legal and Technical Commission shall] “keep such *rules, regulations and procedures* under review and recommend to the Council from time to time such amendments thereto as it may deem necessary or desirable.”
- Article 170(2): The Enterprise shall act in accordance with this Convention and the *rules, regulations and procedures* of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council.”
- Article 187: [The Seabed Disputes Chamber shall have jurisdiction over] “disputes between a State Party and the Authority concerning acts or omissions of the Authority or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of *rules, regulations and procedures* of the Authority adopted in accordance therewith [...]”
- Article 209: “International *rules, regulations and procedures* shall be established in accordance with *Part XI* to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.”
- Article 215: “Enforcement of international *rules, regulations and procedures established in accordance with Part XI* to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.”
- Annex III, Article 3(3): “Exploration and exploitation shall be carried out only in areas specified in plans of work referred to in article 153, paragraph 3, and approved by the Authority in accordance with this Convention and the relevant *rules, regulations and procedures* of the Authority:”
- Annex III, Article 3(4): “Every approved plan of work shall: (a) be in conformity with this Convention and the rules, regulations and procedures of the Authority; (b) provide for control by the Authority of activities in the Area in accordance with article 153, paragraph 4; (c) confer on the operator, in accordance with the rules, regulations and procedures of the Authority, the exclusive right to explore for and exploit the specified categories of resources in the area covered by the plan of work.”
- Annex III, Article 4(1): “Applicants, other than the Enterprise, shall be qualified if they have the nationality or control and sponsorship required by article 153, paragraph 2(b), and if they follow the procedures and meet the qualification standards set forth in the *rules, regulations and procedures* of the Authority.”
- Annex III, Article 4(3): “The criteria and procedures for implementation of the sponsorship requirements shall be set forth in the *rules, regulations and procedures* of the Authority.”
- Annex III, Article 4(6): “The qualification standards shall require that every applicant, without exception, shall as part of his application undertake: (a) to accept as enforceable and comply with the applicable obligations created by the provisions of Part XI, the *rules, regulations and procedures* of the Authority, the decisions of the organs of the Authority and terms of his contracts with the Authority [...]”
- Annex III, Article 6(3): “[...] The proposed plans of work shall comply with and be governed by the relevant provisions of this Convention and the *rules, regulations and procedures* of the Authority, including those on operational requirements, financial contributions and the undertakings concerning the transfer of technology. If the proposed plans of work conform to these requirements, the Authority shall approve them provided that they are in accordance with the uniform and non-discriminatory requirements set forth in the *rules, regulations and procedures* of the Authority [...]”
- Annex III, Article 14(1): “The operator shall transfer to the Authority, in accordance with its *rules, regulations and procedures* and the terms and conditions of the plan of work, at time intervals determined by the Authority all data which are both necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority in respect of the area covered by the plan of work.”
- Annex III, Article 16: “The Authority shall, pursuant to Part XI and its *rules, regulations and procedures*, accord the operator the exclusive right to explore and exploit the area covered by the plan of work in respect of a specified category of resources and shall ensure that no other



entity operates in the same area for a different category of resources in a manner which might interfere with the operations of the operator.”

- Annex III, Article 17 (1): “The Authority shall adopt and uniformly apply *rules, regulations and procedures* in accordance with article 160, paragraph 2(f)(ii), and article 162, paragraph 2(o)(ii), for the exercise of its functions as set forth in Part XI on, inter alia, the following matters: (a) administrative procedures relating to prospecting, exploration and exploitation in the Area; (b) operations: (i) size of area; (ii) duration of operations; (iii) performance requirements including assurances pursuant to article 4, paragraph 6(c), of this Annex; (iv) categories of resources; (v) renunciation of areas; (vi) progress reports; (vii) submission of data; (viii) inspection and supervision of operations; (ix) prevention of interference with other activities in the marine environment; (x) transfer of rights and obligations by a contractor; (xi) procedures for transfer of technology to developing States in accordance with article 144 and for their direct participation; (xii) mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment; (xiii) definition of commercial production; (xiv) qualification standards for applicants; (c) financial matters: (i) establishment of uniform and non-discriminatory costing and accounting rules and the method of selection of auditors; (ii) apportionment of proceeds of operations; (iii) the incentives referred to in article 13 of this Annex; (d) implementation of decisions taken pursuant to article 151, paragraph 10, and article 164, paragraph 2(d).
- Annex III, Article 17(2): “*Rules, regulations and procedures* on the following items shall fully reflect the objective criteria set out below: (a) Size of areas [...]; (b) Duration of operations [...]; (c) Performance requirements [...]; (d) Categories of resources [...]; (e) Renunciation of areas [...]; (f) Protection of the marine environment [...]; (g) Commercial production [...].”

In addition to UNCLOS, the 1994 Agreement also refers to the need for explicit rules, regulations and procedures of the Authority in the following, among others (emphasis added):

- Section 1, paragraph 5: “Between the entry into force of the Convention and the approval of the first plan of work for exploitation, the Authority shall concentrate on: [...] (f) Adoption of *rules, regulations and procedures* necessary for the conduct of activities in the Area as they progress. Notwithstanding the provisions of Annex III, article 17, paragraph 2(b) and (c), of the Convention, such *rules, regulations and procedures* shall take into account the terms of this Agreement, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area; (g) Adoption of *rules, regulations and procedures* incorporating applicable standards for the protection and preservation of the marine environment; [...] (k) Timely elaboration of *rules, regulations and procedures* for exploitation, including those relating to the protection and preservation of the marine environment.”
- Section 1, paragraph 7: “An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies in accordance with the *rules, regulations and procedures* adopted by the Authority.”
- Section 6, paragraph 6: “The Authority shall develop *rules, regulations and procedures* which ensure the implementation of the provisions of this section [on production policy], including relevant *rules, regulations and procedures governing the approval of plans of work*.”
- Section 8, paragraph 1: “The following principles shall provide the basis for establishing *rules, regulations and procedures* for financial terms of contracts [...].”

Notwithstanding the above, the 1994 Agreement also includes the “two-year rule” provision, which prescribes for a narrow window of exception where applications of plans of work for exploitation may be submitted to the Authority for consideration in the absence of regulations, as seen in Section 1, paragraph 15:

“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.”

Seen as a whole, it is overwhelmingly obvious that mining activities under the remit of the Authority are expected to be carried out in accordance with agreed and adopted rules, regulations and procedures for exploitation. The intention under UNCLOS in this respect is clear, and arguably, modifications introduced under the 1994 Agreement do not really alter this expectation. Conversely, the two-year rule (in particular, subparagraph (c) of section 1, paragraph 15) stands alone as a *sui generis* provision in creating a narrow exception to allowing applications for plans of work for exploitation to be submitted for consideration of the Council in the absence of regulations. It is worth reflecting upon whether a mere few words should override almost everything else within the ocean constitution framework, or whether a more restrictive interpretation should be applied to the provision, subjecting it to stricter scrutiny to ensure the true spirit and letter of the law is not eroded.

## 2.2 Unregulated mining: Benefit or burden to humankind as a whole?

UNCLOS is unequivocal that mineral-related activities in the Area, which is the common heritage of humankind, must be carried out for the benefit of humankind as a whole. The member states of the Authority, which collectively form the Authority, bear the responsibility to act on behalf of humankind to organize and control activities in the Area.<sup>8</sup> Indeed, member states stand to be liable under international law for any wrongful acts or contraventions of UNCLOS provisions, primarily as the Authority but possibly also as individual states.<sup>9</sup> This would extend to any decision to approve a mining application before the Authority is confident that it has met its responsibility to ensure the effective protection of the marine environment from the harmful effects of mining activities.<sup>10</sup> Moreover, sponsoring states have the obligation to ensure that sponsored entities are able to meet the rules, regulations and

<sup>8</sup> Articles 153(1) and 157(1) of UNCLOS.

<sup>9</sup> Articles 139 and 235 of UNCLOS.

<sup>10</sup> Cymie Payne, “State responsibility for deep seabed mining obligations”. In: Virginie Tassin Campanella, “Seabed Mining and the Law of the Sea”, Routledge, 2023.

procedures of the Authority,<sup>11</sup> and sponsoring an application for the approval of a plan of work in the absence of regulations could possibly expose the sponsoring state to indefinite liability under international law.<sup>12</sup>

Indeed, the 1994 Agreement imposes an obligation on the Authority to address several tasks before approving the first plan of work and there has been no discernible progress towards this to date. These tasks include the monitoring and regular review of trends of world metal market conditions and metal prices, the development of standards for the protection and preservation of the marine environment, and studying the environmental impact of activities in the Area with the aim to close knowledge gaps, including through the assessment and synthetization of available data (notably, environmental baselines) relating to prospecting and exploration, among others.<sup>13</sup>

Moreover, there are still numerous provisions of UNCLOS that have not been complied with, such as the requirement for the Legal and Technical Commission to “prepare assessments of the environmental implications of activities in the Area” and “make recommendations to the Council regarding the establishment of a monitoring programme to observe, measure, evaluate and analyse, by recognized scientific methods, on a regular basis, the risks or effects of pollution of the marine environment resulting from activities in the Area”, among others.<sup>14</sup>

Similarly, responsibilities assigned to the Legal and Technical Commission under the Exploration Regulations, such as “to develop and implement procedures for determining [...] whether proposed exploration activities in the Area would have serious harmful effects on vulnerable marine ecosystems” (and if it so determined, to ensure that those activities are managed to prevent such effects or not authorized to proceed), remain unfulfilled.<sup>15</sup>

In addition, the Authority has not yet debated and agreed on the acceptable thresholds of harm, with no clear understanding and demarcation between “effective protection”, “harmful effects” and “serious harm”. Indeed, designing an effective and robust set of regulations, including the necessary standards and guidelines to give effect to them, requires sufficient scientific knowledge and understanding, which is simply not there yet.

Finally, it is not just about having the regulations in place, but also other necessary components that need to be developed and agreed upon, such as an appropriate mechanism for the equitable sharing of benefits, the arrangement of compensation for developing countries whose economies rely on land-based mining, monopolization and anti-discriminatory rules, as well as sponsorship requirements and the relationship of effective control, among many others.<sup>16</sup> Allowing mining activities to commence at this point in the absence of the very regulations intended to govern them as well as without agreement on all relevant components would perhaps result in more burdens to humankind than any

<sup>11</sup> Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, paragraphs 103-105.

<sup>12</sup> Pradeep Singh, “What if’ revisited: Open legal questions in light of the two-year rule at the International Seabed Authority”. RIFS Discussion Paper, March 2023. [https://publications.rifs-potsdam.de/rest/items/item\\_6002727\\_1/component/file\\_6002728/content](https://publications.rifs-potsdam.de/rest/items/item_6002727_1/component/file_6002728/content).

<sup>13</sup> Section 1, paragraph 5 of the 1994 Agreement.

<sup>14</sup> Articles 165(2)(d) and (h).

<sup>15</sup> Regulation 31(4) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area; Regulation 33(4) of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area; and Regulation 33(4) of the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area.

<sup>16</sup> 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, Vol. 134. <https://doi.org/10.1016/j.marpol.2021.104804>

potential net benefit. Clearly, the “two-year rule” provision was not intended to put the interests of one ahead of all.

### **2.3 The rationale of the two-year rule: One for all, or all for one?**

The two-year rule was not inserted with the intention to allow a minority group to accelerate mining activities. Rather, the two-year rule was primarily intended to address a situation of a potential deadlock or impasse at the Council, where one or a minority group of obstructionist states is blocking the adoption of the exploitation regulations (which must be adopted by consensus). With the introduction of the two-year rule, there was lesser incentive or motivation for a minority group to frustrate the process by deliberately blocking the adoption of the regulations, since the majority could go ahead to provisionally approve mining applications in their absence. If the majority of states so desires, the Council is at liberty to interpret the two-year rule in such a manner that gives effect to its intended purpose. Given that the consequences of the two-year rule are severe, the provision must be interpreted narrowly and sparingly in a manner that meets its intended purpose.

This is permitted under the Vienna Convention on the Law of Treaties, whereby Article 31(1) provides that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (emphasis added). Additionally, pursuant to Article 32, recourse may also be made to “the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 [...]”. Moreover, pursuant to Article 31(2), if the Council is able to reach an understanding on the nature of the application of the two-year rule or if this becomes increasingly evident from the practice of states, this will also count towards the clarifying the interpretation of the said provision.

It may be the case that any attempt by the Council to adopt a more restrictive interpretation to the two-year rule that disfavors mining applicants would expose it to potential litigation from the aggrieved applicant. However, it seems all the more likely that a liberal interpretation of the provision that favors mining applicants would expose the Authority to potential litigation from dissatisfied member states that should be able to argue convincingly that the Authority is not in a position to allow mining activities to commence, and certainly not in the absence of regulations. In the present circumstances and in light of the Council decision that mining activities should not commence in the absence of regulations and where the effective protection of the marine environment cannot be ensured, it does seem that the Authority should be more concerned about the latter. The risk of exposure to litigation is certainly much higher if the Authority decides to approve an application in the absence of regulations, as opposed to rejecting one.

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### 3. Upholding the ocean constitution in spite of the two-year rule

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Notwithstanding the two-year rule and the new legal phase post-9 July 2023, the Authority must continue to ensure that obligations and requirements imposed upon it under UNCLOS and the 1994 Agreement are met. Thus, if member states decide to effectuate the “two-year rule” provision in such a manner that allows any entity to commence commercial mining activities in the absence of the regulations, they might actually be acting contrary to the ocean constitution (as opposed to respecting it). Consequently, the Authority should now take further pre-emptive steps and impose safeguards, as it has done with decision ISBA/27/C/45 in November 2022 and decision ISBA/28/C/9 in March 2023, on how to address any undesired application that happens to be submitted in the absence of regulations while consensus-based negotiations resume at the Council.

There is no clarity on what the process would be if an application is submitted in the absence of regulations, particularly with respect to what procedures would apply and the criteria for evaluation. There seems to be an accepted view that the Legal and Technical Commission would play a key role in the process, and any application submitted pursuant to the two-year rule would be forwarded to the Legal and Technical Commission for review. However, there are differences in views on whether the Legal and Technical Commission would play a formal role in reviewing the application, and if so, whether the Council would be constrained by any recommendations that the Commission chooses to provide.

The process is clear, however, for situations where the regulations are in place. Following the review of the application by the Legal and Technical Commission to ensure conformity with UNCLOS, the 1994 Agreement and the applicable rules, regulations and procedures of the Authority, the Commission may, as appropriate,<sup>17</sup> (a) recommend the approval of a plan of work, (b) recommend the disapproval of a plan of work, or (c) make no recommendations.<sup>18</sup> Thereafter, the nature of the recommendation from the Commission would determine the decision-making process at the Council.

If the Commission recommends the approval of an application, 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.” When dealing with a recommendation to approve an application, the Council is required to make a decision within 60 days, unless it decides to provide for a longer period. If the Council does not make a decision within the prescribed period, the recommendation shall be deemed to have been approved by the Council at the end of that period.<sup>19</sup>

However, if the Commission “recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work” through “a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in

<sup>17</sup> Article 165(2)(b) of UNCLOS.

<sup>18</sup> Ideally, such a decision would be taken by consensus. However, decisions taken by voting in the Legal and Technical Commission shall be by a majority of members present and voting (section 3, paragraph 13 of the 1994 Agreement).

<sup>19</sup> Section 3, paragraph 11 of the 1994 Agreement.

any one of the chambers” of the Council.<sup>20</sup>

The reference to the chambers of the Council deserves further explanation. The Assembly elects the 36-member Council for four-year periods into five groups:<sup>21</sup>

- Group A: Major consumers of the commodities to be derived from minerals in the Area (4 states)
- Group B: Major investors in the conduct of activities in the Area (4 states)
- Group C: Major terrestrial producers of the commodities to be derived from the Area (4 states)
- Group D: Developing countries with special interests (6 states)
- Group E: Equitable geographic representation (18 states)

However, the five-group system applies to the election process into the Council but a different formula applies when it comes to decision-making by vote, in which a four-chamber system applies to the voting process at the Council.<sup>22</sup> For this latter purpose, Groups A-C remain unchanged and each comprise one chamber respectively. That is not the case for Groups D-E, however, for which only the developing countries in those two groups would constitute one chamber.<sup>23</sup> In other words, the developed countries that sit in Group E would not fall into any chamber; their votes would still count towards determining whether the overall two-thirds majority at the Council has been met, but not for the purposes of the fourth chamber.<sup>24</sup>

To summarize the above: If the Commission recommends approval, the default outcome is that the application is approved unless the Council reverses that recommendation and decides to disapprove the application within 60 days or any extended period that the Council may agree on. If the Commission recommends disapproval or makes no recommendations, the default outcome is that the application is disapproved unless the Council reverses that recommendation and decides to approve the application (with no time limit prescribed under this instance, since the default outcome is that the application is disapproved).

While it is clear that the above process applies to applications that are submitted in the presence of regulations, it is not entirely clear whether the same process should apply in the absence of regulations. Arguably, in situations where the Authority has adopted rules, regulations and procedures, the political organs (i.e. the Council and the Assembly) are satisfied that they have fulfilled their responsibilities under international law and have met their obligations under UNCLOS and the 1994 Agreement.<sup>25</sup>

<sup>20</sup> Ibid.

<sup>21</sup> Section 3, paragraph 15 of the 1994 Agreement.

<sup>22</sup> Section 3, paragraph 9(a): “Each group of States elected under paragraph 15(a) to (c) shall be treated as a chamber for the purposes of voting in the Council. The developing States elected under paragraph 15(d) and (e) shall be treated as a single chamber for the purposes of voting in the Council.”

<sup>23</sup> This was a subject of great debate during the negotiations of the 1994 Agreement. Initially, some negotiators (mainly from developed countries) wanted to only have three special chambers with exclusive voting rights in the form of Groups A-C. After pushback (mainly from developing countries), a compromise was made to accommodate a fourth special chamber that would only comprise developing countries and the decision was taken to collate those qualified members in Groups D-E into this chamber.

<sup>24</sup> Of course, the voting outcomes in the individual chambers would be largely irrelevant if the overall two-thirds majority at the Council is not met following a formal vote.

<sup>25</sup> It is important to stress that the exploitation regulations should not be adopted until and unless states are satisfied that their responsibilities under UNCLOS, the 1994 Agreement and other rules of international law and customary international law have been met. As an increasing number of member states have pointed out, regulations should not be adopted unless there is sufficient science and ability to manage the environment impacts, as well as the necessary standards and guidelines to give effect to them are also ready for adoption. Some states have also contended that the regulations should not be adopted until other essential components have also been agreed upon, such as a mechanism for the equitable sharing of benefits.

Hence, the member states are comfortable to allow such high levels of deference to the Legal and Technical Commission, the subsidiary organ of the Council, to evaluate applications in accordance with those adopted rules, regulations and procedures. It does seem a little illogical in the converse situation, where the rules, regulations and procedures have not been agreed to by member states, to accommodate the same level of deference to the Legal and Technical Commission. Members of the Commission are experts acting in their personal capacity; whereas, the member states of the Authority are the ones that assume liability and would be held accountable under international law for any decision taken under Part XI.

It is contended that since the Council has reached an understanding (by consensus) that commercial mining should not occur in the absence of regulations, the Council is now duty bound to take concrete steps to consolidate this position and ensure it is not exposed to any potential wrongdoing under international law by failing to act accordingly. Critically, the Council would need to intervene with respect to clarifying the process that would apply since the “two-year rule” provision does not specifically address the procedures and criteria for evaluation of a plan of work for exploitation in the absence of regulations.<sup>26</sup> This can be done, legally speaking, by the Council issuing guidelines and directives to the Legal and Technical Commission.

There is no question that the Legal and Technical Commission is a subsidiary organ of the Council. While the members of the Commission act in their personal capacity and independently from the instructions of any individual state or person, it is beyond any doubt that the Commission is subservient and inferior to the Council. The Commission is not a creature of its own will and only exists because the Council and the Authority exists. Indeed, UNCLOS anticipates that the Council will routinely give instructions to the Commission, and the Commission is bound to exercise its functions and take decisions based on rules, regulations and procedures established by the Authority.<sup>27</sup>

Again, it is important to recall that it is only by establishing rules, regulations and procedures (and thereunder, criteria for the evaluation of applications) that the Authority is able to entrust the Commission to carry out such an important function by delegating to it the role of evaluating applications in accordance with those rules, regulations and procedures. Moreover, considering the far-reaching implications of approving a plan of work in the absence of agreed rules, regulations and procedures of the Authority, it would be irresponsible for the Authority to not intervene at this stage. After all, as prescribed by UNCLOS, the Council can only exercise control over activities in the Area through the rules, regulations and procedures of the Authority.<sup>28</sup>

Another key point to bear in mind here is that the two-year rule could theoretically be used in a rather unusual manner by one or a small number of states with mining interests, whereby, there could be a perverse incentive on their part to deliberately block the adoption of the regulations (which requires consensus at the Council). Hypothetically speaking, this could happen if the majority of member states deem it necessary to impose ambitious and stringent requirements through the regulations during the ongoing negotiations. By delaying or blocking the adoption of the regulations, some states might attempt to utilize the “two-year rule” provision to push through an application that will then have to be considered in the absence of regulations.

It is therefore imperative for the Council to take pre-emptive measures to ensure that all applications that happen to be submitted in the absence of regulations should ideally not be approved, unless of

<sup>26</sup> Indeed, the Council has intervened before where UNCLOS and the 1994 Agreement did not elaborate on the applicable process for the extension of approved plans of work for exploration by adopting a decision in 2015 “relating to the procedures and criteria for the extension of an approved plan of work for exploration”. See ISBA/21/C/19. 23 July 2015. [https://www.isa.org/im/wp-content/uploads/2022/06/isba-21c-19\\_6.pdf](https://www.isa.org/im/wp-content/uploads/2022/06/isba-21c-19_6.pdf).

<sup>27</sup> Articles 163(9)-(11) of UNCLOS.

<sup>28</sup> Articles 153(4) and 162(2)(l) of UNCLOS.

course, the majority of member states are of the view that any one of them should be provisionally approved.<sup>29</sup> As will be discussed shortly, one effective way of doing this from a regulatory (and political) perspective is by instructing the Legal and Technical Commission that it would be appropriate for the Commission to refrain from making any formal recommendations relating to a plan of work for exploitation in the absence of regulations.

Consequently, there is a pressing need for the Authority to take measures to safeguard itself from any potential liability or wrongdoing under international law: this interest to act on behalf of and for the benefit of humankind as a whole should far outweigh any single or self-serving interest to conduct activities in the Area in the absence of regulations.

<sup>29</sup> As argued elsewhere, provisional approval in itself does not mean mining can commence. Even if the Council is so minded to provisionally approve an application, mining activities can only commence after the execution of a contract. Since provisional approval is temporary in nature, and a plan of work must take the form of a binding contract that would have to be in conformity with the relevant rules, regulations and procedures of the Authority, it is strongly arguable that commercial-scale mining can only commence once these regulations are adopted. In this regard, when provisionally approving a plan of work (if so minded), the Council undoubtedly retains the power to defer conclusion of a contract until after the rules, regulations and procedures have been adopted and the initial provisional approval is revisited to ensure conformity and such approval is finalized.



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## 4. A responsible Authority: Dealing with mining applications in the absence of regulations

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Having discussed the foremost need for the Council to intervene and take pre-emptive measures to avoid a potential scenario of unregulated mining, this section considers how the Authority should approach applications that happen to be submitted under the “two-year rule” provision. In this respect, the Council is empowered to adopt “specific policies [...] on any question or matter within the competence of the Authority”.<sup>30</sup> This would obviously include the power to decide on how to approach the two-year rule, which speaks exclusively to the Council.

Meanwhile, the Assembly also possesses the requisite power to develop a general policy, in collaboration with the Council, to address the undesirable scenario of unregulated mining from occurring under the remit of the Authority.<sup>31</sup> Collectively, the two political organs of the Authority could come together to defend and ensure that the rudiments of UNCLOS and the 1994 Agreement are not eroded by virtue of the applicability of the two-year rule.

More specifically, and as discussed earlier, the Council is vested with the power to issue directives and guidelines to its subsidiary organ, the Legal and Technical Commission.<sup>32</sup> It is vital that the Council intervenes at this critical juncture and provides clarity regarding the process that would apply if an application is submitted in the absence of rules, regulations and procedures, primarily as UNCLOS and the 1994 Agreement – to an overwhelming extent – anticipate that these would be in place before applications are considered or approved.

Such directives or guidelines could include any of the following components, among others:

- A directive to the Legal and Technical Commission that it would not be appropriate to recommend the approval of an application in the absence of rules, regulations and procedures because the Council would not be in a position to exercise control over mining activities in their absence. This would also give effect to Council decision ISBA/28/C/9 that commercial mining should not occur in the absence of regulations (since if the Commission makes no recommendations, the application would be disapproved by default unless the Council decides to approve the same). Moreover, this allows the Council to retain more control over the process, given that the member states are the ones that would bear responsibility under international law and must meet their obligations under UNCLOS and the 1994 Agreement. Likewise, this approach supports the “two-year rule” provision, which actually singles out the Council as the responsible organ to “consider and provisionally approve” any such applications. Such directive could, in addition, request the Legal and Technical Commission to provide an elaborate report on the application and its findings to assist the Council in its decision-making process. It is imperative that an application submitted under the two-year rule is

<sup>30</sup> Article 162(1) of UNCLOS.

<sup>31</sup> Pradeep Singh. “Deep seabed mining? Let’s think twice before we mine.” <https://ejfoundation.org/news-media/deep-seabed-mining-lets-think-twice-before-we-mine>.

<sup>32</sup> Article 163(9) of UNCLOS.

treated with much greater scrutiny than under usual circumstances where regulations are in place, since the present situation is unprecedented, and the very regulations intended to govern are absent.

- A directive to the Legal and Technical Commission establishing a tiered approach for the evaluation of any applications that happen to be submitted pursuant to the two-year rule. Here, the Council could instruct the Commission to undertake the review in stages, reporting to the Council on progress made with each stage before proceeding with the next. Indeed, while UNCLOS does provide that the Authority shall consider applications every fourth month,<sup>33</sup> there is no time limit prescribed to complete the review process. Given that applications submitted under the “two-year rule” provision cannot be assessed against the relevant regulations because they are absent, it is justifiable for the process to subsist over an extended period with opportunities for member states, stakeholders, and observers to feed into a lengthy and elaborate process. Such a tiered approach to the consideration of any such applications could take the following form:
  - Stage one (formal requirements): The Legal and Technical Commission to review the submitted application and report to the Council on the following:
    - Details pertaining to the sponsorship certificate and the sponsorship arrangement, including nationality or effective control requirements pertaining to the applicant and the state sponsoring it. Here, the Legal and Technical Commission should describe the applicant and its legal status, including the existence of any parent or subsidiary companies. The Commission should also describe the relationship between the sponsoring state and the applicant, including the requirements of nationality or effective control. If the Commission requires more information from the applicant in order to ascertain the above, the Commission should make such a request.<sup>34</sup>
    - Details pertaining to whether the sponsoring state has adopted laws within their domestic legal system. Here, the Legal and Technical Commission should report on whether the sponsoring state has “adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”. If the Commission requires more information from the applicant in order to ascertain the availability and adequacy of the above, the Commission should make such a request.<sup>35</sup>
    - Details pertaining to the financial and technical capabilities of the applicant. Here, the Legal and Technical Commission shall report on the operational and fiscal situation of the applicant, including whether the applicant is in possession of the necessary technologies and equipment, as well as the financial situation of the applicant. Other relevant factors for the Legal and Technical Commission to report on is whether the applicant is capable of providing sufficient financial guarantees and has been able to procure insurance coverage from a reputable insurer for the duration of the plan of work.<sup>36</sup>
    - Details pertaining to the performance of the applicant under any previous contracts with the Authority. Here, the Legal and Technical Commission should report on the performance of the applicant any previous contracts and elaborate on how the applicant performed under the exploration contract. In particular, the Legal and Technical Commission should report on whether the applicant satisfactorily delivered the information required under the Exploration

<sup>33</sup> Annex III, Article 6(1) of UNCLOS.

<sup>34</sup> Annex III, Article 4(1) of UNCLOS.

<sup>35</sup> Annex III, Article 4(4) of UNCLOS.

<sup>36</sup> Annex III, Article 4(2) of UNCLOS.

Regulations through the annual reports, particularly on environmental baselines and monitoring. Additionally, the Legal and Technical Commission should report on whether data and information required to be submitted under the exploration contract have been provided, including “geological, environmental, geochemical and geophysical data” that have been obtained and “results of tests conducted” during the exploration phase.<sup>37</sup>

- Details pertaining to the qualification standards, which every applicant must meet without exception, as prescribed under Annex III, Article 4(6). Here, the Legal and Technical Commission shall assess whether the requirements therein have been met (noting that provisions relating to undertakings for the transfer of technology does not apply due to section 5(2) of the 1994 Agreement). Moreover, apart from providing other undertakings, it would appear to be improbable for the applicant to accept as enforceable the rules, regulations and procedures of the Authority since they do not exist (although a firm commitment to comply with any future rules, regulations and procedures may be required).<sup>38</sup>
  - Details pertaining to the proposed mining areas. Here, the Legal and Technical Commission should report on the location and size of proposed mining areas, as well as whether there are any other area-based management tools or relevant measures adopted by other existing arrangements.
- Stage two (environmental requirements): The Legal and Technical Commission to continue to review the submitted application and report to the Council on the following:
- Details pertaining to whether the application is able to provide for the effective protection of the marine environment from the harmful effects of mining activities.<sup>39</sup> Here, the Council could require the Legal and Technical Commission to hold open meetings when considering environmental requirements pertaining to the application. Member states and observers shall be invited to attend deliberations, including where the applicant is invited to give presentations on the proposed plan of work. The Council could also develop criteria for evaluation, which the Legal and Technical Commission would have to apply when reviewing an application.
  - Details pertaining to whether the application falls under an area where there is an existing regional environmental management plan (REMP), and whether the application conforms to the objectives under the REMF. Here, the Legal and Technical Commission shall consider whether the proposed activities would be in conformity with the applicable REMF, if any.<sup>40</sup>
  - Details pertaining to the environmental impact assessment and environmental monitoring and management plan submitted by the applicant. Here, the Legal and Technical Commission shall request more information from the applicant if required. Such instruments should also be placed on the website of the Authority and be open for stakeholder consultations. The Council could instruct the Legal and Technical Commission to hold hearings in the format of open meetings in order to fully appraise these documents, and the Commission shall prepare a report to summarize these hearings and express its findings for the Council.<sup>41</sup>

<sup>37</sup> *Ibid*, as well as Regulation 32 of the Regulations for the Exploration of Polymetallic Nodules, together with Section 11, Annex IV, Regulations for the Exploration of Polymetallic Nodules.

<sup>38</sup> Annex III, Article 4(6) of UNCLOS.

<sup>39</sup> Article 145 of UNCLOS

<sup>40</sup> See for instance, the regional environmental management plan for the Clarion-Clipperton Zone.

<sup>41</sup> Section 1, paragraph 7 of the 1994 Agreement: “An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a

- A directive to the Legal and Technical Commission underlining all the relevant provisions under UNCLOS and the 1994 Agreement, as well as norms under international law such as the precautionary principle, with guidelines on how to give effect to such provisions and norms when assessing a plan of work under the two-year rule. This could entail making references to salient provisions such as Articles 140(1) and 145 and requiring the Legal and Technical Commission to assess whether such an application meets these provisions.

In addition to the above, the Council could already also decide to act pre-emptively by inserting a specific agenda item for the Commission,<sup>42</sup> inviting it to provide a prognosis on how it intends to deal with an application under the two-year rule. The Council could also ask the Legal and Technical Commission to develop procedures and evaluative criteria for such plans of work and submit it for the approval of the Council.<sup>43</sup>

If the Council is not able to agree on imposing directives on the Legal and Technical Commission with explicit instructions or to develop appropriate guidelines, the Council should then strive for the either of the following:

- To agree on a “backstop” agreement, whereby if an application happens to be submitted, the Legal and Technical Commission is instructed to not finalize the review process until the Council has decided on the applicable procedures and evaluation criteria.
- To submit a request for an advisory opinion from the Seabed Disputes Chamber to clarify the application and implications of section 1, paragraph 15 of the 1994 Agreement.

Finally, the Council could also seize the opportunity at present to instruct the Legal and Technical Commission to fulfil some of its pending responsibilities under UNCLOS, the 1994 Agreement and the Exploration Regulations. This includes preparing assessments of the environmental implications of activities in the Area and the establishment of a monitoring programme to observe, measure, evaluate, and analyse the risks or effects of pollution of the marine environment resulting from activities in the Area with a view to develop recommendations for the Council,<sup>44</sup> as well as the assessment and synthesis of available data from prospecting and exploration activities.<sup>45</sup> Whichever path is chosen, one thing is clear, namely, that the consideration process of an application in the absence of regulations will be a tedious and time-consuming affair, and the eventual disapproval of a plan of work is a very realistic plausibility.

programme for oceanographic and baseline environmental studies in accordance with the rules, regulations and procedures adopted by the Authority.

<sup>42</sup> Rule 8(a)

<sup>43</sup> Articles 163(10) and (11) of UNCLOS: “Each Commission shall formulate and submit to the Council for approval such rules and regulations as may be necessary for the efficient conduct of the Commission's functions”; and “the decision-making procedures of the Commissions shall be established by the rules, regulations and procedures of the Authority.

<sup>44</sup> Article 165(2)(h) of UNCLOS.

<sup>45</sup> Section 1, paragraph 5(j) of the 1994 Agreement.

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## 5. Conclusion: Quo Vadis, International Seabed Authority?

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Having passed the expiration date, the Authority now enters an uncharted phase of legal uncertainty and great anxiety, whereby an application for the approval of a plan of work for exploitation can be submitted for consideration in the absence of the very rules, regulations and procedures intended to govern such activities. It is not an overstatement to say that the global constitution for the ocean and common heritage of humankind is being put to the test with the Part XI regime possibly being put in a compromised position. It remains to be seen how the member states of the Authority will respond to the challenge.

Arguably, the member states should take all necessary pre-emptive measures and adopt an interpretation that is consistent and gives effect to the true intention and mischief that the two-year rule sought to address. Push has now come to shove. The Authority is in its critical formative years and now finds itself confronted with some existential questions. How the member states react to the invocation of the two-year rule and the potentiality of unregulated mining will reveal what the Authority truly stands for, not just for present generations but also for generations to come.

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## 6. About the author

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