PART XI
THE AREA

Section 1
General provisions

Article 133
Use of terms

For the purposes of this Part:

(a) **'resources' means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules;**

(b) **resources, when recovered from the Area, are referred to as 'minerals'.**

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Arvid Pardo*, The Common Heritage: Selected Papers on Oceans and World Order (1975)

Documents: Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970; ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex; ISA, Press Release of 23 July 2003, ISA Doc. SB/9/1 (2003); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex; GA, Report of the Ad Hoc Open-Ended Working Group to Study Issues Relating to Their Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, UN Doc. A/61/65 (2006); GA, Joint Statement of the Co-Chairpersons of the Working Group, UN Doc. A/63/79 (2008); GA, Letter Dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly, UN Doc. A/65/68 (2010); GA Res 67/95 of 14 December 2012; GA Res. 67/78 of 11 December 2012; GA Res. 66/288 of 27 July 2012; GA Res. 60/30 of 29 November 2005; UN DOALOS, Marine Biological Diversity beyond Areas of National Jurisdiction: Legal and Policy Framework (2011)

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I. Purpose and Function

1 Art. 133 is the first provision of Section 1 of Part XI (The Area), arguably the most innovative part of the Convention as it deals with the new regime of the common heritage of mankind (→ Art. 136). It provides a definition of the kind of resources to which Part XI applies, namely mineral resources. Other kinds of resources, such as living resources, are implicitly excluded from the scope of Part XI.

2 The UNCLOS follows a fragmented approach as far as the 'use of terms' (as definitions are often referred to) is concerned. Some definitions are to be found in single parts (for example, Art. 124 (1)(a) gives the definition of 'land locked State'). Other definitions 'for the purposes of this Convention' are provided for in Art. 1 on the use of terms and scope. Among them

there are some definitions which are mostly relevant for Part XI, namely the definitions of the 'Area', the 'Authority' and 'activities in the Area'. For example, the Area is defined in Art. 1 (1)(1), as 'the sea-bed and ocean floor and subsoil thereof, beyond the limit of national jurisdiction'. The reference in Art. 1 to 'the subsoil thereof' makes Art. 133 redundant as far as the words 'or beneath the sea-bed' are concerned.

Art. 133 provides the definition of 'resources' only for the purposes of Part XI. In fact the definition of 'resources' is strictly linked to the definition of 'activities in the Area', intended to mean 'all activities of exploration for, and exploitation of, the resources of the Area', as stated in Art. 1 (1)(3). This definition, which is given 'for the purposes of this Convention', does not envisage a restriction to mineral resources only. The conclusion to be drawn could be that any time the expression 'activities in the Area' is used in Part XI, it is to be understood according to the restrictive meaning of 'resources', as defined in Art. 133. However, any time the expression 'activities in the Area' is used in other parts of the UNCLOS (for example, in Arts. 209 and 215, included in Part XII, on the protection and preservation of the marine environment) it is to be understood as referred to the ordinary and broader meaning of 'resources' that includes also living resources. 3

While Art. 133 (a) presents some logical intricacies, the same cannot be said for Art. 133 (b). It informs us that the 'mineral resources' referred to in Art. 133 (a) are called 'minerals'. But what else could this refer to? 4

II. Historical Background

No distinction between different kinds of resources was made in the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, adopted on 17 December 1970, whereby the United Nations General Assembly (UNGA) solemnly declared that 'the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction […], as well as the resources of the area, are the common heritage of mankind'.[1] Under the Draft Ocean Space Treaty, elaborated by Malta in 1971,[2] all natural resources, whether living or non-living, existing beyond the 200 NM limit would be managed by international ocean space institutions to ensure the equitable sharing by all States of the benefits derived from the development of these resources, taking into particular consideration the interests and needs of poor countries.[3] However, it became clear during the negotiations of the UNCLOS that the majority of States were in favour of applying the new regime of common heritage of mankind only to the mineral resources of the seabed and the subsoil beyond the limits of national jurisdiction. 5

Part I of the 1975 Informal Single Negotiating Text was more analytical than the present Art. 133 (a) on what could be considered as mineral resources: 6

> 'For the purposes of this Convention: (…)
> (iii) "Resources" means resources in situ.
> (iv) "Mineral resources" means any of the following categorizations:
> (a) Liquid or gaseous substances such as petroleum, gas, condensate, helium, nitrogen, carbon dioxide, water, steam, hot water, and also sulphur and salts extracted in liquid form in solution;
> (b) Useful minerals occurring on the surface of the sea-bed or at depths of less than three metres beneath the surface and also concretions of phosphorites and other minerals;
> (c) Solid minerals in the ocean floor at depths of more than three metres from the surface;
> (d) Ore-bearing silt and brine'.[4]

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[1] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970, Principle 1.

[2] Sea-Bed Committee, Draft Ocean Space Treaty: Working Paper Submitted by Malta, UN Doc. A/AC.138/53 (1971).

[3] See *Arvid Pardo*, The Common Heritage: Selected Papers on Oceans and World Order (1975), 381 *et seq*.

[4] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137–138 (Article 1).

7 A similar approach was followed in the 1979 Informal Composite Negotiating Text:

> 'For the purposes of this Part of the present Convention: […]
> (b) "Resources" means mineral resources in situ. When recovered from the Area, such resources shall, for the purposes of this Part of the present Convention, be regarded as minerals.
> (c) Minerals shall be divided into the following categories:
> (i) Liquid or gaseous substances such as petroleum, gas, condensate, helium, nitrogen, carbon dioxide, water, steam, hot water, and also sulphur and salts extracted in liquid form in solution;
> (ii) Useful minerals occurring on the surface of the sea-bed or at depths of less than three metres beneath the surface and also concretions of phosphorites and other minerals;
> (iii) Solid minerals in the ocean floor at depths of more than three metres from the surface;
> (iv) Ore-bearing silt and brine'.[5]

8 The 1980 Informal Composite Negotiating Text provided as follows:

> 'For the purposes of this Part:
> (a) "Resources" means mineral resources in situ. When recovered from the Area, such resources shall be regarded as minerals.
> (b) Resources shall include:
> (i) Liquid or gaseous substances at or beneath the surface such as petroleum, gas, condensate, helium, and also sulphur and salts extracted in liquid form in solution;
> (ii) Solid substances occurring on the surface or at depths of less than three metres below the surface, including polymetallic nodules;
> (iii) Solid substances at depths of more than three metres below the surface;
> (iv) Metal-bearing brine at or beneath the surface'.[6]

9 The provision was then simplified in the 1981 Draft Convention on the Law of the Sea,[7] where it referred generally to 'all solid, liquid or gaseous mineral resources'. The only specific example given was polymetallic nodules, which were were considered the most promising resource of the Area when the UNCLOS was being negotiated. However, as it was understood by the drafters of the UNCLOS, and as it can easily be inferred from the text of the provision, all other kinds of mineral resources, including hydrocarbons, are covered by the definition.[8] The present Art. 133 has the same wording as it had in the 1981 Draft Convention.

10 In 1982 the United States proposed the addition of the words 'for which rules, regulations and procedures had been adopted'[9] to para. (a). This amendment would have had the notable consequence of excluding all the resources of the Area from the regime of the common heritage of mankind, so long as no legal regime had been adopted for them at the international level and instead applying the principle of freedom of the high seas to such resources. The proposal was not accepted.

III. Elements

1. 'For the purposes of this Part: (a) 'resources' means all […] mineral resources'

11 What definitions to give, if any, is always a difficult question to be addressed by the drafters of a legal text.[10] The most prudent choice is to define only those terms that are used

[5] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV. 1 (1979), OR VIII, 73 (Article 133).

[6] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV. 2 (1980), OR VIII, 75 (Article 133).

[7] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 194 (Article 133).

[8] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 75.

[9] UNCLOS III, Changes Suggested by the Delegation of the United States of America, WG.21/Informal Paper 18 (1982, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VI (1984), 278.

[10] '*Omnis definitio in iure civili periculosa est*', see: Alan Watson (ed.), Digest of the Roman Emperor Justinian, vol. IV (2011), book 50, title 17 (fragment 202).

in a meaning different from, or more restrictive than, their ordinary one. Art. 133 (a) provides the definition of the term 'resources' only for the purposes of the part where the provision is included, that is: Part XI (The Area). Here the term is given a more restrictive meaning than its ordinary one, as it only refers to to mineral resources. Natural, non-mineral, but living resources, such as the so-called sedentary species defined in Art. 77 (4), are thus excluded from the definition.[11] This further implies that in the other parts of the UNCLOS the term recovers its ordinary and broader meaning. For example, Art. 246 (5), included in Part XIII (Marine scientific research), provides that consent by the coastal State may withhold consent to marine scientific research projects that are of direct significance for the exploration and exploitation of natural 'resources', referring to both living and non-living resources.[12] The broad meaning of 'resources' should also be retained where, although in Part XI, the term is used not in isolation, but with to the adjective 'natural'. This occurs in Art. 145 (b), which provides that the International Seabed Authority (ISA or the Authority) shall adopt rules, regulations and procedures for the protection and conservation of the 'natural resources of the Area'.[13]

Art. 133 (a) clearly states that the 'resources' are all kinds of mineral resources of the seabed and its subsoil, in whatever form they are found. The ISA has so far adopted three sets of regulations on prospecting and exploration for certain mineral resources in the Area (the so-called mining code) relating to polymetallic nodules (2000; amended in 2013),[14] polymetallic sulphides (2010)[15] and cobalt-rich ferromanganese crusts (2012)[16] The codes confirm the wide definition contained in UNCLOS and respectively define 'resources' as: 12

> 'any deposit or accretion of nodules, on or just below the surface of the deep seabed, which contain manganese, nickel, cobalt and copper'.[17]
>
> 'hydrothermally formed deposits of sulphides and accompanying mineral resources in the Area which contain concentrations of metals including, inter alia, copper, lead, zinc, gold and silver'.[18]
>
> 'cobalt-rich iron/manganese (ferromanganese) hydroxide/oxide deposits formed from direct precipitation of minerals from seawater onto hard substrates containing minor but significant concentrations of cobalt, titanium, nickel, platinum, molybdenum, tellurium, cerium, other metallic and rare earth elements'.[19]

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[11] According to Nordquist/Nandan/Rosenne (note 8), 76, 'other potential ocean resources, such as ocean thermal energy conversion (OTEC), are also not resources of the Area'. The exclusion of activities consisting in the use of temperature differentials to generate energy from the regime of Part XI is also a consequence of the fact that these activities do not take place in the Area, but in the superjacent water column.

[12] For information on of functioning of Art. 246, see *Huh/Nishimoto* on Art. 246.

[13] For further information, see *Vöneky/Beck* on Art. 145 MN 39 *et seq*.

[14] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex (Polymetallic Nodules Regulations). Polymetallic nodules 'are lumps of metallic ore, between golf ball and soccer ball in size, scattered loosely in expansive fields on abyssal plains. Their quantity in a given area can be assessed simply by photographing the ocean bottom. They can be scooped up by mechanical harvesters with little physical damage to the seabed', see ISA, Press Release of 23 July 2003, ISA Doc. SB/9/1 (2003), 2.

[15] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex (Polymetallic Sulphides Regulations). 'Hydrothermal polymetallic massive sulphides occur typically in chimney-like structures, called smokers, surrounding undersea hot-spring vents. Their minerals come mainly from magma, the mass of molten rock deep beneath the earth's crust, where it breaches the ocean bottom in volcanic regions along the margins of ocean basins. Individual deposits are small and scattered. Mining would require the destruction of the smokers, with potentially catastrophic consequences for the exotic animal communities that live in the superheated, oxygen-deprived water and cannot exist in a normal environment dependent on sunlight', see ISA Press Release (note 14), 2.

[16] ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/a/11 (2012), Annex (Cobalt-Rich Ferromanganese Crusts Regulations). 'Cobalt-rich ferromanganese crusts, derived like the nodules from metals precipitated out of seawater, are fused to the seabed in layers up to tens of centimetres thick, often buried beneath other seabed deposits. They are found on the flanks and ridges of globe-encircling, mid-ocean mountain range. Assessment of their occurrence and metal content and their eventual exploitation will require digging or drilling the ores out of a solid rock bed', see ISA Press Release (note 14), 2.

[17] Reg. 1 (3)(d) Polymetallic Nodules Regulations.

[18] Reg. 1 (3)(d) Polymetallic Sulphides Regulations.

[19] Reg. 1 (3) (a) Cobalt-Rich Ferromanganese Crusts Regulations.

2. '*in situ* in the Area'

13 The mineral resources to which Part XI applies are '*in situ*', intended to refer to those minerals that originate from the Area. This wording implies that the regime of the Area excludes mineral resources that originate in other ocean spaces than from the Area and are only found fortuitously there. This could be the case with regards to mineral resources transported as cargo on sunken ships or the mineral components of the wrecked remains of the sunken ships themselves. In the latter instance, Art. 149 in relation to archaeological and historical objects could apply.[20]

3. Genetic Resources

14 Today, difficult questions are posed by genetic resources located in the Area. The deep seabed is not a desert. Despite extreme conditions of cold, complete darkness and high pressure, it is the habitat of diverse forms of life associated with typical geological or geomorphological features, such as hydrothermal vents, cold water seeps, seamounts or deep water coral reefs. In particular, it supports biological communities that present unique genetic characteristics. For instance, some such communities live in the complete absence of sunlight where warm water springs from tectonically active areas (so-called hydrothermal vents). Several species of micro-organisms, fish, crustaceans, polychaetes, echinoderms, coelenterates and molluscs have been found in these areas, many of which were new to science. The communities in question, which do not depend on plant photosynthesis for their survival, rely on specially adapted micro-organisms able to synthesize organic compounds from the hydrothermal fluid of the vents (chemosyntesis). The ability of some deep seabed organisms to survive extreme temperatures (thermophiles and hyperthermofiles), high pressure (barophiles) and other extreme conditions (extremophiles) makes their genes of great interest to science and industry. The exploitation of genetic resources, through patents or other means, may in the near future become a commercially valuable activity taking place beyond the limits of national jurisdiction.

15 Neither the UNCLOS nor the 1992 Convention on Biological Diversity (CBD) provide a specific legal framework for genetic resources found on the seabed or in superjacent waters. In 2006 the subject of the international regime for the genetic resources in the deep seabed was discussed within the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, established under UNGA Resolution 60/30 of 29 November 2005. Opposite views were put forward by the States concerned.

16 Some States took the position that principle of common heritage of mankind contained in the UNCLOS and the mandate of the ISA should be extended to cover genetic resources:

> 'Several delegations reiterated their understanding that the marine genetic resources beyond areas of national jurisdiction constituted the common heritage of mankind and recalled article 140 of the Convention, which provides that the activities in the Area shall be carried out for the benefit of mankind and that particular consideration should be given to the interest and needs of developing States, including the need for these resources to be used for the benefit of present generations and to be preserved for future generations. (…) A number of delegations mentioned that the International Seabed Authority constituted an existing mechanism in this area and that consideration should accordingly be given to the possibility of broadening its mandate'.[21]

17 Other States relied on the principle of freedom of the high seas (Art. 87), which would imply a right of freedom of access to, and unrestricted exploitation of, deep seabed genetic resources:

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[20] See *Scovazzi* on Art. 149.

[21] GA, Report of the Ad Hoc Open-Ended Working Group to Study Issues Relating to Their Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, UN Doc. A/61/65 (2006), para. 71.

> 'Other delegations reiterated that any measures that may be taken in relation to genetic resources in areas beyond national jurisdiction must be consistent with international law, including freedom of navigation. In their view, these resources were covered by the regime of the high seas, which provided the legal framework for all activities relating to them, in particular marine scientific research. These delegations did not agree that there was a need for a new regime to address the exploitation of marine genetic resources in areas beyond national jurisdiction or to expand the mandate of the International Seabed Authority'.[22]

18 The Working Group held a second meeting in 2008. Again, different views were expressed as regards the regime to be applied to marine genetic resources, repeating what had already been said in 2006:

> 'In that regard, divergent views were expressed on the relevant legal regime on marine genetic resources beyond areas of national jurisdiction, in particular whether those marine genetic resources were part of the common heritage of mankind and therefore fell under the regime of the Area, or were part of the regime for the high seas'.[23]

19 The same contrary positions were manifested during the 2010 meeting of the Working Group.[24]

20 Perhaps the question of the regime of genetic resources beyond national jurisdiction would be better addressed from another perspective. The UNCLOS cannot be supposed to regulate those activities that its drafters did not intend for the simple reason that they were not foreseeable in the period when the treaty was being negotiated. At that time (1973–1982), very little was known about the genetic qualities of deep seabed organisms. The term 'genetic resources' does not appear anywhere in the UNCLOS. If this perspective is followed, the conclusion can be that a legal gap currently exists for genetic resources found in both the Area and the high seas.

21 It is extremely difficult to go against the plain text of Art. 133 that excludes non-mineral resources, such as genetic resources, from the application of Part. XI.[25] However, some general principles of the UNCLOS should be taken into consideration when envisaging any future and more specific regime for marine genetic resources in areas beyond national jurisdiction. These principles include the paramount objective to:

> 'contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular the special interests and needs of developing countries, whether coastal or land-locked'.[26]

Furthermore, the application of the principle of freedom of the high seas to genetic resources under a 'first-come-first-served' approach would lead to inequitable and unacceptable consequences. New cooperative schemes, based on a regime for access and the benefit of all States, should be envisaged if a future agreement on genetic resources beyond the limits of national jurisdiction will ever be drafted. This would also be in full conformity with the principle of fair and equitable sharing of the benefits arising out of the utilization of genetic resources set forth by the CBD.

22 New prospects for addressing the question of genetic resources emerged at the 2011 meeting of the Working Group. States participating in the meeting recommended that:

> 'a process by initiated by the General Assembly, with a view to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS'.[27]

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[22] *Ibid.*, para. 72.

[23] GA, Joint Statement of the Co-Chairpersons of the Working Group, UN Doc. A/63/79 (2008), para. 32.

[24] See GA, Letter Dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly, UN Doc. A/65/68 (2010), paras. 70–72.

[25] However, see *Vöneky/Höfelmeier* on Art. 136 MN 22.

[26] Preamble 5; for further information, see also *Lagoni* on the Preamble MN 29–30.

[27] UN DOALOS, Marine Biological Diversity beyond Areas of National Jurisdiction: Legal and Policy Framework (2011), 3, available at: http://www.un.org/depts/los/biodiversityworkinggroup/webpage_legal%20and%20policy.pdf.

One of the key elements for a future global 'package' on conservation and sustainable use of marine biodiversity could be a regime for genetic resources, including access and benefit sharing, as recalled in the 2011 recommendation of the Working Group.[28]

23 At its 2012 meeting, the Working Group requested the United Nations Secretary General to convene two intersessional workshops in 2013 on the topics of 'marine genetic resources' and 'conservation and management tools, including area-based management and environmental impact assessment'. The workshops are intended to improve understanding of the issues and clarify key questions in order to enable the UNGA to make progress on ways to fulfil its mandate.[29] By Resolution 67/78, adopted on 11 December 2012,[30] the UNGA decided[31] to convene the two workshops in May 2013[32] and recalled

> 'that in "The future we want" States committed to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea'.[33]

24 Lastly, on 19 June 2015, following the recommendations of the Working Group, the United Nations General Assembly adopted by consensus Resolution 69/292, relating to the development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The negotiations should address four main topics, intended as a 'package', in the sense that none of them can be separated from the others, namely:

- marine genetic resources, including questions on the sharing of benefits;
- measures such as area-based management tools, including marine protected areas;
- environmental impact assessments;
- capacity building and transfer of marine technology.

The process for the negotiations will encompass two phases. In 2016 and 2017 a preparatory committee will meet to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally-binding instrument under the UNCLOS. By the end of its seventy-second session (2017–2018) the General Assembly will decide on the convening and on the starting date of an intergovernmental conference to elaborate the text of an international legally-binding instrument under the UNCLOS.

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[28] Other key elements specified in the recommendation are protected areas, environmental impact assessment, capacity-building and the transfer of marine technology,.

[29] See GA Res. 67/95 of 14 December 2012, para. 1 and appendix.

[30] GA Res. 67/78 of 11 December 2012.

[31] *Ibid.*, para. 182.

[32] The workshop on marine genetic resources addressed the following subjects: 'Meaning and scope; extent and types of research, uses and applications; technological, environmental, social and economic aspects; access-related issues; types of benefits and benefit-sharing; intellectual property rights issues; global and regional regimes on genetic resources, experiences and best practices; impacts on and challenges to marine biodiversity beyond areas of national jurisdiction; exchange of information on research programmes regarding marine biodiversity in areas beyond national jurisdiction'.

[33] GA Res. 67/78 of 11 December 2012, para. 181. 'The Future We Want' is the outcome document adopted by the UN Conference on Sustainable Development, held in Rio de Janeiro in 2012 (the so-called Rio+20 Conference, see GA Res. 66/288 of 27 July 2012).

Article 134
Scope of this Part

1. This Part applies to the Area.

2. Activities in the Area shall be governed by the provisions of this Part.

3. The requirements concerning deposit of, and publicity to be given to, the charts or lists of geographical coordinates showing the limits referred to in article 1, paragraph 1 (1), are set forth in Part VI.

4. Nothing in this article affects the establishment of the outer limits of the continental shelf in accordance with Part VI or the validity of agreements relating to delimitation between States with opposite or adjacent coasts.

Documents: UN DOALOS, Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/40/REV.1 (2008)

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I. Purpose and Function

The four paragraphs that compose Art. 134 are relatively heterogeneous. Art. 134 (1) and (2) relate to the scope of Part XI on the regime of the Area, in which Art. 134 is itself included. Art. 134 (3) makes a reference to Part VI on the regime of the continental shelf, and Art. 134 (4) is a disclaimer provision. **1**

Art. 134 must be read in connection with other provisions of the UNCLOS. The definition of the term 'Area' used in Art 134 (1), is given in Art. 1 (1)(1) as 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.' The definition of the terms 'activities in the Area', used in Art. 134 (2), is given in Art. 1 (1)(3) as 'all activities of exploration for, and exploitation of, the resources of the Area.' The reference to Part VI made in Art. 134 (3) as regards the limits of the Area is specifically related to Art. 76 (9) on the definition of the continental shelf, and to Art. 84 on charts and lists of geographical co-ordinates. Art. 134 (4) is also related to Art. 76, and to Art 83 on the delimitation of the continental shelf between States with opposite or adjacent coasts, both included in Part VI. **2**

II. Historical Background

The 1975 Informal Single Negotiating Text (ISNT) contained two provisions relevant to the present Art. 134, namely Art. 2 and Art. 6. Art. 2 ISNT read: **3**

> '1. This Convention shall apply to the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, hereinafter called the "Area".
>
> 2. States Parties to this Convention shall notify the International Sea-bed Authority established pursuant to Article 21 (hereinafter called the "Authority"), of the limits referred to in paragraph 1 of

this article defined in this Convention and determined by co-ordinates of latitude and longitude and shall indicate the same in appropriate large scale charts officially recognized by that State.

3. The Authority shall register and publish such notification in accordance with rules adopted by it for the purpose.

4. Nothing in this article shall affect the validity of any agreement between States with respect to the establishment of limits between opposite or adjacent States'.[1]

Art. 6 ISNT read:

'Activities in the Area shall be governed by the provisions of this Convention and shall be subject to regulation and supervision by the Authority as provided herein. No such activities shall be carried out except in accordance with such regulations and the provisions of this Convention.'[2]

4 After some discussion at the various sessions of the Conference, a provision identical to the present UNCLOS Art. 134 was included in the 1981 Draft Convention on the Law of the Sea[3]. The main substantive change from the ISNT was the deletion of the sentence according to which no activities in the Area would be carried out except in accordance with the provisions of the UNCLOS and regulations adopted by the International Sea-Bed Authority (ISA or the Authority). This was done following a proposal made by the United States.[4] However, what was been deleted could be considered as implied as a logical consequence of what has been retained in Art. 134 (2), namely that Part XI governs activities in the Area.

III. Elements

1. 'This Part applies to the Area' and 'Activities in the Area shall be governed by […] this Part'

5 The first two paragraphs of Art. 134 can be considered as truisms. That the part of UNCLOS entitled 'the Area' would apply to the Area and to activities in the Area is precisely what is expected, without any need to state it. However, Art. 134 (2) is not drafted in terms of exclusivity, and activities in the Area are also mentioned and governed by provisions included in Part XII on the protection and preservation of the marine environment, namely Art. 209 on pollution from activities in the Area and Art. 215 on enforcement with respect to pollution from activities in the Area.

2. 'requirements concerning deposit of, and publicity' of 'charts or lists […] are set forth in Part VI'

6 According to Art. 134 (3), the limits of the Area are those that are drawn on the charts or specified in the lists of geographical co-ordinates showing the outer limit of the continental shelf that, under Art. 76 (9), and Art. 84, coastal States are bound to deposit with the United Nations Secretary General and with the Secretary General of the Authority. Under Art. 84 (2), coastal States are also bound to give due publicity to such charts or lists.[5]

7 Art. 134 (3) is based on the fact that the Area begins where the seabed subject to national jurisdiction (the outer limit of the continental shelf) ends. The two completely different

[1] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 138 (Article 2).

[2] *Ibid.*, 138 (Article 6).

[3] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 194 (Article 134).

[4] First Committee UNCLOS III, United States: Proposed Amendments to the Committee I Single Negotiating Text (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 153 (Article 6).

[5] *Cf. Tanaka* on Art. 84 MN 11–14. The duty to give due publicity can be found in several provisions throughout UNCLOS. For further analysis on the duty to give due publicity, see e. g. *Symmons* on Art. 16 MN 16–19; *Barnes* on Art. 21 MN 23.

regimes of the sovereign rights over resources (→ Art. 77) and of the common heritage of mankind (→ Art. 136) are separated by the same boundary line (→ Art 76).

3. 'Nothing […] affects the establishment of the outer limits of the continental shelf' 'or the validity of [delimitation] agreements'

Art. 134 (4) provides that nothing in Art. 134 affects the determination of the outer limit of the continental shelf of coastal States or the validity of agreements relating to the establishment of maritime boundaries between the States concerned. However, to be meaningful and consistent with the title of Art. 134, the disclaimer should have referred to the whole of Part XI and not only to Art. 134. **8**

The determination of the outer limits of the continental shelf is set forth in Art. 76, one of the most complex provisions of the UNCLOS.[6] A special procedure is envisaged in Annex II to the UNCLOS, relating to the Commission on the Limits of the Continental Shelf, for the cases where the outer edge of the continental margin extends beyond the 200 NM distance from the baselines of the territorial sea. Although directly affected as the entity in charge of the organization and control of activities in the Area,[7] the ISA is not granted any specific role in the determination of the boundary line between the seabed subject to national jurisdiction and the Area. **9**

The rules for the delimitation of the exclusive economic zone or the continental shelf between States with opposite or adjacent coasts are respectively found in Arts. 74 and 83. In principle, it is difficult to see how the regime applying in the Area, that is in the seabed beyond national jurisdiction, could affect the 'validity' of agreements on delimitations between States, which necessarily apply within the limits of national jurisdiction. Moreover, it would be absurd to conclude that the purpose of Art. 134 (4) is to uphold the validity of agreements by which two or more States were to delimit among themselves portions of seabed that go beyond what Art. 76 grants to coastal States, thus encroaching upon the regime of the Area. **10**

A meaning can be given to the second part of Art. 134 (4) by recalling that under Art. 76 (8) information on the limits of the continental shelf beyond 200 NM from the baselines of the territorial sea is to be submitted by the coastal State to the Commission on the Limits of the Continental Shelf, which is then entitled to make a recommendation on the submission. Art. 134 (4) can be used to confirm that any action taken by the Commission on a submission made by one State cannot prejudice the rights that would by granted to another State by a delimitation agreement concluded or to be concluded by the two States concerned. This is mirrored in Art. 9 Annex II, which provides that 'the action of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts'. **11**

In fact, the Rules of Procedure of the Commission provide as follows: **12**

> '1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.
>
> 2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States'.[8]

The Annex I to the Rules of Procedure further confirms the non-prejudice rule:

> 'The Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States,[9] […]

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[6] For further information on how the article functions, see generally *Parson* on Art. 76.

[7] Art. 157 (1).

[8] UN DOALOS, Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/40/REV.1 (2008), 17 (Rule 46).

[9] *Ibid.*, Annex I (para. 1).

(a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

(b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute'.[10]

Article 135
Legal status of the superjacent waters and air space

Neither this Part nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the air space above those waters.

Documents: Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970; ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

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I. Purpose and Function

1 Art. 135 is a disclaimer provision (or non-prejudice provision) that could well have constituted a paragraph of Art. 134, as it is a logical consequence of Art. 134 (1). Art. 78 is a similar disclaimer provision included in Part VI on the continental shelf, and is also based on the distinction between seabed, waters and air. It provides that 'the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters'.[1]

2 Art. 135 relates to a quite interesting situation from the legal point of view. It occurs where different regimes apply to two different vertical space layers, namely the seabed beyond national jurisdiction and the high seas (the latter also including the airspace above it)[2].

3 Art. 135 is directed at avoiding any prejudice to the legal status of certain spaces. It does not enter into the connected but separate question as to the accommodation of different activities, irrespective of the 'layer' where they take place. This is done by Art. 147 (1) and (3),[3] which provide as follows:

> 'Activities in the Area shall be carried out with reasonable regard for other activities in the marine environment.'

[10] *Ibid.*, Annex I (para. 5).
[1] *Cf. Maggio* on Art. 78 MN 6–10.
[2] Art. 87 (1)(b).
[3] For further information, see *Vöneky/Beck* on Art. 147 MN 8–17, 34.

'Other activities in the marine environment shall be conducted with reasonable regard for activities in the Area.'

A similar 'accommodation' provision is Art. 87 (2), according to which the high seas freedoms 'shall be exercised by all States […] with due regard for the rights under this Convention with respect to activities in the Area'. 4

II. Historical Background

In 1970, during the preparatory work for UNCLOS III, Norway submitted a draft resolution which expressed the basic concept of the present Art. 135 and added to it a specific mention of the recognized high seas freedoms: 5

'Nothing herein shall affect the legal status of the waters superjacent to the area as high seas or that of the air space above these waters; in particular there shall be no infringement of the recognized freedoms of the high seas nor shall activities in the area interfere unjustifiably with the exercise of these freedoms.'[4]

The Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, adopted on 17 December 1970 by the United Nations General Assembly, also included the basic concept of non-prejudice to a legal status without further specifications, stating: 'Nothing herein shall affect: (a) the legal status of the waters superjacent to the area or that of the air space above those waters'.[5] 6

A working paper submitted by Canada in 1971 presented a broader scope. The abstract prohibition on affecting the legal status was expressed in the more concrete terms by an obligation to avoid unjustifiable interference. This obligation was given a reciprocal content, in the sense that neither the activities in the waters not those conducted on the seabed would unjustifiably interfere with the other kind of activities: 7

'All activities in the marine environment shall be conducted in such a manner as to avoid unjustifiable interference with the exploration and exploitation of the resources of the area, and conversely […] exploration and exploitation of these resources must not result in any unjustifiable interference with such other activities'.[6]

In a text prepared in 1973 to illustrate areas of agreement and disagreement, the wording of the 1970 Declaration of Principles was combined with a specific list of rights that could not be affected by activities in the Area: 8

'[Except as provided in these articles, nothing herein]
[Neither these articles nor any rights granted or exercised pursuant thereto] shall affect the legal status of the waters superjacent to the Area [as high seas] or that of the air space above those waters.
[2. [Except as provided in these articles] The use of the area for the purpose of exploration and exploitation of its resources shall not conflict with freedom of navigation, fishing, scientific research, laying and maintenance of submarine cables and pipelines and other freedoms of the high seas']'.[7]

The 1975 Informal Single Negotiating Text was very close to the present Art. 135:

'Neither the provisions of this Convention nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the air space above those waters.'[8]

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[4] Sea-Bed Committee, Declaration of Principles Governing the Activities of States with Respect to the Sea-Bed and the Ocean Floor, and the Suboil thereof, underlying the High Seas beyond the Limits of National Jurisdiction. Norway: Draft Resolution, UN Doc. A/AC.138/SC.I/L.4/REV.1 (1970), para. 6.

[5] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970, Principle 13.

[6] Sea-Bed Committee, International Sea-Bed Régime and Machinery, Working Paper Submitted by the Delegation of Canada, UN Doc. A/AC.138/59 (1971), 14 (para. 13).

[7] Sea-Bed Committee, Report of Sub-Committee I: Annex III, UN Doc. A/AC.138/94/ADD.1 (1973), 24 (Article 16).

[8] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 139 (Article 15).

9 In the 1976 Revised Single Negotiating Text the words 'neither the provisions of this Convention' were replaced by 'neither this part of the Convention'.[9] No further substantive changes were made thereafter.

III. Elements

1. 'any rights granted or exercised'

10 The rights exercised or granted pursuant to Part XI are basically those provided for in the contracts concluded by the International Seabed Authority (the Authority) for the exploration or exploitation of mineral resources of the Area, as well as those provided for in the mining codes adopted by the Authority. All the three codes existing so far, namely the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area[10] (Polymetallic Nodules Regulations) adopted in 2000, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area[11] (Polymetallic Sulphides Regulations) adopted in 2010 and amended in 2013, and the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area[12] (Cobalt-Rich Ferromanganese Crusts Regulations) adopted in 2012, contain the following provision:

> 'These Regulations shall not in any way affect the freedom of scientific research, pursuant to article 87 of the Convention, or the right to conduct marine scientific research in the Area pursuant to articles 143 and 256 of the Convention. Nothing in these Regulations shall be construed in such a way as to restrict the exercise by States of the freedom of the high seas as reflected in article 87 of the Convention.'[13]

2. 'shall [not] affect the legal status of the waters superjacent to the Area'

11 The wording 'waters superjacent to the Area' is to be understood as the whole water column and not only the waters immediately above the seabed.[14] While mostly taking place on the seabed, activities in the Area can also extend to the superjacent waters. In the advisory opinion of 1 February 2011 on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea, made the following remark:

> 'Transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. In the case of polymetallic nodules, this applies, for instance, to transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place.'[15]

12 The legal status of the waters superjacent to the Area, which is by definition located 'beyond the limits of national jurisdiction' (→ Art. 1 (1)(1)), can only be the high seas status. It includes, *inter alia*, the rights listed in Art. 87 (1), namely the freedoms of navigation, of

[9] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 130 (Article 15).

[10] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex.

[11] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex.

[12] ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex.

[13] Reg. 1 (4) Polymetallic Nodules Regulations; Reg. 1 (4) Polymetallic Sulphides Regulations; Reg. 1 (4) Cobalt-Rich Ferromanganese Crusts Regulations.

[14] See also *Maggio* on Art. 78 MN 9–10.

[15] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 96, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Adv_Op_010211_eng.pdf.

overflight, to construct artificial islands and other installations permitted under international law, of fishing, and of scientific research, as governed by the relevant UNCLOS provisions. The freedom to lay submarine cables and pipelines, also listed in Art. 87 (1), is an activity which is mostly related to the seabed rather than to the superjacent waters. It is regulated by Arts. 112 to 115. Art. 112 (2) particularly refers to Art. 79 (5), which provides that 'possibilities of repairing existing cables or pipelines shall not be prejudiced'.[16]

How activities which take place in the deep sea-bed, at thousands of meters of depth, could affect the air space and its legal status is an interesting question. However, Art. 135 addresses the problem at its root by excluding any possibility of prejudice. **13**

Section 2
Principles governing the area

Article 136
Common heritage of mankind

The Area and its resources are the common heritage of mankind.

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[16] See *Englender* on Art. 79 MN 28.

Documents: GA, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res. 2467 (XXIII) of 21 December 1986; GA, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res. 2574 (XXIV) of 15 December 1969; GA, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res. 2340 (XXII) of 18 December 1967; GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970; ITLOS, A Guide to Proceedings before the International Tribunal for the Law of the Sea (2009), available at: http://www.itlos.org/fileadmin/itlos/documents/guide/guide_eng_2009.pdf

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I. Purpose and Function

1 Art. 136 is the key provision of Part XI of the Convention on the Law of the Sea, together with Art. 137 (2). It determines the legal status of the Area and its resources[1] and provides the legal framework for its utilization. The concept of common heritage of mankind laid down in this article serves as a basis for the subsequent articles, as it implies most of the following principles or is at least closely connected to them.[2] Art. 136 reaffirms the announcement of the concept of 'the common heritage of mankind' in preambular paragraph 6 of the Convention and in the UN General Assembly's Declaration of Principles of 1970.[3] All in all, the incorporation of the principle has been described as the main innovative feature of the Convention in comparison to the previous sea law instruments.[4] By proclaiming the applicable legal principle for the deep seabed, Art. 136 also provides an outline for the development and interpretation of the Convention by the States Parties and the Authority.[5] All activities and rules concerning the seabed in the Area have to meet its intention and serve its purpose.[6]

[1] The term 'Area' is defined in Art. 1 (1)(1), see *Tanaka* on Art. 1 MN 6–7; for a definition of 'resources' see Art. 133, *Scovazzi* on Art. 133 MN 11–12; for a critical discussion of the spatial scope of those terms see *Alex G. Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143, 147 *et seq*.

[2] *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 335.

[3] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970.

[4] *Tullio Scovazzi*, The Conservation and Sustainable Use of Marine Biodiversity, Including Genetic Resources, in Areas beyond National Jurisdiction: A Legal Perspective, Speech at the Twelfth Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, 22 June 2011, available at: http://www.un.org/Depts/los/consultative_process/ICP12_Presentations/Scovazzi_Presentation.pdf.

[5] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 99 (MN 136.8(c)).

[6] See the Sea-Bed Committee, Report of the Legal Sub-Committee, GAOR 24th Sess. Suppl. 22 (A/7622), 9, 14 (paras. 20–21).

Art. 136 has a special status *vis-à-vis* the other treaty provisions granted by Art. 311 (6).[7] This demonstrates the States Parties' high regard for the principle's significance and their commitment to permanently keep the deep seabed under this regime. The significance of the extraordinary regime for the deep seabed is also reflected by Arts. 187 and 288 (3): while the jurisdiction of the International Tribunal for the Law of the Sea generally requires declarations by or understandings between the parties to a case, the Seabed Disputes Chamber of the Tribunal has compulsory jurisdiction over all disputes concerning activities in the Area.[8] 2

In a broader perspective, Art. 136 and the following articles may also be seen as counterbalancing the freedom of the high seas in Art. 87 (1).[9] The latter ensures that all States have access to the high seas; however, according to Art. 87 (2), this freedom is limited by the rights of other States both regarding the high seas and the Area. Both regimes also share some features, such as the prohibition of national occupation.[10] 3

Given the substantial vagueness of Art. 136 compared to the detailed provisions in the subsequent articles, it could be questioned whether it has more than a merely symbolic role. Furthermore, the concept of common heritage of mankind is still, despite its employment in several international instruments,[11] subject to vivid discussion as to its scope and elements. Thus, a clear normative content cannot be established, which is also reflected in the different terms used to describe the concept.[12] 4

However, the significance of Art. 136 is far from being merely symbolic. Denying this neither meets the intention of the drafters of Art. 136 nor accounts for its long-term value. In the process of establishing the common heritage of mankind as a prominent and definite international legal principle, it is essential that it be mentioned and elaborated in international instruments.[13] Thinking in categories of international legal norms, the express mention of the principle can also help develop customary international law on the topic. 5

As the first principle provision in Part XI, Art. 136 plays a central role in clarifying the aims pursued by the drafters in creating a regime for the deep seabed area. Instead of national or individual freedom of use, Part XI aims to internationalize the deep seabed and its utilization.[14] For the achievement of this purpose, the articles of Part XI are supplemented by the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Implementation Agreement). 6

II. Historical Background

Essentially, Art. 136 is the formulation of a compromise which was perceived as necessary by the drafters of the Convention. During UNCLOS III, the prospected scarcity of terrestrial resources triggered increased interest in the possibility of mining polymetallic nodules in the 7

[7] Art. 311 (6) reads: 'States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Art. 136 and that they shall not be party to any agreement in derogation thereof'.

[8] A comprehensive overview of the jurisdiction of the Tribunal can be found in: ITLOS, A Guide to Proceedings before the International Tribunal for the Law of the Sea (2009), available at: http://www.itlos.org/fileadmin/itlos/documents/guide/guide_eng_2009.pdf, 4–5.

[9] Nordquist/Nandan/Rosenne (note 5), 100 (MN 136.8(e)).

[10] *Wolfrum* (note 2), 335; see *Vöneky/Höfelmeier* on Art. 137 MN 14, for an assessment of how these similarities trigger the formation of particular customary international law.

[11] Express mention – besides Art. 136 – in Art. 11 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; implicit enunciation in Arts. 1, 2, 4 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies; and in the Preamble of the Antarctic Treaty.

[12] Kemal Baslar has identified ten frequently used terms: concept, notion, doctrine, regime, ideal, theory, principle, right, rule, (legal) 'term of art', see *Kemal Baslar*, The Concept of the Common Heritage of Mankind in International Law (1998), 2.

[13] *Wolfrum* (note 2), 336.

[14] *Ibid.*, 334.

deep seabed. The negotiating States expected the economic significance of polymetallic nodules to rise considerably and thus took great care in drawing up a regime for the Area.

8 The invention of the concept of common heritage of mankind with respect to the law governing the deep seabed is commonly attributed to ARVID PARDO, representative of Malta at the General Assembly of the United Nations.[15] In a speech given on 1 November 1967, he took a stand on the dangers of allowing the extension of national jurisdiction to the seabed:

> 'The process [of States extending their jurisdiction] has already started and will lead to a competitive scramble for sovereign rights over the land underlying the world's seas and oceans, surpassing in magnitude and in its implications last century's colonial scramble for territory in Asia and Africa. […] Between the very few dominant powers, suspicions and tensions would reach unprecedented levels. Traditional activities on the high seas would be curtailed and, at the same time, the world would face the growing danger of permanent damage to the marine environment […].'[16]

9 According to PARDO, neither the concept of freedom of exploitation nor a sovereignty-based approach would be able to solve the looming political, economic and environmental issues. He therefore developed a new approach through the prohibition of national appropriation, the dedication for peaceful uses and a shared and responsible utilization of the Area with particular consideration for developing countries, which was intended to generate long-term benefits for mankind itself. Given this background, the implementation of the principle of common heritage of mankind differs fundamentally in its history from the other novelties in the Convention: while other innovations, for example the exclusive economic zone (→ Part V), mark the final codification of naturally evolved international law of the sea, the principle of common heritage of mankind is rather revolutionary and tailored to the particular situation.[17]

10 The Legal Sub-Committee of the Seabed Committee was the body specifically tasked with breathing life into the new concept of common heritage of mankind. In its 1969 report, the Committee stated that

> '[…] the notion of the 'common heritage of mankind' would provide the basis for specific principles concerning the area; accordingly, all rules and principles for activities in the sea-bed should be based on that notion.'[18]

11 The focus of the subsequent discussions rested on the formation of a bundle of subordinate principles that would shape the concept of common heritage of mankind. The principle found express mention in several draft treaty versions. For example in the one submitted by the United States in 1970,[19] which provided that the 'International Seabed Area' was to be the common heritage of mankind, comprising all areas of seabed and subsoil seaward of a 200 metre isobath adjacent to the coast.[20]

12 Tanzania's Draft Statute for an International Seabed Authority of 1971 more accurately defined the international seabed area as 'the sea-bed and the ocean floor and the subsoil thereof and its resources lying beyond the limits of national jurisdiction', also declaring it to be common heritage of mankind.[21] A similar wording was used by a working paper presented by thirteen Latin American States in the same year.[22] A broader Maltese proposal

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[15] *Scovazzi* (note 4), 1; *cf.* also *Betsy Baker*, Uncommon Heritage: Elisabeth Mann Borgese, Pacem in Maribus, the International Ocean Institute and Preparations for UNCLOS III, Ocean Yearbook 26 (2012), 11, 16, on Elisabeth Mann Borgeses' considerable contributions to the development of the concept.

[16] *Arvid Pardo*, The Common Heritage: Selected Papers on Oceans and World Order 1967–1974 (1975), 31.

[17] *Ibid.*, 1.

[18] Report of the Legal Sub-Committee (note 6), 14 (paras. 20–21).

[19] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130 *et seq.*

[20] *Ibid.*, 132 (Art. 1(1) and 1(2)).

[21] Sea-Bed Committee, United Republic of Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51–64.

[22] Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93–101.

submitted few weeks later envisaged the application of the common heritage principle not only to the seabed, but to all 'ocean space'[23] – defined as 'the surface of the sea, the water column and the sea-bed beyond internal waters'.[24] The UN General Assembly, having been occupied with the status of the Area for multiple years already,[25] issued a 'Declaration of Principles' for the Area in 1970[26] that introduced the term 'the Area' and subjected the Area and its resources to the regime of common heritage of mankind. The resolution became a model for several subsequent drafts, including the aforementioned Latin American version.[27] The discussion of the matter in the First Committee resulted in the development of draft articles for the Second Session of UNCLOS III.[28] Art. 2 provided that 'The Area and its resources are the common heritage of mankind'; either without (version A) or with (version B) the addendum 'This principle shall be implemented and interpreted in accordance with the provisions of these articles'. At the Third Session, in the Informal Single Negotiation Text, the addendum was eliminated[29] in favour of the view that considered the declaration of the basic principle sufficient and any further explanation a potential limit to its effective implementation.[30]

In the course of the ensuing negotiations and the final drafting of the Convention, the article remained unchanged. This is an indication of the early universal acceptance of the new basic principle governing the Area. However, in the context of the Convention as a whole, the acceptance of the internationalization of the deep seabed was conditional upon the granting of sovereign exploitation rights in the exclusive economic zone.[31] In addition, the concrete design of the articles succeeding and specifying Art. 136 gave rise to dissent by numerous developed States who feared that the articles would be a disincentive for public and private mining operations due to the heavy monopoly of the International Seabed Authority (ISA), the potential financial risks and the universally applicable decision-making procedure in the Council of the ISA.[32] In order to achieve increased acceptance of the Convention in the face of its imminent entry into force without accession by most of the industrialized nations, the United Nations launched a renegotiation of Part XI, resulting in the 1994 Implementation Agreement, adopted by the General Assembly on 17 August 1994.[33] According to its Art. 2, the Agreement and the Convention shall be 'applied together as one single instrument'. After its adoption, UNCLOS reached almost universal participation.[34] 13

[23] Sea-Bed Committee, Malta: Draft Ocean Space Treaty (1971), UN Doc. A/AC.138/53, GAOR 26th Sess. Suppl. 21 (A/8421), 105–193.

[24] *Ibid*., 114 (Art. 1).

[25] GA Res. 2340 (XXII) of 18 December 1967; GA Res. 2467 (XXIII) of 21 December 1986; GA Res. 2574 (XXIV) of 15 December 1969, all titled '[Examination of the] Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind'.

[26] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970.

[27] See *supra*, note 22.

[28] First Committee UNCLOS III, Draft Articles Considered by the Committee at its Informal Meetings (Arts. 1–21), UN Doc. A/CONF.62/C.1/L.3 (1974), OR III, 157.

[29] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 138 (Art. 3).

[30] First Committee UNCLOS III, 11th Meeting, UN Doc A/CONF.62/C.1/SR.11 (1974), OR II, 53.

[31] *Uwe Jenisch*, Renaissance des Meeresbodens – mineralische Rohstoffe und Seerecht, NordÖR 10 (2010), 373, 375.

[32] GA Res. 48/527 of 10 November 1993, 7 *et seq*.; *Scovazzi* (note 4), 4.

[33] For an in-depth analysis of the process leading to the Agreement see *Tullio Treves*, Entry into Force of the United Nations Law of the Sea Convention: The Road towards Universality, in: Najeeb Al-Nauimi/Richard Meese (eds.), International Legal Issues Arising under the United Nations Decade of International Law (1995), 443 *et seq*.

[34] As of June 2016, there were 168 States Parties. See the table of ratifications, available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

III. Elements

1. 'the common heritage of mankind'

14 The concept of common heritage of mankind has its roots in the idea of universal solidarity, both in terms of time and space: not only does it address mankind as a whole, stating that certain resources are of common interest, but it also reaches from present to future generations.[35] The evolution of the principle can be seen in the context of two tendencies currently reshaping public international law: on the one hand, the shift from an 'international law of coexistence' to an 'international law of cooperation';[36] and on the other hand, the development of a so-called 'third generation of human rights' attributing a legal position to groups of human beings rather than individuals.[37] Furthermore, it is in line with the growing awareness of the significance of global environmental protection and its implications for mankind in general. The evolution of the common heritage principle is also associated with the emergence of the notion of 'global public goods'.[38]

15 The first express implementation of the principle took place in the domain of international law of outer space: the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979 declares that the moon and its resources are the common heritage of mankind.[39] It has been argued that the first express references actually did not introduce the concept, but instead reiterated a universal and intertemporal principle derived from natural law.[40] However, such a view avoids without reasons the search for positivist hints such as State practice and treaties. It is not supportable since it confuses a meta-legal value that is incapable of proof with an elaborated legal principle. As noted above, the meaning of the term 'common heritage of mankind' is subject to discussions and can only be assessed on a concrete normative basis. A universally accepted, comprehensive definition of the term has not yet evolved, owing to the absence of State practice and express acceptance. This ambiguity has led some scholars to the conclusion that the idea of common heritage of mankind is nothing but a philosophical concept[41] or a part of the theoretical background necessary to achieve the aim of global environmental protection.[42] However, in cases where the principle has been installed in international treaty law, such as UNCLOS, the term 'principle' may well be used – here, the scope and elements are clearly defined by the relevant treaty norms.[43]

16 In general, the principle is mostly installed using five main elements: first, the prohibition of private and public appropriation or sovereignty; second, concerted management and exploitation by representatives from all nations; third, equal sharing of benefits acquired from exploitation of the region; fourth, the prohibition of military uses or installations; and fifth, the preservation for future generations.[44] The preservation for future generations in this

[35] *Antonio A. Cancado Trindade*, International Law for Humankind: Towards a New Jus Gentium (2010), 328.

[36] *Cf. Ulrich Beyerlin*, Staatliche Souveränität und internationale Umweltschutzkooperation: Gedanken zur Entwicklung des Umweltvölkerrechts, in: Ulrich Beyerlin *et al.* (eds.), Recht zwischen Umbruch und Bewahrung: Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt (1995), 937, 939.

[37] *Cf. Philip Alston*, A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?, NILR 29 (1982), 307, 308 *et seq*.

[38] On this relationship, see *Ellen Hey*, Conceptualizing Global Natural Resources: Global Public Goods Theory and International Legal Concepts, in: Holger P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 881, 889 *et seq*.

[39] Art. 11 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; see *supra*, note 11, for previous implementations of certain elements without express mention.

[40] *Baslar* (note 12), 9.

[41] *Ibid*., 8.

[42] *Beyerlin* (note 36), 952.

[43] *Rüdiger Wolfrum*, Common Heritage of Mankind, Max Planck Encyclopedia of Public International Law, vol. II (2012), 452–458.

[44] *Scott J. Shackelford*, The Tragedy of the Common Heritage of Mankind, StanfordELJ 28 (2009), 109, 111; *Jennifer Frakes*, The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica:

context is rather an objective than a normative provision. All normative elements can be found in the Convention:[45] while Art. 136 proclaims the employment of the principle, the subsequent articles install the different aspects.

a) Prohibition of Private and Public Appropriation or Sovereignty. Art. 137 (1) forbids the exercise of sovereignty over or appropriation of any part of the Area, both by States and natural or legal persons. Complementarily, the article obliges States Parties not to recognize any such act. Along with the inclusion of all States, instead of only States Parties, into the group of addressees of Art. 137 – which, with a view to the limits imposed by the *pacta tertiis*-rule, may be interpreted as a reference to parallel customary international law provisions[46] –, the obligation of non-recognition provides a strong safeguard for the prohibition of appropriation and sovereignty. 17

b) Concerted Management and Exploitation by All Nations. The element comprising the mutual management of the common-heritage-area is installed by numerous provisions in the Convention. Generally, all international cooperation and management regarding the Area is achieved through the creation of a specialized international organization, the ISA, as provided for in Art. 157. All States Parties are *ipso facto* members of the ISA pursuant to Art. 156 (2), which acts on behalf of all of mankind (→ Art. 137 (2)) and thus represents those States which are not parties to the Convention. The States, acting through the Authority, effectively act as trustees for all of mankind.[47] The complex system governing the exploitation of the Area is installed by Art. 153, ruling that all exploitation measures must be carried out either by the Enterprise, an organ of the ISA, or by States Parties or their nationals if sponsored by States Parties.[48] Compared to other treaty law designs that have manifested the concept of common heritage of mankind, the management and exploitation system envisaged by the Convention is by far the most elaborate one. This is on account of the Area's prospected economic importance as well as the heavy weight of its perceived counterpart, the freedom of the high seas. 18

c) Equal Distribution of Benefits. According to Art. 140 (2), in conjunction with Art. 160 (2)(f)(i), the Authority is responsible for the equitable sharing of all benefits derived from the Area. Art. 140 also provides for consideration of the interests and needs of developing States. However, both statements only provide a legal framework that needs further concretization, which is given by the ensuing articles: Art. 142 ensures equal distribution and consultation between the mining party and the coastal State, and Arts. 143 and 144 provide for universal distribution of technology and knowledge as well as affirmative action to the advantage of less developed States. This regime has been further elaborated and modified by the Implementation Agreement for Part XI of the Convention. 19

d) Designation for Peaceful Uses. Art. 141 allows only peaceful uses of the Area. It has been argued that the ban of military uses and installations is not part of the common-heritage-principle, but rather a concept of its own.[49] However, considering the peace-oriented and beneficial purpose of the common-heritage-principle as well as the embedding of the designation for peaceful uses amongst the other Convention provisions formulating the principle, at least in this case it has obviously been understood as an inherent part of the common heritage of mankind. 20

Will Developed and Developing Nations Reach a Compromise?, WILJ 21 (2003), 409, 411; other experts individualize different elements, *cf. Wolfrum* (note 2), 146, which, however, materially add up to the same normative content.

[45] *Cf.* however, *Bradley Larschan/Bonnie C. Brennan*, The Common Heritage of Mankind Principle in International Law, Colum. J. Transnat'l L. 21 (1983), 305, 325 *et seq.*, arguing on the basis of Pardo's original proposal that the Convention fails in implementing the elements.

[46] See *Vöneky/Höfelmeier* on Art. 137 MN 14.

[47] *Wolfrum* (note 43), 455.

[48] See further *Siegfried* on Art. 153.

[49] *Baslar* (note 12), 106.

2. Nature of the Principle in the Deep Seabed Area

21 Notwithstanding the common consensus that the principle of common heritage of mankind itself is ambiguous, it remains to be assessed whether the concrete regime imposed on the deep seabed by the Convention is paralleled by a corresponding rule of customary international law. This is especially important with regard to the treatment of non-signatory States. Some writers suggest that through the largely consensual drafting process since 1967, a rule of customary international law according a special legal status to the deep seabed area has evolved.[50] Given the express disagreement of the United States of America with the distributive system of Part XI, this is hardly arguable in respect of the entire system imposed under the name of 'common heritage of mankind'. It is, however, more convincing that certain parts of the system installed by the Convention, such as the ban on sovereign claims in Art 137, represent customary international law.[51] In addition, the purpose of the principle – the extension of benefits to all of mankind – suggests that not only States Parties, but all States are bound by the regime as an *erga omnes* provision. However, given the rule of *pacta tertiis nec nocent nec prosunt* pursuant to Art. 34 of the Vienna Convention on the Law of Treaties such universal validity could, again, only be construed by arguing that the system represents customary international law or even *ius cogens*.[52]

3. Scope of Art. 136

22 Notably, Art. 136 extends the application of the principle of common heritage of mankind not only to the resources of the deep seabed, but also to the Area itself. For the scope of Part XI as a whole, this could mean that the regime elaborated there is not only valid for economic uses of the deep seabed – as Art. 134 in conjunction with Art. 1 (1)(3) and Art. 133 suggests – but also extends to other uses such as research activities.[53] The spatial scope of the principle of common heritage of mankind for the Area depends on the interpretation of Art. 1 (1), which defines the 'Area' as the seabed and ocean floor and subsoil thereof. Considerable debate exists over whether the elaborated exploitation regime of the Area also extends to genetic resources of the seabed.[54] Whereas the wording of Art. 133 (a) in conjunction with Art. 1 (1) seems to suggest that 'activities in the Area' in the sense of Part XI can only be such activities that relate to the mineral resources of the Area, a dynamic interpretation of the treaty that is in line with its original purpose could also include the exploitation of genetic resources.[55] In any event, even if not covered by the provisions governing mineral-related 'activities in the Area', operations concerning genetic resources may still be seen as bound by the general principle in Art. 136.

4. Humankind as a Subject of International Law?

23 In international law, which is essentially State-focused and has so far mostly regulated interactions amongst States, treating humankind as an addressee or benefactor of positive norms remains a novelty. Such development is due to the realization that international law must not only rule out present conflicts, but also provide an order which serves as an

[50] *Jon Van Dyke/Christopher Yuen*, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, San DiegoLRev 19 (1981–82), 493, 538.

[51] *Erkki Holmila*, Common Heritage of Mankind in the Law of the Sea, Acta Societatis Martensis 1 (2005), 187, 203; see the discussion of the customary law character at the articles in question.

[52] An assessment of the possible *erga omnes*-validity of Part XI is given by *Vöneky/Höfelmeier* on Art. 138 MN 8–10.

[53] *Wolfrum* (note 2), 335; *Oude Elferink* (note 1), 152 and 154.

[54] *Oude Elferink* (note 1), 150 *et seq*.; and *Scovazzi* (note 4), 9 *et seq*.; see also *Scovazzi* on Art. 133 MN 14–22.

[55] *Cf.* GA Res. 61/65 of 20 March 2006, para. 71; *contra Alexander Proelss*, Marine Genetic Resources under UNCLOS and the CBD, GYIL 51 (2008), 417 *et seq*.

intergenerational basis for peaceful and prosperous societies in the future.[56] By referencing mankind, a close link to the concept of sustainable development and its resource-saving dimension is established.[57]

However, it is not convincing to argue that the installation of a concept such as common heritage of mankind also leads to the formation of a new subject of international law[58] in the sense that 'all of humanity becomes the sovereign over the international commons'[59]. Even though Art. 137 (2) expressly renders mankind authorized to dispose of the resources of the Area, mankind as such is not capable of representative legal action like international organizations are capable of through their organs. The ISA, as shown by Art. 157 (1), is not such an organ, but rather an administrative facility through which the States Parties control activities in the Area.[60] However, the reference to mankind is not an empty clause. It marks the reference point for all actions undertaken by the Authority and the States Parties: not only do they have to consider the interests of all States rather than only those of the signatory States, but they also have to account for the needs of future generations instead of only the present one.[61] Additionally, as specified by Art. 140 (1), 'mankind' as a reference group is wider than 'States', providing for the inclusion of those human beings that are not represented by States.[62] 24

Article 137
Legal status of the Area and its resources

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

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.

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.

Bibliography: *Edward Duncan Brown*, Freedom of the High Seas Versus the Common Heritage of Mankind, San DiegoLRev 20 (1983), 521–560; *C. John Colombos*, International Law of the Sea (5th edn. 1962); *Wolfgang Durner*, Common Goods (2000); *Jon Van Dyke/Christopher Yuen*, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, San DiegoLRev 19 (1982), 493–551; *Alex G. Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143–176; *Ernst Fasan*, The Meaning of the Term Mankind in Space Legal Language, 2 JSpaceL (1974), 125–131; *Jochen Frowein*, Non-Recognition, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. VII (2012), 739–741; *Gilbert Gidel*, Le droit international public de la mer, vol. I (1932); *Edward Guntrip*, The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?, Melb.J.Int'l L. 4 (2003), 376–405; *Kay Hailbronner/Marcel Kau*, Der Staat und der Einzelne als Völkerrechtssubjekte, in: Wolfgang Graf Vitzthum (ed.), Völkerrecht (5th edn. 2010), 147–261; *Erkki Holmila*, Common Heritage of Mankind in the Law of the Sea, Acta Societatis Martensis 1 (2005), 187–205; *Wilhelm A.*

[56] See *Cancado Trindade* (note 35), 327.
[57] *Wolfrum* (note 2), 337.
[58] This view has been put forward by *Ernst Fasan*, The Meaning of the Term Mankind in Space Legal Language, JSpaceL 2 (1974), 125, 131; and *Aldo Armando Cocca*, The Advances in International Law through the Law of Outer Space, JSpaceL 9 (1981), 13, 14.
[59] Expression used by *Shackelford* (note 44), 110.
[60] *Wolfrum* (note 43), 457.
[61] *Cf. ibid*., 456.
[62] *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312, 318.

Kewenig, Common Heritage of Mankind – politischer Slogan oder völkerrechtlicher Schlüsselbegriff?, in: Ingo von Münch (ed.), Staatsrecht-Völkerrecht-Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag (1981), 385–406; *Hersch Lauterpacht*, Sovereignty over Submarine Areas, BYIL 27 (1950), 376–433; *Ronald St. John Macdonald*, The Common Heritage of Mankind, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt (1995), 153–172; *Daniel B. Magraw/Lisa D. Hawke*, Sustainable Development, in: Daniel Bodansky/Jutta Brunnée/Ellen Hey (eds.), The Oxford Handbook of International Environmental Law (2007), 613–638; *Kenneth Mwenda*, Deep Sea-Bed Mining Under Customary International Law, Murdoch University Electronic Journal of Law 7 (2000); *Graham Nicholson*, The Common Heritage of Mankind and Mining: An Analysis of the Law as to the High Seas, Outer Space, the Antarctic and World Heritage, NZJEL 6 (2002), 177–198; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Virgiliu Pop*, Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership (2008); *Wolfgang Graf Vitzthum*, International Seabed Area, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law), vol. VI (2012), 137–146; *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312–337; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287–345; *Rüdiger Wolfrum*, Common Heritage of Mankind, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. II (2012), 452–458; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYUNL 3 (1999), 173–241

Documents: CBD, Subsidiary Body on Scientific, Technical and Technological Advice, Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work, UN Doc. UNEP/CBD/SBSTTA/8/INF/3/REV.1 (2003); GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970; GA, Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res. 2574 (XXIV) of 15 December 1969; GA, Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948

Cases: ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971), 16

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I. Purpose and Function

1 Art. 137 deals with the implications of the regime governing the Area[1] and its resources[2] for sovereign as well as private property rights. It bans all national and private occupation or sovereign administration of the Area and its resources, both by individuals and legal entities (Art. 137 (1)). Complementarily, it prohibits all recognition of such acts. However, concerning the minerals[3] recovered from the Area, this overall ban of occupation does not apply:

[1] Defined in Art. 1 (1)(1) as 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.

[2] '[R]esources' are defined in Art. 133 (a) – regarding physical composition, there is no difference between 'minerals' and 'resources'; 'resources' become 'minerals' through recovery, see further *Scovazzi* on Art. 133 MN 11–12.

[3] For the meaning of the term 'minerals', see *Scovazzi* on Art. 133 MN 11–13.

According to Art. 137 (3), States, individuals and legal entities may claim, acquire and exercise rights over such minerals in conformity with Part XI. Again, the recognition of all other actions regarding such minerals is prohibited. Art. 137 (2) reiterates the core element of the principle of common heritage of mankind: the attribution of all rights over the Area's resources to mankind as a whole. According to the first sentence of the provision, the Authority acts on behalf of all mankind.

Generally, Art. 137 serves as safeguard for the attribution of the rights over the Area to all of mankind: Not only does it prohibit all public and private occupation other than the recovery of minerals according to the rules of the Convention, but through the States' obligation not to recognize any measures of occupation contrary to the Convention regime it also provides a protection mechanism for the above-mentioned prohibition.[4] Minerals recovered by violation of the Convention rules cannot be alienated; hence, the economic incentive for any such recovery is diminished. 2

II. Historical Background

Even during the early stages of the discussion in the Sea-Bed Committee, complex notions evolved regarding the legal status of the Area. There was broad consensus that three kinds of possible conduct in relation to the seabed had to be examined and regulated separately: appropriation, exercise of sovereignty and exploitation.[5] Particular emphasis was put on the aspect that exploitation, even though it is different from simple non-appropriation and must thus be regulated, could never become part of or precursor for national sovereignty claims.[6] This notion is also reflected in the ensuing 'moratorium resolution' by the UN General Assembly[7] which urges States to refrain from exploitation until a regime governing the seabed has been established[8] and forbids the recognition of any kind of claims to the seabed beyond the limits of national jurisdiction.[9] 3

During the Sea-Bed Committee session in 1970, the US submitted a draft convention that handled the issue of the legal status with regard to national sovereignty, non-recognition and exploitation,[10] but addressed neither issues of private exploitation and appropriation nor the question of in which entity jurisdiction over the Area would be vested. Later that year, the Declaration of Principles presented a wording that included private action in the regulation of the legal status of the Area: 4

> '2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
>
> 3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.'[11]

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[4] *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, 336.

[5] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 103 (MN 137.2).

[6] See Sea-Bed Committee, Report of the Legal Sub-Committee, GAOR 24th Sess. Suppl. 22 (A/7622), 9, 14–15.

[7] GA, Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res. 2574 (XXIV) of 15 December 1969.

[8] *Ibid*., Part D, subparagraph (a).

[9] *Ibid*., subparagraph (b).

[10] The paper suggests a prohibition of national sovereignty over the Area combined with a duty of non-recognition for other States as well as the provision that (other) rights and titles over the Area and its resources may only be acquired as provided for in the Convention, see Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130, 132 (Art. 2).

[11] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970.

5 It was not until a proposal by thirteen Latin American States that the idea of attributing exclusive jurisdiction over the Area to all of mankind while entrusting the Authority with the exercise of this jurisdiction came up.[12] This version contrasted with a USSR draft which expressly deprived the 'Agency' of the jurisdiction and disposal over the seabed and allotted it a rather supplementary role next to the States Parties as primarily responsible entities for enforcing the Convention.[13]

6 In the 'Draft Articles Considered by the Committee at its Informal Meetings'[14], circulated during the Second Session of the Conference in 1974, the prohibition of the acquisition of sovereign or ownership rights over the Area was provided for separately from the regulation of rights to the resources of the Area, however, both were combined in one provision and supplemented by a duty of non-recognition.[15] Simultaneously, several other proposals presented during the Conference included provisions that vested all rights over the Area in the 'Authority' on behalf of mankind.[16]

7 The version provided by the Informal Single Negotiation Text (ISNT) during the Third Session in 1975 only made slight alterations to the wording and content of the draft articles of the Second Session.[17] It was not until the Sixth Session in 1977 that the element providing for the Authority as trustee for all of mankind, which had always been discussed in different contexts, was merged with the ISNT version, titled 'No Claim or Exercise of Sovereignty or Other Rights', to form a single Art. 137 now entitled 'Legal Status of the Area and its Resources'[18]. Apart from minor technical changes, the Informal Composite Negotiation Text corresponds to the final version of Art. 137.

III. Elements

1. 'No State shall claim or exercise sovereignty or sovereign rights'

8 As one of the core implications of the principle of common heritage of mankind,[19] the prohibition of sovereign claims to the Area or parts of it is the first element that the Convention deals with in defining the scope of the principle for the Area.[20] However, Art. 137 does not specify which acts it is seeking to forbid and hence lacks a definition of 'sovereign claims'. If one seeks to evaluate the possibility of sovereign claims to the sea-bed, the legal status becomes significant. Any 'occupation' of the seabed in the classical sense would presuppose the seabed to be classified as *res nullius* – in the areas beneath the high seas, derivative means of acquisition are out of question – which has never been accepted or advocated in State practice.[21] The same

[12] Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93 (Art. 3).

[13] Sea-Bed Committee, Union of Soviet Socialist Republics: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 74–75 (Art. 26).

[14] First Committee UNCLOS III, Draft Articles Considered by the Committee at its Informal Meetings (Articles 1–21), UN Doc. A/CONF.62/C.1/L.3 (1974), OR III, 157.

[15] *Ibid.*, 158–159 (Art. 4).

[16] Nordquist/Nandan/Rosenne (note 5), 106 (MN 137.5).

[17] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 138 (Art. 4).

[18] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VII, 23 (Art. 137).

[19] For a controversial discussion of the importance of the prohibition of sovereignty within the common heritage principle, see *Erkki Holmila*, Common Heritage of Mankind in the Law of the Sea, Acta Societatis Martensis 1 (2005), 187, 195 *et seq.*

[20] See further *Vöneky/Höfelmeier* on Art. 136 MN 14–20.

[21] *Edward Guntrip*, The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?, Melb.J.Int'l L. 4 (2003), 376, 387 *et seq.*; *Wolfrum* (note 4), 336; contra: *Hersch Lauterpacht*, Sovereignty over Submarine Areas, BYIL 27 (1950), 376, 398 *et seq.*

is valid when applying the freedom of the high seas to the seabed.[22] On the other hand, it has also been generally accepted that the seabed is not *res communis*, a common good that cannot be appropriated.[23] The status given to the respective space or resources by the principle of common heritage of mankind is to be viewed as a legal category on its own.[24] In State practice and international correspondence, it has been largely undisputed that this new status forbids the exercise of sovereignty or appropriation by States. Thus, this novel element of the common heritage regime for the deep seabed is paralleled by a corresponding rule of customary international law.[25] However, Art. 137 does not imply that the legal possibility of sovereign claims exists under general international law. Instead, it is to be read as a reflection of the above-mentioned consensus that the special legal status of the Area renders sovereignty acquisitions impossible. On the other hand, it prevents the emergence of new forms of sovereign claims for the deep seabed and forbids analogies to the occupation of land that is '*res nullius*'.

2. 'nor shall any State […] appropriate any part [of the Area]'

The principle of non-appropriation also embodied in Art. 137 (1) can be derived from the prohibition of sovereignty.[26] While the prohibition of sovereignty is concerned with issues of jurisdiction, the ban on appropriation relates to exploitation of the deep seabed. The term 'appropriation' covers any form of exclusive control over parts of the Area. Even though, as provided for by Art. 134 (2), Art. 1 (1)(3) and Art. 133 (a), the activities covered by Part XI only encompass the exploration or exploitation of **mineral** resources,[27] both Arts. 136 and 137 do not specifically refer to those activities, but to the Area as such (going beyond its resources). Hence, it has been argued that energy production from the Area[28] or acquisition of exclusive rights over genetic material from the deep seabed[29] could be prohibited by the principle of non-appropriation. However, such inclusions presuppose that the principle of non-appropriation is universal and may be applied separately from the mining regime in Part XI. But as no international consensus has yet been found on this controversial issue,[30] it seems likely that such an interpretation goes beyond the intentions of the Convention's drafters. **9**

Complementary to the prohibition of national appropriation, private appropriation of the Area and its parts by juridical or natural persons is also forbidden by Art. 137 (1) cl. 1. Hence, even assuming the possibility of private appropriation where occupation or appro- **10**

[22] *Wolfrum* (note 3), 336.

[23] *C. John Colombos*, International Law of the Sea (1962), 46 *et seq.*; *Gilbert Gidel*, Le droit International public de la mer, vol. I (1932), 498.

[24] *Ronald St. John Macdonald*, The Common Heritage of Mankind, in: Ulrich Beyerlin *et al.* (eds.), Recht zwischen Umbruch und Bewahrung: Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt (1995), 153, 154; *cf.* however, *Edward Duncan Brown*, Freedom of the High Seas Versus the Common Heritage of Mankind, San DiegoLRev. 20 (1983), 521, 523; and *Wolfgang Graf Vitzthum*, International Seabed Area, in: Rüdiger Wolfrum (ed.), MPEPIL, vol. VI (2012), 137, 142, who categorize common heritage of mankind as a variation of *res communis*.

[25] *Wolfrum* (note 4), 336.

[26] *Holmila* (note 19), 195 (footnote 40).

[27] As *Wolfrum* (note 4), 335, points out, the recovery and usage of genetic resources and petroleum is hence not covered by Part XI.

[28] See *Alex G. Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143, 155.

[29] Study of the relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed (decision II/10 of the Conference of the Parties to the Convention on Biological Diversity), in: CBD, Subsidiary Body on Scientific, Technical and Technological Advice, Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work, UN Doc. UNEP/CBD/SBSTTA/8/INF/3/REV.1 (2003), 30 (para. 117); contra *Wolfrum* (note 3), 334 (footnote 245); see also the commentary of Art. 136 for further references on the inclusion of genetic resources in the deep seabed regime, *Vöneky/Höfelmeier* on Art. 136 MN 22.

[30] *Graf Vitzthum* (note 24), para. 16.

priation by States is legally impossible,[31] such acts are not permitted regarding the deep seabed. As a consequence, the provisions in international human rights law protecting private property[32] do not apply. Through the provision banning private appropriation, Art. 137 also prevents the emergence of any rules that may permit individuals or organizations, both international or non-governmental, to acquire ownership of *res nullorum* or the like within the Area independently of their status regarding national sovereignty. In this context, the article seems to address natural and juridical persons directly. However, taking into account the limited international legal personality of individuals,[33] it is more convincing that Art. 137 aims to ban all national permission or recognition of private ownership rights to (or parts of) the deep seabed.

3. 'No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized'

11 As a counterweight to the prohibition of sovereign claims over and appropriation of the seabed or parts thereof under Art. 137 (1) cl. 1, as well as the ban on the claim, acquisition or exercise of rights over its minerals other than in accordance with Art. 137 (2), Art. 137 (1) cl. 2 installs a duty of non-recognition. Non-recognition means the withholding of acceptance or recognition of a claim by other States and their entities. States may not take any action that explicitly or implicitly recognizes the validity of the relevant claim,[34] for example allowing the trade in those minerals under their jurisdiction. Rather, States must acknowledge and uphold the illegality of such claims.[35] The mechanism installed by the duty of non-recognition ensures that a breach of the prohibitions contained in Art. 137 will be both legally ineffective and economically unattractive. It thus enhances the effectiveness of the prohibitions to an extent that has been compared to the legal status of *ius cogens*.[36]

4. 'All rights in the resources of the Area are vested in mankind as a whole'

12 Art. 137 (2) specifies the beneficiary of the principle of common heritage of mankind as 'mankind as a whole'. It vests mankind with all rights over the resources of the Area. However, without an established international legal personality entitled 'mankind,' which is capable of acting through representatives,[37] this sentence is not a substantive legal attribution but rather a guideline for the implementation of the following provisions by the Authority and the States Parties. Accordingly, the Authority is not a technical representative of mankind, but serves as an advocate securing its needs and long-term concerns.[38] Such include especially the foreseeable needs and interests of future generations, implying aspects

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[31] For a detailed discussion of this matter using the example of the non-appropriation provisions concerning the moon, see *Virgiliu Pop*, Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership (2008), 62 *et seq.*

[32] *Cf.* e. g. Art. 17 Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948.

[33] See *Kay Hailbronner/Marcel Kau*, Der Staat und der Einzelne als Völkerrechtssubjekte, in: Wolfgang Graf Vitzthum (ed.), Völkerrecht (2010), 147 *et seq.*

[34] *Jochen Frowein*, Non-Recognition, in: *Rüdiger Wolfrum*, Max Planck Encyclopedia of Public International, vol. VII (2012), 739.

[35] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971), 16, 54 (para. 119): 'The member States of the United Nations are […] under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia'.

[36] *Rüdiger Wolfrum*, Common Heritage of Mankind, in: Rüdiger Wolfrum, Max Planck Encyclopedia of Public International, vol. II (2012), 452, 453.

[37] This subject matter is discussed by *Vöneky/Höfelmeier* on Art. 136 MN 23–24.

[38] For detailed provisions on the Authority and its procedures see Arts. 156–185 of the Convention and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. 48/263 of 17 August 1994, 3.

of the principle of sustainable development[39] in the reasonable management of exhaustible resources[40] and safeguards for the protection of the environment.[41] The resources as such, before their recovery, are rendered inalienable. Even though alienation is already impeded by the vesting of all rights in mankind as an entity not capable of acting and not formally represented by the Authority, this clause sets yet another safeguard for the intertemporal dimension of the common heritage of mankind: Even if international law should evolve to a point where 'all of mankind' receives the status of an international legal personality,[42] the resources of the deep seabed remain in its hands to serve the interest of future generations.

5. 'The minerals recovered from the Area […] may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority'

13 Regarding minerals recovered from the Area in accordance with the Convention and the rules, regulations and procedures of the Authority, Art. 137 (2) cl. 3 and Art. 137 (3) cl. 1 allow the claim, acquisition and exercise of rights. This provision is supplemented by Art. 1 of Annex III of the Convention,[43] which states that title to such minerals shall pass upon recovery. As defined by Art. 133, this event also marks the terminological conversion of 'resources' into 'minerals'. The passing of a title over the minerals to the miners is based on the legal fiction that separates the legal status of the seabed from its resources; otherwise, Art. 137 (1) cl. 1 would contradict the claim of any rights to minerals, as they, too, form part of the seabed.[44] A similar distinction exists for the high seas: While appropriation of the high seas as such is prohibited under Art. 89, its resources – fish – may be appropriated in accordance with the freedom of fishery in Art. 87 (1)(e).[45] However, the acquisition of rights over minerals is only possible 'in accordance with this Part [XI]', Art. 137 (3) cl. 1. The article refers to the detailed provisions concerned with mining, a pivotal example being Art. 153 (3), dealing with the necessary contractual agreements with the Authority.[46] The provision also bears a negative dimension: The prohibition of all unilateral mining or appropriation of minerals, one of the sensitive topics in elaborating the common heritage regime.[47]

6. Effect on Non-Signatory States

14 Through their universal wording, the prohibition of sovereign claims and appropriation as well as the duty of non-recognition address all States – in treaty law, the *pacta tertiis*-doctrine under Art. 34 VCLT impedes any effect on third parties, however, the formulation may be interpreted as a reference to parallel customary law provisions.[48] In State practice, all attempts to claim rights over the deep seabed have been rejected,[49] and other than the principle of common heritage of mankind itself, the prohibition of such claims and the duty not to recognize it does not lack legal preciseness.[50] Thus, there are good reasons to argue that customary international

[39] Detailed information on this concept is given by *Daniel B. Magraw/Lisa D. Hawke*, Sustainable Development, in: Daniel Bodansky/Jutta Brunnée/Ellen Hey (eds.) The Oxford Handbook of International Environmental Law (2007), 613 *et seq.*

[40] *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312, 318 *et seq.*

[41] *Wolfrum* (note 4), 337.

[42] *Cf. Ernst Fasan*, The Meaning of the Term Mankind in Space Legal Language, JSpaceL 2 (1974), 125, 131.

[43] According to Art. 318, the Annexes form an integral part of the Convention, see *Tams* on Art. 318 MN 4.

[44] *Cf. Holmila* (note 19), 191 *et seq.*, arguing that in this context, minerals must be classified as *res nullius*.

[45] *Wolfgang Durner*, Common Goods (2000), 216.

[46] See further *Siegfried* on Art. 153.

[47] *Wolfrum* (note 40), 317.

[48] See the discussion of an *erga omnes*-validity of Part XI by *Vöneky/Höfelmeier* on Art. 138 MN 10.

[49] *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYUNL 3 (1999), 173, 187 *et seq.*; *Guntrip* (note 20), 388 *et seq.*; *Holmila* (note 18), 203.

[50] See the commentary of Art. 136 for the discussion of customary law validity of the common heritage of mankind as such, *Vöneky/Höfelmeier* on Art. 136 MN 21.

law not only hinders the claim of rights to the deep seabed,[51] but also includes a duty of non-recognition. A separate question is that of mining rights under customary international law for States that are not parties to the Convention. Other than the prohibition of sovereignty over and appropriation of the Area or parts of it as such, State practice and *opinio iuris* are ambiguous on a prohibition of unilateral mining outside the Convention.[52] Since, however, certain general features of the principle of common heritage of mankind with respect to the Area have become part of customary international law, it has to be argued that mining is to be regarded as unlawful if it is not carried out for the benefit of mankind as a whole.[53]

Article 138
General conduct of States in relation to the Area

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

Bibliography: *Ian Brownlie*, Principles of Public International Law (7th edn. 2008); *A. Ralph Carnegie*, The Vienna Convention on the Law of Treaties and the Law of the Sea Law-Making, An.Jur.Interam. 57 (1984), 53–94; *Jon Van Dyke/Christopher Yuen*, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, San DiegoLRev 19 (1982), 493–551; *Myron H. Nordquist*, Deep Seabed Mining: Who Should Pay?, Marine Technology Society Journal 12 (1978), 23–26; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Alexander Proelss*, Article 34, in: Oliver Dörr/Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary (2012), 605–643; *Alexander Proelß*, Raum und Umwelt im Völkerrecht, in: Wolfgang Graf Vitzthum/Alexander Proelß (eds.), Völkerrecht (6th edn. 2013), 351–438; *Carlos Fernández de Casadevante Romani,* Objective Regime, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. VII (2012), 912–915; *Christian Tomuschat*, Völkerrechtlicher Vertrag und Drittstaaten, BDGVR 28 (1988), 9–50; *Wolfgang Graf Vitzthum*, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: Wolfgang Graf Vitzthum (ed.), Völkerrecht (5th edn. 2010), 6–71; *Budislav Vukas*, Treaties, Third-Party Effect, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. X (2012), 31–38; *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312–337; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287–345

Documents: GA, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960; GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) of 24 October 1970; GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; GA Res. 48/263 of 28 July 1994

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[51] *Wilhelm A. Kewenig*, Common Heritage of Mankind – politischer Slogan oder völkerrechtlicher Schlüsselbegriff?, in: Ingo von Münch (ed.), Staatsrecht-Völkerrecht-Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag (1981), 385, 389; *Jon Van Dyke/Christopher Yuen*, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, San DiegoLRev 19 (1982), 493, 538.

[52] *Graham Nicholson*, The Common Heritage of Mankind and Mining: An Analysis of the Law as to the High Seas, Outer Space, the Antarctic and World Heritage, NZJEL 6 (2002), 177, 179 *et seq*. and 186 *et seq*.

[53] *Durner* (note 45), 223; *cf.* also *Wolfrum* (note 40), 335 *et seq*.; *Wolfrum* (note 4), 344 *et seq*., leaving it to the State's discretion how the common benefit is effectuated; contra: *Kenneth Mwenda*, Deep Sea-Bed Mining Under Customary International Law, Murdoch University Electronic Journal of Law 7 (2000), para. 24.

I. Purpose and Function

Art. 138 is one of the pivotal provisions for deep seabed mining.[1] Through its reference to the provisions of Part XI, the new regime for the deep seabed, Art. 138 expressly states the absence of a freedom of mining – such as the freedom of the high seas – in favour of the requirement that any form of mining in the Area may only take part after permission by and under surveillance of the Authority. Concerning its addressees, Art. 138 has two dimensions: On the one hand, all member States have the duty to abide by the applicable general international law, especially the Charter of the United Nations, and Part XI – the latter is a repetition of the universal principle of *pacta sunt servanda* under Art. 26 VCLT. On the other hand, Art. 138 extends this obligation to non-signatory States, thus claiming validity *erga omnes*. This is consistent with the notion that the rights over the deep seabed are vested in mankind as a whole – it can only be effectively implemented if all States, regardless of their status as to the Convention, follow the regime ensuing from this notion, thereby effectuating it for human beings of all nationalities.[2] **1**

All activities, whether carried out by States Parties or other States, are to be undertaken in a manner that serves the interest of maintaining peace and security and promotes international co-operation and mutual understanding. This provision reiterates the purposes of the United Nations, embodied in Art. 1 of its Charter.[3] **2**

II. Historical Background

As the content of Art. 138 is mainly self-evident,[4] it was not subject to significant debate or changes throughout the drafting process of the Convention. The Declaration of Principles, adopted by the UN General Assembly in a resolution of 1970, contained a similar provision, additionally including the Friendly Relations Declaration[5] as a particular point of reference: **3**

> 'States shall act in the area in accordance with the applicable rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.'[6]

The Maltese draft articles presented during the 1971 session of the Sea-Bed Committee made only slight changes to the wording, omitting the 'rules' of international law and adding the 'provisions of the convention' as applicable norms.[7] A draft by the USSR proposed adding the 'Declaration on the Granting of Independence to Colonial Countries and Peoples',[8] which is **4**

[1] *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, 337.

[2] *Ibid*., 338.

[3] Art. 1 Charter of the United Nations reads: 'The Purposes of the United Nations are: 1. To maintain international peace and security […] 3. To achieve international co-operation in solving international problems […]'.

[4] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 113 (MN 138.1).

[5] GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) of 24 October 1970.

[6] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970, para. 6.

[7] Sea-Bed Committee, Malta: Draft Ocean Space Treaty (1971), UN Doc. A/AC.138/53, GAOR 26th Sess. Suppl. 21 (A/8421), 105–193.

[8] Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960.

now referred to in Art. 140, to the body of applicable rules.[9] After the discussion of all of the aforementioned elements at the 1973 session of the Sea-Bed Committee, two revised, alternative drafts of the article, now titled 'General Conduct in the Area and in Relation to the Area,'[10] were presented: Option (A) referred to 'States activities' and mentioned the Friendly Relations Declaration, but not the Convention itself, in a wording otherwise similar to the final article, whereas version (B) sought to regulate 'all activities' in the Area *per se* and mentioned only the Convention and the United Nations Charter as applicable law.[11] The separation between 'general conduct in the Area' and 'activities in the Area' led to the formation of two separate articles during the Third and Fourth Sessions of the Sea-Bed Committee, as shown by Art. 6 – 'General Conduct of States in Relation to the Area' – of the Revised Single Negotiation Text presented in the fourth session in 1976:

> 'Without prejudice to Article 5, the general conduct of States in relation to the Area shall be in accordance with the provisions of this Part of the Convention, and other pertinent rules of international law, including the Charter of the United Nations, in the interests of maintaining peace and security and promoting international co-operation and mutual understanding.'[12]

5 Art. 5 of the text simply stated that all activities in the Area be governed by the provisions of 'this Part of the Convention'. It is now included in Art. 134 (2), which is why the reference was later deleted. Apart from such minor changes, including the alteration of sentence structure for standardization purposes,[13] the content and wording of Art. 138 remained subsequently unchanged.

III. Elements

1. 'The general conduct of States in relation to the Area'

6 Art. 138 refers to all conduct 'in relation to' the Area both in its title and text. This wide and vague wording was chosen to include not only actual exploitation measures – mineral-related activities[14] – in the Area, but all activities related to the exploitation and exploration of resources in the Area.

2. 'in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law'

7 According to Art. 138, States Parties are guided by three different categories of norms: Part XI of the Convention itself, the principles embodied in the Charter of the United Nations, and other rules of international law. As the *modus operandi* in fulfilling these legal obligations, Art. 138 stipulates the observance of the interests of maintaining peace and security and promoting international cooperation and mutual understanding as guiding principles. Those objectives form a partial reiteration of the purposes of the United Nations, under whose

[9] Sea-Bed Committee, Union of Soviet Socialist Republics: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 67 (Art. 7).

[10] A preparatory text had contained an article with all of the proposed elements titled 'Applicability of Principles and Rules of International Law', *cf.* Sea-Bed Committee, Texts Illustrating Areas of Agreement and Disagreement, UN Doc. A/AC.138/94/ADD.1 (1973), 8 (Art. 6).

[11] The consolidated version was included in First Committee UNCLOS III, Draft Articles Considered by the Committee at its Informal Meetings (Articles 1–21), UN Doc. A/CONF.62/C.1/L.3 (1974), OR III, 157, 159 (Art. 6).

[12] UNCLOS III, Revised Single Negotiating Text (Part I)', UN Doc. A/CONF.62/WP.8/REV.1/PART I (1975), OR V, 125, 129 (Art. 6).

[13] For further references and conference documents on the subject matter, see Nordquist/Nandan/Rosenne (note 4), 116 (MN 138.8).

[14] *Cf. Scovazzi* on Art. 134 MN 7 and *Tanaka* on Art. 1 MN 11.

auspices the Convention was negotiated. The reference to Part XI includes not only the articles laid down in Part XI itself, but covers the entire regime governing the seabed – including the 1994 Implementation Agreement[15] and all rules, regulations and procedures adopted by the Authority for activities in the Area.[16] It may be seen as a reinforcement of the fact that a freedom of exploitation does not exist; instead, exploitation is subject to express consent and control by the Authority.[17] The second body of norms, the 'Principles embodied in the Charter of the United Nations', cover all well-established rules in the Charter with universal acceptance, such as the prohibition on the use of force and the principle of co-operation. Finally, the inclusion of 'other rules of international law' means all norms of international law applicable to the relevant situation and time – be they treaty norms or such of customary international law or general principles of law.[18] Even though the provision is worded to address all States,[19] it is limited by the *pacta tertiis*-rule. Hence, in general, treaty norms are only applicable to the respective States Parties.[20] The reference to 'other rules of international law' appears in other provisions of the Convention as well, such as Art. 293 (1), and serves to put the Convention in place in the global context of public international law.

3. Applicability of the Deep Seabed Regime to Non-Signatory States?

As pointed out above, the notion of common heritage of mankind can only be pursued effectively if, on the one hand, mankind as a whole is addressed, and, on the other hand, all States are bound by its principles. By the inclusion of all States in its addressees, Art. 138 takes a step in that direction.[21] **8**

Usually, the general international norm of *pacta tertiis nec nocent nec prosunt* bars the extension of treaty norms to non-signatory States. In the context of the deep seabed regime, fears were that this situation might provide a loophole for miners wishing to escape the Convention regime by registering with non-parties.[22] Understandably, the drafters of the Convention tried to impede such situations by extending certain provisions to all States. Yet, under general international law, there are only limited options for treaty provisions to be effective against non-signatory States without their consent.[23] On the one hand, treaty norms may claim universal validity if they represent general international customary law or even *ius cogens*. As has been discussed,[24] some basic aspects of the principle of common heritage of mankind form part of current customary international law. Most prominently, no State, be it signatory or non-signatory, has so far made sovereign claims over the Area, which can be regarded as acquiescence to the prohibition of sovereign claims.[25] However, the general acceptance of single aspects of the regime of Part XI does not amount to a validity of the regime as a whole against third States. Apart from those accepted provisions, the *pacta tertiis*-rule applies. Another legal category of norms that may claim validity *vis-à-vis* third States is **9**

[15] GA Res. 48/263 of 28 July 1994.

[16] Nordquist/Nandan/Rosenne (note 4), 117 (MN 138.9(b)).

[17] *Wolfrum* (note 1), 337 *et seq*.

[18] *Cf.* Art. 38 (1) Statute of the International Court of Justice, which is also referred to by Art. 74 (1) and Art. 83 (1) for a definition of sources of international law.

[19] *Cf. Alexander Proelss*, Raum und Umwelt im Völkerrecht, in: Wolfgang Graf Vitzthum/Alexander Proelss (eds.), Völkerrecht (6th edn. 2013), 351, 393.

[20] On this aspect see *infra*, MN 8–10.

[21] *Cf. Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312, 333.

[22] *Myron H. Nordquist*, Deep Seabed Mining: Who Should Pay?, Marine Technology Society Journal 12 (1978), 23.

[23] *Cf.* generally *Christian Tomuschat*, Völkerrechtlicher Vertrag und Drittstaaten, BDGVR 28 (1988), 9.

[24] See *Vöneky/Höfelmeier* on Art. 136 MN 21.

[25] *Jon Van Dyke/Christopher Yuen*, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, San DiegoLRev 19 (1982), 493, 538; *cf.* also *Wolfrum* (note 1), 345 (footnote 285), who classifies the prohibition of national occupation as *ius cogens*.

that of an objective regime.[26] Such regimes are possible if all States, which possess sovereign rights regarding a certain item or territory, establish a special status for that item or territory with the intention of doing so *erga omnes*.[27] This does not apply to the regime put forward by Part XI, since even assuming that States are legitimate representatives of mankind as a whole, not all of them are signatories to the treaty.[28]

10 Apart from the notion of objective regimes, the *erga omnes* validity of treaties is often advocated where their purpose can only be achieved through universal participation and they are intended to serve community interests.[29] Part XI fulfils these conditions; however, such *erga omnes* validity lacks a foundation in current international law, which is based on the principle of sovereignty of States that generally prohibits their being bound against their will.[30] Thus, Art. 138 cannot be understood as effectively extending the effect of Part XI to third parties. It can, however, be interpreted as a directive for the behaviour of States Parties *vis-à-vis* non-parties: they shall prevent any conduct that contradicts Part XI through their own arrangements with those States.[31]

Article 139
Responsibility to ensure compliance and liability for damage

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.

Bibliography: *Donald K. Anton*, The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17), McGill Int'l J. Sust. Dev. L. & Pol'y 7 (2011–2012), 241–257; *James R. Crawford*, State Responsibility, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. IX (2012), 517–533; *David Freestone*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, AJIL 105 (2011), 755–760; *James L. Kateka*, Protection and

[26] See the discussion at *Ian Brownlie*, Principles of Public International Law (2008), 662 *et seq.*; *cf.* further *Alexander Proelss*, Article 34, in: Oliver Dörr/Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary (2012), 605, 622 *et seq.*

[27] *Carlos Fernández de Casadevante Romani*, Objective Regime, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. VII (2012), 912; *Wolfrum* (note 1), 344.

[28] *Wolfrum* (note 21), 337.

[29] *Tomuschat* (note 23), 37; specifically for the common heritage of mankind: *A. Ralph Carnegie*, The Vienna Convention on the Law of Treaties and the Law of the Sea Law-Making, Anu.Jur.Interam. 57 (1984), 53, 77; critical: *Wolfgang Graf Vitzthum*, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: Wolfgang Graf Vitzthum (ed.), Völkerrecht (5th edn. 2010), 6, 54.

[30] *Wolfrum* (note 1), 344.

[31] *Cf. Budislav Vukas*, Treaties, Third-Party Effect, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. X (2012), 31, 36, on a similar provision in Art. 33 (1) of the UN Fish Stocks Agreement.

Preservation of the Marine Environment in the Area under UNCLOS, in: Holger P. Hestermeyer/Doris König/Nele Matz-Lück/Volker Röben/Anja Seibert-Fohr/Peter-Tobias Stoll/Silja Vöneky (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 919–931; *John H. Knox*, The Myth and Reality of Transboundary Environmental Impact Assessment, AJIL 96 (2002), 291–319; *Timo Koivurova*, Due Diligence, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. III (2012), 236–246; *Pieter Jan Kuyper*, Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?, IOLR 7 (2010), 9–33; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459–488; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287–345

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration); UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration)

Cases: ECtHR, *Matthews v. the United Kingdom*, Judgment of 18 February 1999, http://hudoc.echr.coe.int/hudoc; ECtHR, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, http://hudoc.echr.coe.int/hudoc; ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 226; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf; PCIJ, *Case Concerning Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17, 5

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I. Purpose and Function

Art. 139 provides for the effective implementation of the regime governing the Area vis-à-vis the persons or entities ultimately carrying out the activities in the Area. It obliges States Parties and international organizations to ensure that all activities in the Area are in conformity with the provisions of Part XI, be that the conduct of a State or of actors with its nationality or controlled by it – through sponsorship according to Art 153 (2)(b). On the other hand, according to Art. 139 (2) failure by States to comply with the provisions of Part XI results in liability for all damages caused; exception being made only in the case that the damage was caused by a sponsored person that has been adequately controlled. Under Art. 139 (3), States Parties are also called upon to ensure the implementation of those primary and secondary obligations through international organizations, of which they are members. Despite the general commitment within the principle of common heritage of **1**

mankind to take into account the special interests and needs of developing States, reflected in Art. 140, the responsibility regime imposed by Art. 139 applies equally to all States Parties.[1]

2 Art. 139 must be read together with Art. 304, which states that regulations of the Convention concerning responsibility and liability are without prejudice to the application of existing rules and the development of further rules on the subjects under international law. This is paralleled by the reference to general international law by Art. 139 (1) itself; however, Art. 304 goes further by also enclosing future rules.[2] By imposing a special responsibility and liability regime for Part XI, Art. 139 is a specific provision supplementing the general rules set forth in Art. 235.

3 Art. 139 is supplemented by Art. 4 (4) Annex III,[3] providing for responsibility to ensure compliance with the Convention and liability for damage in the event of a State sponsoring a contractor according to Art. 153 (2)(b) and Art. 4 (1)-(3) of its Annex III.[4] Its counterpart dealing with the liability of the contractor and the Authority appears in Art. 22 Annex III.[5]

II. Historical Background

4 The limits of responsibility and liability in a treaty work are important factors for possible signatory States when considering ratification, since States have always been anxious to engage in commitments that imply possible secondary obligations. This observation is reflected in the large number of elaborate, but controversial propositions for the responsibility regime presented during the drafting process of the Convention. As early as 1970, the United States of America presented an elaborate article on State responsibility in their 'Draft Convention on the International Seabed'.[6] The draft's Art. 11 addressed both primary and secondary responsibilities of States Parties – apart from regulations similar to the present content, the draft also envisaged a duty to maintain public order pursuant to Art. 11 (3) and a duty to establish breaches of the Convention as punishable offences under national law (Art. 11 (2)). It did not, however, mention possible responsibilities of international organizations.

5 In the 1970 'Declaration of Principles', which was adopted as a resolution of the General Assembly of the United Nations, the latter issue was incorporated into a principle that accounted for both responsibility and liability, attributing them to 'every State':

> '14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international regime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organization or on their behalf. Damage caused by such activities shall entail liability.'[7]

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[1] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 151 *et seq*.; an in-depth assessment on this issue is given by *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459, 473 *et seq*.

[2] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 211; see also ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 169 *et seq*.

[3] According to Art. 318, the Annexes form an integral part of the Convention, see *Tams* on Art. 318 MN 4.

[4] See also ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, UN Doc. ISBA/6/A/18 (2000), Regulation 9.

[5] See further, *Le Gurun* on Annex III Art. 22.

[6] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130 *et seq*.

[7] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970.

Subsequently, in the 1971 session of the Sea-Bed Committee, Tanzania[8], Malta[9] and the USSR[10] made different suggestions for the wording of an article addressing responsibility and liability. A common feature of those drafts is that they address only States Parties, not 'every State'. During the Second Session of UNCLOS in 1974, the scope and meaning of the articles was subject to considerable debate and uncertainty, since there had not yet been decisions on the entities that would be allowed to exploit the Area.[11] Moreover, the extent of possible liability remained controversial.[12] It was due to those controversies that the draft produced during the session by the First Committee remained rather vague and tentative on the issue, explicitly leaving the matter to be discussed and decided on at a later stage.[13] **6**

Accordingly, the more the consent grew over the entities ultimately allowed to exploit the Area, the more decisive the issue of liability and responsibility was articulated in the different drafts. While the Informal Single Negotiation Text of 1975 still addressed 'every State' in general and conferred on them both responsibility and liability for 'governmental agencies, non-governmental entities and persons under [their] jurisdiction or acting on [their] behalf' without an exemption clause,[14] the Revised Single Negotiation Text of 1976 burdened States Parties with the responsibility and liability – notwithstanding applicable principles of international law – for 'States Parties, or State enterprises, or persons natural or juridical which possess the nationality of States Parties or are effectively controlled by them or their nationals', except where a sponsored person has been adequately controlled by the State.[15] Both drafts further provided for the responsibility of international organizations, joint responsibility in case of co-operation, and an obligation on States to ensure compliance by international organizations of which they are members. **7**

In the ensuing drafting process, the article remained unchanged until the composition of the Draft Convention of 1981, which restructured the paragraphs into a new consolidated Art. 139, but left the content largely unaltered.[16] **8**

III. Elements

1. 'responsibility' and 'liablity'

It has been argued that the notion of 'responsibility' in Art. 139 is different from the meaning of the term in Art. 304 and Art. 22 Annex III and comprises only primary obligations,[17] whereas 'liability' refers to the secondary obligation that follows any breach of the primary obligations.[18] The structure of the article clearly supports such an interpretation: **9**

[8] Sea-Bed Committee, United Republic of Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51, 54–55 (Art. 14).

[9] Sea-Bed Committee, Malta: Draft Ocean Space Treaty (1971), UN Doc. A/AC.138/53, GAOR 26th Sess. Suppl. 21 (A/8421), 105, 147–148 (Art. 77 and 78).

[10] Sea-Bed Committee, Union of Soviet Socialist Republics: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 72 (Art. 16).

[11] *Cf.* First Committee UNCLOS III, Draft Articles Considered by the Committee at its Informal Meetings (Articles 1–21), UN Doc. A/CONF.62/C.1/L.3 (1974), OR III, 157, 163 (footnote 22).

[12] See the references in: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 121 (MN 139.4); *cf.* also Draft Articles Considered by the Committee (note 11).

[13] Draft Articles Considered by the Committee (note 11), 163 (footnotes 22 and 23).

[14] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 140 (Art. 17).

[15] UNCLOS III, Revised Single Negotiating Text (Part I)', UN Doc. A/CONF.62/WP.8/REV.1/PART I (1975), OR V, 125, 131 (Art. 17).

[16] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 195 (Art. 139).

[17] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 66.

[18] *Ibid.*

The two categories are covered in separate paragraphs and the section concerning 'responsibility' deals with obligations of conduct – which are typically primary obligations – while the other paragraph and its regulation of 'liability' applies only after the breach of such 'responsibilities'.

2. 'States Parties shall have the responsibility to ensure that activities in the Area […] are controlled by them or their nationals, shall be carried out in conformity with this Part'

10 The primary responsibility for States and international organizations under Art. 139 (1) is to ensure that all activities in the Area under their control – the control which is guaranteed by the requirement of sponsoring as a decisive national expression of will[19] – adhere to the rules of Part XI. This reference includes the rules in Annexes III and IV, as well as the rules, regulations and procedures of the Authority and the respective contracts, since they are also based on Part XI and the Annexes.[20] Concerning the primary obligations, Art. 139 is supplemented by Art. 153 (4) and Art. 4 (4) Annex III, which refer to it expressly. Art. 153 (4) sets forth a duty on all signatory States to assist the Authority in supervising and guaranteeing the observance of the applicable Convention regime when activities in the Area are carried out. Art. 4 (4) Annex III implements a duty to ensure adherence to the Convention by any sponsored contractor.

11 Private persons or entities as such may only carry out activities in the Area if they are sponsored by a State according to Art. 153 (2) and meet the criteria set forth in Art. 4 Annex III. Therefore, the primary obligation provided for in Art. 139 (1) (and the abovementioned supplementing norms) must be read as referring to sponsoring States. Through the sponsoring requirement, the Convention aims to assure the States' influence on and control over mining applications and their later implementation.[21] As to the scope of such a 'responsibility to ensure', it must be noted that the wording indicates an obligation of conduct or due diligence, not of result.[22] In international law, the formulation has especially been used in connection with the general obligation of States to prevent transboundary harm stemming from activities conducted on their territory.[23] With an obligation of due diligence, States are called upon to apply their best possible measures to prevent harm and violations of the relevant rules. However, this obligation does not impose strict liability.[24] The content and means of those measures may vary according to the factual situation and the different national legal systems, as long as they are reasonably appropriate.[25] For the obligation laid down in Art. 139 (1), minimal requirements dictated by the test of 'reasonable appropriate-

[19] *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, 342, points out that it is this criterion that separates the scheme in Part XI from the flag State principle for ships in Arts. 91 *et seq.* that does not require a 'genuine link'.

[20] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 105.

[21] *Wolfrum* (note 19), 341.

[22] *Cf.* ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14, 77 (para. 187): 'An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct.'; see also *James L. Kateka*, Protection and Preservation of the Marine Environment in the Area under UNCLOS, in: Holger P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 919, 925.

[23] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 226, 241; see also UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration), Principle 21.

[24] *Cf.* ILC, Report of the International Law Commission: Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries, UN Doc. A/56/10 (2001), GAOR 53rd Sess. Suppl. 10, 390; *Timo Koivurova*, Due Diligence, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. III (2012), 236; for a critique doubting the practicability of such a test, see *John H. Knox*, The Myth and Reality of Transboundary Environmental Impact Assessment, AJIL 96 (2002), 291, 294.

[25] Draft Articles on Prevention of Transboundary Harm (note 24); *Responsibilities and Obligations of Sponsoring States* (note 1), para. 120.

ness' include that the measures must be and remain in force for the duration of the contract with the Authority and must not merely consist of contractual arrangements with the entities in question.[26]

Several applicable norms and rules give substance to the States' due diligence obligation in Art. 139 (1). According to the Polymetallic Nodules Regulations 31 (2)[27] and Polymetallic Sulphides Regulations 33 (2)[28] as well as Ferromanganese Crusts Regulations 33 (2)[29], the States have to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration.[30] The principle demands that in situations with a threat of serious or irreversible damage, necessary environmental protection measures shall not be postponed using scientific uncertainty as an argument. Taken literally, this obligation merely specifies the due diligence responsibility concerning activities connected with the relevant minerals; however, in the view of the Seabed Disputes Chamber, the precautionary approach is part of the due diligence obligation itself and thus also applicable to all other activities.[31] It may even be – or be currently becoming – a principle of customary international law.[32] Another inherent element of the due diligence obligation is the obligation to conduct an environmental impact assessment before any potentially harmful activities are undertaken.[33] Further refinement of the due diligence obligation in question is given by the 'best environmental practices' obligation in Polymetallic Sulphides Regulations 33 (2) and Ferromanganese Crusts Regulations 33 (2).[34] Further detailed provisions on specific 'due diligence' measures can be found in Polymetallic Nodules Regulations 32 (7) and Polymetallic Sulphides Regulations and Ferromanganese Crusts Regulations 35 (8), dealing with guarantees to the Authority for protection of the marine environment, as well as, in a wider sense, Art. 153 (4) – duty of assisting the Authority – and Art. 235 (2) on providing recourse for compensation.[35] 12

3. 'damage caused by the failure of a State Party or international organizations to carry out its responsibilities under this Part shall entail liability'

Art. 139 (2) deals with the liability of (sponsoring) States or international organizations triggered by any failure to comply with the primary duties in Art. 139 (1), Art 4 (4) Annex III and the rest of Part XI. 13

a) 'damage caused by the failure'. The first clause of Art. 139 (2) is concerned with the general (secondary) liability of States Parties, including sponsoring States, and international 14

[26] *David Freestone*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, AJIL 105 (2011), 755, 759; a number of States have enacted specific legislation with a view to implementing their obligations, see e. g. the Federal Republic of Germany, Seabed Mining Act of 6 June 1995 (Meeresbodenbergbaugesetz – MbergG), BGBl. I (1995), 778, 782, as amended by Art. 74 of the Act of 8 December 2010 BGBl. I (2010), 1864, particularly §§ 4, 5, 11 and 12; Czech Republic, Act No. 158/2000 of 18 May 2000 on Prospecting, Exploration for and Exploitation of Mineral Resources from the Seabed beyond Limits of National Jurisdiction and Amendments to Related Acts, UN DOALOS, LOSB No. 51 (2003), 78; *cf.* SPC-SOPAC EU-Funded Project: Deep Sea Minerals (DSM) in the Pacific Islands Region, Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation, July 2012, available at: http://www.sopac.org/dsm/public/files/reports/SOPAC_RLRF_for_DSM_Final_12.07.12_.pdf.

[27] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, UN Doc. ISBA/6/A/18 (2000), Annex (Polymetallic Nodules Regulations).

[28] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, UN Doc. ISBA/16/A/12/REV.1 (2010), Annex (Polymetallic Sulphides Regulations).

[29] ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, UN Doc. ISBA/18/A/11 (2012), Annex (Ferromanganese Crusts Regulations).

[30] UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration).

[31] *Responsibilities and Obligations of Sponsoring States* (note 1), paras. 130 *et seq.*

[32] *Pulp Mills Case* (note 22), 71 (para. 164); *Freestone* (note 26), 758, 760.

[33] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 148; *Rayfuse* (note 1), 479 *et seq.*; *cf.* also *Knox* (note 24), 295 *et seq.*

[34] *Responsibilities and Obligations of Sponsoring States* (note 1), paras. 136 *et seq.*

[35] *Ibid.*, para. 242 (summary).

organizations. Two conditions for liability are set out: The failure of the States to carry out their responsibilities and the consequential occurrence of damage.

15 The responsibilities of States referred to in this context encompass all responsibilities under Part XI, the Annexes and the rules enacted by the Authority, as they all form part of the deep seabed mining regime. The question whether a violation has occurred must be assessed, taking into consideration the specifics of the relevant rule. The same case-by-case assessment must be applied when identifying the subject entitled to make the claim: While for general provisions it seems likely that the Authority is entitled to claim on behalf of all of mankind according to Art. 137 (2), environmental protection norms that are valid *erga omnes* may also entail claimant rights for every other State.[36] Contrary to the general customary international law on the liability of States,[37] material damage is required for liability under Art. 139 (2).[38] Furthermore, a causal link between the breach of obligation by the State or international organization and the occurrence of damage is demanded by the wording of Art. 139 (2) 'damage caused'. For the liability of sponsoring States, the causal link must exist between the failure of the State and the damage caused by the sponsored contractor.[39] Hence, the liability imposed on sponsoring States is not strict liability – in the sense that the State will be held liable for any damage caused by the contractor – but a liability dependent on the fault of the State.[40] As Art. 139 (2) provides, joint activities by States and/or international organizations entail joint liability. On the basis of equity, the same applies in the case of multiple sponsorship, notwithstanding possible differing provisions by the Authority.[41]

16 For the scope of the compensation, customary international law provides that full compensation, to the extent of the actual amount of the damage that occurred, must be paid.[42] The reparation as such may, depending on the nature of the damage, take the form of compensation, restitution or satisfaction.[43]

17 **b) 'A State Party shall not however be liable for damage caused […] if the State Party has taken all necessary and appropriate measures to secure effective compliance'.** As provided for in the second clause of Art. 139 (2) – as well as Art. 4 (4) Annex III – a sponsoring State is exempt from liability for damage caused by the contractor if the State has taken all 'necessary and appropriate measures' demanded by Art. 153 (4) and Art. 4 (4) Annex III.[44] The Convention does not specify which measures fulfill the 'necessary and appropriate'-test imposed to curtail liability. Art. 4 (4) Annex III offers some guidance, stating that liability does not apply

> '[…] if that State Party 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.'

18 The focus on securing compliance with the Convention *ex ante* – through laws and administrative measures – indicates that the State is not categorically required to take enforcement measures against its contractors to escape liability. The wording also implies a considerable extent of flexibility for the State in choosing the measures to be taken.[45] As

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[36] ILC, Report of the International Law Commission: Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 59, 319 (Art. 48); *Responsibilities and Obligations of Sponsoring States* (note 1), para. 180.

[37] *Cf.* ASR with Commentaries (note 36),68 (Art. 2).

[38] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 178.

[39] *Ibid.*, para. 181.

[40] *Ibid.*, para. 189; *Freestone* (note 26), 759.

[41] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 192.

[42] PCIJ, *Case Concerning Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17, 5, 47; ASR with Commentaries (note 36), 223 (Art. 31); see also Annex III Art. 22 UNCLOS.

[43] ASR with Commentaries (note 36), 25 (Art. 34).

[44] For the scope of those due diligence obligations see *supra*, MN 11–12.

[45] Nordquist/Nandan/Rosenne (note 12), 127 (MN 139.9(b).

noted in the context of the due diligence obligation contained in Art. 139 (1), the test of 'appropriateness' includes a case-by-case analysis, but as a minimum requirement demands that the measures remain in force for the duration of the contract with the Authority and go beyond contractual arrangements with the entities in question.[46] Notably, the exemption from liability does not extend to the direct obligations – opposed to the abovementioned obligations of due diligence – of the sponsoring States under the Convention.[47]

c) 'Without prejudice to the rules of international law'. The reference to the rules of general international law – those relating to the responsibility of States[48] and international organizations[49] – prevents the liability regime of Part XI from being interpreted as limiting the general liability. Instead, the liability imposed by Art. 139 (2) is designed to enhance general international law,[50] while at the same time being supplemented and completed by its rules.[51] On the one hand, violations of international obligations outside the regime of Part XI may entail the general international responsibility of the acting State. On the other hand, gaps in liability within the regime may be closed by customary international law where it provides for reparation.[52] This is the case if a sponsoring State has neglected its due diligence obligations but no damage has occurred.[53] The same is valid in cases where there has been a violation of the due diligence obligation and harm has occurred, but the causal link between the two is missing – under general international law, this may be treated as a situation without attributable damage that however still evokes State responsibility. Another gap in liability occurs where the obligation of due diligence has been fulfilled, but the contractor – which is generally liable for misconduct under national laws implementing Art. 4 (4) of Annex III – has caused harm without violating his obligations.[54] A similar situation exists if the contractor can be found guilty of misconduct, but is insolvent or does not have assets within the sponsoring State's reach.[55] Yet, strict liability – or 'residual liability' as in the enumerated situations – of the State for lawful acts on its part has not been recognized in customary international law.[56] **19**

d) Relationship of Sponsoring State Liability and Contractor Liability. As mentioned above, the contractor itself is liable for damage caused by its wrongful acts under Art. 22 Annex III. The provision provokes questions as to the relationship to the sponsoring State's liability under Art. 139 (2). A look at the theoretical background of the different liabilities is **20**

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[46] *Cf. supra*, MN 11.

[47] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 207.

[48] *Cf.* generally ASR with Commentaries (note 36); and *James R. Crawford*, State Responsibility, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. IX (2012), 517.

[49] *Cf.* ILC, Report of the International Law Commission: Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011), GAOR 66th Sess. Suppl. 10, 52; *Pieter Jan Kuyper*, Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?, IOLR 7 (2010), 9 *et seq.*

[50] *Wolfrum* (note 19), 342.

[51] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 171.

[52] *Ibid.*, para. 208.

[53] ASR with Commentaries (note 36), 68 (Art. 2).

[54] *Responsibilities and Obligations of Sponsoring States* (note 1), Written Statement of International Union for Conservation of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group, 19 August 2010, para. 97, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf.

[55] *Donald K. Anton*, The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17), McGill L.J. Sust. Dev. L. & Pol'y 7 (2011–2012), 241, 250.

[56] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 209; *contra*: *Responsibilities and Obligations of Sponsoring States* (note 1), Memorial Filed on behalf of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, 13 August 2010, 19 *et seq.* available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Greenpeace_WWF.pdf; and *ibid.*, Written Statement of International Union for Conservation of Nature and Natural Resources, para. 104; for a comprehensive analysis, see *Anton* (note 55), 253 *et seq.*

instructive in this matter: Both the sponsoring State's and the contractor's liability rely on an individual failure of the respective entity and the damage caused by this very failure; thus, joint and several liability – occurring where two entities contribute to the same damage – does not apply.[57] Both forms of liability exist independently and parallel, but Art. 4 (4) and Art. 22 Annex III indicate that the primary liability is that of the contractor.[58] Additionally, on grounds of equity, if the full damage has been covered by the contractor, there is no longer any room for reparation by the sponsoring State.[59]

4. 'shall take appropriate measures to ensure the implementation of this article'

21 As provided for by Art. 139 (3), States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of the primary and the secondary responsibilities contained in Art. 139 (1) and (2) with respect to such organizations. This is in line with the general notion in international law that States cannot contract out of their responsibilities under international treaty law by joining an international organization that acts in the sphere of the respective treaties.[60] If the international organization carries out activities in the Area on its own account, it will directly be responsible and liable under Art. 139 (1) and (2); in this case, Art. 139 (3) supplements this liability in further obliging States Parties to see to the international organization assuming its responsibility and liability. On the other hand, the open-ended formulation of the paragraph – 'with respect to such organizations' – also allows for application if the respective international organization is not responsible and liable under Art. 139 (1) and (2): In this case, the member State has to ensure the implementation of Part XI and the assumption of liability under 139 (2) of the international organization for the sphere of its derived competence. Again, however, the responsibility of the member State is only to take 'appropriate measures' to 'ensure' the implementation – resulting in a due diligence obligation with the implications discussed above.[61] In conjunction with Art. 139 (2), the member State will thus only be liable for any failure of the international organization in assuming responsibility and liability under Art. 139 if the measures it has taken cannot be deemed reasonably appropriate.

Article 140
Benefit of mankind

1. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.

2. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2(f)(i).

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[57] *Responsibilities and Obligations of Sponsoring States* (note 1), para. 201.

[58] Nordquist/Nandan/Rosenne (note 12), 127 (MN 139.9(b).

[59] *Responsibilities and Obligations of Sponsoring States* (note 1), para 202.

[60] *Cf.* ECtHR, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, para. 67, available at: http://hudoc.echr.coe.int/hudoc; and ECtHR, *Matthews v. the United Kingdom*, Judgment of 18 February 1999, para. 32, available at: http://hudoc.echr.coe.int/hudoc.

[61] *Cf. supra*, MN 11–12.

Bibliography: *Philippe Cullet*, Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations, EJIL 10 (1999), 549–582; *René-Jean Dupuy*, The Area as the Common Heritage of Mankind, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 579–586; *Wolfgang Durner*, Common Goods (2000); *Moshe Hirsch*, Developing Countries, in: Rüdiger Wolfrum (ed.), MPEPIL, vol. III (2012), 70–78; *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt (1995), 121–134; *Uwe Jenisch*, Renaissance des Meeresbodens – mineralische Rohstoffe und Seerecht (Teil 1), NordÖR 10 (2010), 373–382; *Ronald St. John Macdonald*, The Common Heritage of Mankind, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt (1995), 153–171; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459–488; *Tullio Scovazzi*, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL 19 (2004), 383–409; *Guglielmo Verdirame*, The Definition of Developing Countries under GATT and other International Law, GYIL 39 (1996), 164–197; *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312–337; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287–345; *Rüdiger Wolfrum*, Common Heritage of Mankind, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. II (2012), 452–458

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; GA, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

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I. Purpose and Function

Art. 140 introduces basic objectives for the usage regime of the Area and provides for the benefit-sharing-element of the principle of common heritage of mankind as anchored in Art. 136. In its first paragraph, it orders that all activities in the Area be carried out for the benefit of mankind as a whole, adding the consideration of the interests and needs of developing States and peoples without self-government as well as the 'Declaration on the Granting of Independence to Colonial Countries and Peoples'[1] as guidelines. The second paragraph entrusts the Authority with the task of organizing the non-discriminatory, equitable sharing of benefits in accordance with Art. 160 (2)(f)(i). It is evident from the vague wording and the reference to 'any appropriate mechanism' that both paragraphs were envisaged to be further implemented through specifying regulations.[2] **1**

[1] GA, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 December 1960.

[2] *Rüdiger Wolfrum*, Common Heritage of Mankind, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. II (2012), 452, 456.

II. Historical Background

2 Since the ideas of equitable sharing of benefits and the use for the benefit of all mankind are agreed core elements of the principle of common heritage of mankind,[3] they have been discussed in various forms since a very early stage of the drafting process. The first elaborate draft submitted to the Sea-Bed Committee by the United States in 1970 already contained an article providing for the use of revenues from the exploitation for the benefit of all mankind; however, its only addressee was the 'International Seabed Resource Authority', which was called upon to use those revenues for the transfer of technology, research and payments for the economic advancement of developing States.[4] Later that year, the General Assembly adopted its 'Declaration of Principles' for the seabed, including the subject matter in different places:

> 'The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.'
>
> 'The régime shall […] ensure the equitable sharing by States in the benefits derived [from the use of the area and its resources], taking into particular consideration the interests and needs of developing countries, whether land-locked or coastal.'[5]

3 The separation of the issues of 'benefit of all mankind' and 'equitable sharing of benefits' is symptomatic for almost the entire drafting process. It was not until the Seventh Session in 1978 that the two elements were combined to form one article.[6] The subsequent drafts by Tanzania,[7] Malta,[8] and the USSR[9] were largely based on the Declaration of Principles in that regard and did not breed new developments on the issue. The draft articles submitted at the Second Session of UNCLOS in 1974, reflecting the outcome of the First Committee's discussions, contained two separate articles on the topic. The first article, entitled 'Benefit of Mankind as a whole',[10] repeated the provision of the Declaration and added that geographically disadvantaged States shall be involved in the exploration and exploitation of the Area.[11] For the second article, headed 'General Norms regarding Exploitation',[12] two versions were presented which adopted considerable amounts of the Declaration's wording and added provisions to ensure that the exploitation be carried out in an orderly and safe manner. Presented in 1975, the Informal Single Negotiation Text (ISNT) contained two articles which mainly repeated the Declaration of Principles[13]. However, the ISNT additionally took up the notion contained in the early US proposal in a third article providing that

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[3] For a general discussion of this principle see *Vöneky/Höfelmeier* on Art. 136 MN 14–20.

[4] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130, 133 (Art. 5).

[5] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970, Principles 7 and 9.

[6] See the references in Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 138 (MN 140.9 *et seq.*).

[7] Sea-Bed Committee, United Republic of Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51, 53 (Art. 4).

[8] Sea-Bed Committee, Malta: Draft Ocean Space Treaty (1971), UN Doc. A/AC.138/53, GAOR 26th Sess. Suppl. 21 (A/8421), 105, 145 (Art. 66).

[9] Sea-Bed Committee, Union of Soviet Socialist Republics: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 72 (Art. 16).

[10] First Committee UNCLOS III, Draft Articles Considered by the Committee at Its Informal Meetings, UN Doc. A/CONF.62/C.1/L.3 (1974), OR IV, 157, 159 (Art. 7).

[11] This matter is now embedded in Art. 148, see further *Vöneky/Beck* Art. 148 MN 9–10.

[12] Draft Articles Considered by the Committee (note 10), Art. 10.

[13] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc A/CONF.62/WP.8/PART I (1975), OR IV, 137, 138–139 (Arts. 7 and 9).

> '[t]he Authority shall ensure the equitable sharing by States in the benefits derived from activities in the Area, taking into particular consideration the interests and needs of the developing countries whether coastal or land-locked.'[14]

The next substantial enrichment of the content of the articles was – *inter alia*[15] – brought about by a proposal of the Group of 77 in 1977, suggesting that the sharing of benefits was to take particular note of the rights of peoples and countries without self-governing status or independence.[16] Thereupon, the idea was taken up by the Informal Composite Negotiation Text (ICNT) of the same year, which still, however, kept up the separation of the matter into two articles, one of them essentially concerned with the role of the Authority in establishing a system realizing all of the *modi operandi* prescribed by the different principles.[17] 4

After proposals during the Seventh Session of the Committee to merge the 'equitable sharing' issue and the 'benefit of mankind' element into one article, the revised ICNT of 1979 presented a new Art. 140 which featured two paragraphs, but still lacked the reference to the United Nations and its documents as well as the prescription of 'non-discriminatory' sharing of benefits.[18] Those changes were introduced by the second and third revision of the ICNT in 1980.[19] Remarkably, the third revision of the ICNT also entailed the insertion of the clause 'as specifically provided for in this Part' into paragraph 1, reducing the independent content of the article and providing a compromise for the insertion of the 'non-discriminatory distribution' in para. 2 for those States that feared a negligence of States Parties *vis-à-vis* developing or land-locked States and peoples.[20] In the drafting process ensuing the presentation of the third revision of the ICNT, the article underwent no further substantial changes until its incorporation in the Convention. 5

III. Elements

1. 'Activities in the Area shall […] be carried out for the benefit of mankind as a whole'

In providing a framework for all usage of the Area, Art. 140 (1) renders 'mankind as a whole' the ultimate beneficiary of the proclamation of the Area as 'common heritage of mankind'. Besides the inclusion of all States – arguably even non-signatory States[21] – irrespective of their geographic location, the interests and needs of developing countries and non-self-governing people are given a special emphasis. Arguably, the normative content of Art. 140 (1) is not only reduced by the ambivalent language and the lack of further explanation, but also by the reference to – and thus limitation by – the other provisions in Part XI. Yet, the article is significant as an interpretative guideline for the Authority and the States in fulfilling the provisions of the Convention, especially since it refines the wide scope 6

[14] *Ibid*., 141 (Art. 23 (3)).

[15] See Nordquist/Nandan/Rosenne (note 6), 137 (MN 140.8) for further references.

[16] UNCLOS III, Group of 77: Article 9 (1977, mimeo.), reproduced in: Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 385 *et seq*.

[17] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 23 and 26 (Arts. 140 and 151).

[18] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 1, 75 (Art. 140).

[19] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 18, 28 (Art. 140), introduced the reference to the UN and its documents; and the UNCLOS III, Informal Composite Negotiating Text (Revision 3), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 1, 5 (Art. 140), added the provision that the distribution of benefits be carried out 'on a non-discriminatory basis'.

[20] See the discussion of the compromise in Nordquist/Nandan/Rosenne (note 6), 140 (MN 140.12 *et seq*).

[21] *Ibid*., 140 (MN 140.15(a)).

of 'mankind'.[22] As such, the 'benefit of mankind as a whole'-test diminishes or even excludes the consideration of private (economic and personal) interests.[23]

7 To explain the meaning and scope of the term 'mankind', it is important to note that it has a spatial and a temporal aspect:[24] On the one hand, it includes all persons on the planet irrespective of their whereabouts or national identity. On the other hand, it includes present and future generations. Therefore, global long-term concerns and aspects of sustainable development have to be taken into account when conducting activities in the Area for the 'benefit of all mankind'.[25]

8 The postulation of activities in the Area to be carried out for the benefit of mankind as a whole includes two different lines of demands: The first is the participation of all States in the equitable sharing of benefits; the second is the equalization of the effective conditions for all States to conduct deep seabed mining.[26] The first aspect is covered by Art. 140 (2) (see below). The second aspect is founded in the ideas that equalization of conditions amounts to indirect participation in the usage of the Area and that common goods should primarily be used to foster the progress of underdeveloped States.[27] It has two sides: The restriction of mining by technologically advanced countries to retain capacities for other States – imposed by the usage regime of Part XI, the Annexes and the Implementation Agreement, contrary to a regime of freedom of use – and the promotion of mining by the latter.[28] This promotion is achieved by transfer of technology (Art. 144) and the exclusive management of the Area by the Authority.

2. 'taking into particular consideration the interests and needs of developing States'

9 In setting the needs and interests of developing States as one of the primary parameters for conducting activities to the benefit of mankind as a whole, the Convention follows a general trend in international law for differential instead of formally equal treatment of States,[29] which has also been enshrined in the common heritage conception of the Moon Treaty.[30] Art. 140 (1) complements Art. 148 which postulates 'the effective participation of developing States in activities in the Area'. Art. 140 is concerned with the general consideration of developing States in regulating and carrying out activities, while Art. 148 aims at direct participation rights of those States. In addition, Art. 143 and Art. 144 provide for assistance to developing States in order to render them capable both in know-how and in available technology to conduct activities in the Area.

10 As already outlined, the normative content of this special obligation is low. First of all there are persistent uncertainties about the precise contours of the notion of a 'developing State'.[31] Secondly, the consideration of their needs is expressly limited in favour of other

[22] *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312, 325.

[23] *Tullio Scovazzi*, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL 19 (2004), 383, 392.

[24] A detailed analysis of the legal philosophy of mankind is given by *René-Jean Dupuy*, The Area as the Common Heritage of Mankind, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 579, 580 *et seq*.

[25] For further comments see *Vöneky/Höfelmeier* on Art. 140 MN 6–7.

[26] This interpretation has been suggested by *Dupuy* (note 24), 581; and taken over by *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, 339.

[27] *Wolfrum* (note 26), 321.

[28] *Ibid*., 339.

[29] See *Philippe Cullet*, Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations, EJIL 10 (1999), 549, 563.

[30] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, UNTS 1363, 3, Art. 11 para. 7 lit. d.

[31] *Moshe Hirsch*, Developing Countries, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. III (2012), 70 *et seq*.; see generally *Guglielmo Verdirame*, The Definition of Developing Countries Under GATT and Other International Law, GYIL 39 (1996), 164 *et seq*; it is not convincing to argue

provisions of Part XI. Attempts to make use of this clause as a loophole for a dynamic or amendatory interpretation of the treaty in favour of developing countries[32] have been rejected.[33] Without further authoritative implementation, the direct advantages of developing countries stemming from Art. 140 may thus be seen as merely symbolic, at most providing incentives for additional developments on the subject.

3. 'equitable sharing of financial and other economic benefits'

Through the obligation to equally distribute economic benefits, Art. 140 (2) establishes an important function of the Authority. The principle of non-discrimination enshrined in the paragraph is an essential pattern of the regime envisaged by Part XI: It is also included in Art. 141, providing for use by 'all States without discrimination', and Art. 152, which introduces a general anti-discrimination test for all measures by the Authority. The paragraph forms part of the tripartite universal participation regime of Part XI, comprising participation in the Assembly (Art. 159), in the usage of the Area (Art. 141) and in the sharing of benefits.[34] **11**

According to the cited Art. 160 (2)(f)(i), the Assembly – an organ of the Authority pursuant to Art. 158 – will assess and approve the rules and procedures for the equitable sharing of benefits after recommendation by the Council. The provision also reiterates the special consideration of developing States and peoples without full independence that is already contained in Art. 140 (1). In addition to the rule-making capacity, Art. 160 (2)(g) entrusts the Assembly with the decision on the actual distribution. When providing for the share of financial benefits, the negotiating States primarily had in mind that the Enterprise was to undertake independent seabed mining activities (→ Art. 153 (2)(a); Art. 170; Annex IV) and later distribute the earnings.[35] However, the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea[36] abolished the possibility of independent activities of the Authority through the Enterprise[37] and overall diminished the originally privileged role of the Enterprise in the mining regime in favour of States and private entities.[38] The focus of economic distributive justice consequentially shifted from the equal distribution of earnings to the compensation of losses caused by activities in the Area, envisaged in Art. 151 (10). Notably, the obligation of distributing the benefits does not only apply to financial, but also to other economic benefits. For example, the transfer of technology as envisaged in Art. 150 (d) is encompassed by the provision.[39] **12**

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that all States that are not part of the group of industrialized countries, as for instance China on the one hand, and Somalia or Lesotho on the other, have the same legitimate right to be supported as 'developing states'. Here, a more reasonable approach has to be taken that differentiates between the economic power of the developing States Parties.

[32] See ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Statement by the Republic of Nauru of 5 August 2010, paras. 2 *et seq.*, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Nauru.pdf,.

[33] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf, paras. 151 *et seq.*; analysis by *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459, 473 *et seq.*

[34] *Cf. Wolfgang Durner*, Common Goods (2000), 216 *et seq.*

[35] *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention, in: Ulrich Beyerlin *et al.* (eds.), Recht zwischen Umbruch und Bewahrung: Völkerrecht-Europarecht-Staatsrecht: Festschrift für Rudolf Bernhardt (1995), 121, 125.

[36] As stated in its Art. 2 (1) the Agreement is in fact an amendment of the Convention, according to its Art. 1 (2) the Annex forms an integral part of the Agreement and thus of the Convention.

[37] According to S. 2 of the Annex of the 1994 Agreement, mining activities of the Enterprise remain permitted, however, merely as joint ventures.

[38] Comprehensive overviews are given by *Uwe Jenisch*, Renaissance des Meeresbodens – mineralische Rohstoffe und Seerecht (Teil I), NordÖR 10 (2010), 373, 380; and *Jaenicke* (note 35), 125.

[39] *Ronald St. John Macdonald*, The Common Heritage of Mankind, in: Beyerlin *et al.* (note 35), 153, 165.

Article 141
Use of the Area exclusively for peaceful purposes

The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part.

Bibliography: *Boleslaw A. Boczek*, Peaceful Purposes of the United Nations Convention on the Law of the Sea, ODIL 20 (1989), 359–389; *René-Jean Dupuy*, The Area as the Common Heritage of Mankind, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 579–586; *Wolfgang Durner*, Common Goods (2000); *Alex G. Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143–176; *Edward Guntrip*, The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?, Melb.J.Int'l L. 4 (2003), 376–405; *John Kish*, The Law of International Spaces (1973); *Alexander Proelss*, Peaceful Purposes, in: Rüdiger Wolfrum (ed.), MPEPIL, vol. VIII (2012), 193–201; *Elmar Rauch*, Military Uses of the Oceans, GYIL 28 (1985), 229–267; *Wolfgang Graf Vitzthum*, International Seabed Area, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. VI (2012), 137–146; *Rüdiger Wolfrum*, Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?, GYIL 24 (1981), 200–241; *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312–337; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287–345

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; GA, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res 2340 (XXII) of 18 December 1967; Maltese Note Verbale of 17 August 1967 to United Nations Secretary-General, UN Doc. A/6695 (1967)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

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I. Purpose and Function

1 Art. 141 incorporates one of the core elements of the general principle of common heritage of mankind into the Convention: The sole use for peaceful purposes. Another key element provided for by Art. 141 is the inclusion of all States, be they coastal or land-locked, signatory or non-signatory, into the circle of potential user States. However, the reservation 'without prejudice to the other provisions of this part' indicates the marginal independent content of the article and the need for further specification of the usage regime. The non-discrimination element, despite being aimed at the benefit sharing stage, can also be found in Art. 140 (2).

II. Historical Background

2 To trace the emergence of Art. 141, one must distinguish between two elements: The reservation of the Area for peaceful purposes and the non-discriminatory use for all States. Both elements have always been understood as parts of the necessary implementation of the

principle of common heritage of mankind, as the repeated integration into the 'Declaration of Principles', adopted by the General Assembly of the United Nations in 1970, shows:

> 'The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.'
>
> 'The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area […].'[1]

Three years earlier, the General Assembly had already declared that the use of the seabed 3
and the ocean floor '[…] should be conducted in accordance with the purposes and principles of the Charter of the United Nations […]'[2] and created an 'Ad-hoc Committee to study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction' to further investigate the topic; indicating that 'peaceful uses' was meant to reflect the anti-aggression regime of the Charter.[3] A draft by Malta submitted in 1971 provided for an article with almost the same content as the present Art. 141,[4] but went further by envisaging another article that specifically prohibited the positioning of nuclear weapons and other weapons of mass destruction on the seabed as well as weapons testing in the seabed area.[5] Similarly, a proposal by the USSR from the same year contained a further article that explicitly left the 'Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed' unimpeded.[6] The same is true for the 1971 draft statute presented by Tanzania.[7] Subsequently, the discussion in the sessions of the Sea-Bed Committee and in the second session of the Conference in 1974 focussed on whether and how to provide a detailed article on the designation for peaceful uses. The positions ranged from a complete demilitarization – prominently supported by the Ecuadorian delegation[8] – to a statement of non-aggression, advocated by the United States.[9]

The amalgamation of the two above-named elements in one article took place at the Third 4
Session of UNCLOS in 1975 through the Informal Single Negotiation Text, which contained an article headed 'Reservation and Use of the Area Exclusively for Peaceful Purposes':

> '1. The Area shall be reserved exclusively for peaceful purposes.
>
> 2. The Area shall be open to use exclusively for peaceful purposes by all States Parties, whether coastal or land-locked, without discrimination, in accordance with the provisions of this Convention, and regulations made thereunder.'[10]

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[1] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970, Principles 5 and 8.

[2] GA. Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind, GA Res 2340 (XXII) of 18 December 1967.

[3] *Elmar Rauch*, Military Uses of the Oceans, GYIL 28 (1985), 229, 240.

[4] Sea-Bed Committee, Malta: Draft Ocean Space Treaty (1971), UN Doc. A/AC.138/53, GAOR 26th Sess. Suppl. 21 (A/8421), 105, 145 (Art. 69).

[5] *Ibid*., 150 (Art. 84).

[6] Sea-Bed Committee, Union of Soviet Socialist Republics: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 68 (Arts. 1 and 6).

[7] Sea-Bed Committee, United Republic of Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), cited in: GAOR 26th Sess. Suppl. 21 (A/8421), 51, 53 and 55–56 (Arts. 7 and 16).

[8] UNCLOS III, 67th Plenary Meeting, UN Doc. A/CONF 62/SR.67 (1976), OR V, 56–57.

[9] First Committee UNCLOS III, Draft Articles Considered by the Committee at Its Informal Meetings, UN Doc. A/CONF.62/C.1/L.3 (1974), OR IV, 157, 159: The extent of the controversy is reflected in Art. 8, an elaborate article on the 'Preservation of the Area Exclusively for Peaceful Purposes' declaring each element except the inevitable Declaration of Principles wording controversial; see also *Rauch* (note 3), 240; and *Boleslaw A. Boczek*, Peaceful Purposes of the United Nations Convention on the Law of the Sea, ODIL 20 (1989), 359, 369 *et seq*.

[10] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 138 (Art. 8).

5 In the remaining drafting process, the only significant change made to that suggestion was the extension of the usage right to all States instead of just States Parties in the second paragraph, introduced by the Revised Single Negotiation Text in 1976.[11] Apart from that alteration, the article remained substantively unchanged.

III. Elements

1. 'exclusively for peaceful purposes'

6 The designation of the seabed for peaceful purposes can be traced back to two ideological strands: The idea that military uses are inevitably triggered by national interests and therefore cannot serve the 'benefit of all mankind', and the fear that military uses could hinder exploitation, which is the primary purpose of the usage regime.[12] Peaceful purpose clauses can be found in numerous provisions of the Convention, such as Art. 88, Art. 143 (1), Art. 147 (2)(d), Art. 155 (2), Art. 240 (a), Art. 242 (1), Art. 246 (3) and Art. 301 as well as the Preamble.[13] The designation of the seabed for peaceful purposes in Art. 141 is in line with other international agreements, such as the Partial Nuclear Test Ban Treaty and the Seabed Arms Control Treaty. Despite the mention of peaceful purposes in a multitude of international instruments,[14] a clear normative content of this phrase cannot be established; nor does a substantiated principle of peaceful purposes exist in customary international law.[15]

7 Even in the Convention, the term is used in different contexts: While some provisions – such as Art. 240 – refer to certain activities, others, such as Art. 88 and Art. 141, are concerned with spaces. The meaning of the term 'peaceful purposes' can therefore only be evaluated by assessing the concrete provision. In the case of the Area, possible interpretations range from a complete demilitarization of the Area to a mere prohibition of aggression, essentially reiterating Art. 2 (4) of the Charter of the United Nations.[16] Even though the original Maltese proposal of installing the common heritage of mankind was clearly aimed at a complete demilitarization of the Area,[17] the wording and the placement of Art. 141 in the context of the Convention suggest otherwise. Apart from Malta's understanding, the legislative history of Art. 141, as seen above, shows that even though attempts were made to include details of what was meant by 'peaceful uses' in the treaty, none prevailed. This could be explained by the assumption that in the negotiators' view, the conclusion of the Seabed Arms Control Treaty in 1971 rendered such specifications unnecessary – which would in turn indicate that the military activities the States were seeking to prohibit through Art. 141 were the stationing of nuclear weapons or such of mass destruction.[18]

8 Considering the article as a whole, the incorporation of the non-discriminatory aspect and the usage rights of all States suggests that the article as such is rather focused on the regulation of access to the Area than on the demilitarization of the Area.[19] If the negotiating States had intended to entirely demilitarize the Area, they would have done so in a separate article. From a systematic perspective, the inclusion of Art. 301 in the Convention hints

[11] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 129 (Art. 8).

[12] *Rüdiger Wolfrum*, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312, 319.

[13] Preamble, para. 4 reads: '[…] will promote the peaceful uses of the seas and oceans'.

[14] For a list of the relevant instruments, see: *Alexander Proelss*, Peaceful Purposes, in: Rüdiger Wolfrum (ed.), MPEPIL, vol. VIII (2012), 193, 194.

[15] *Ibid.*, 193; *Boczek* (note 9), 363 *et seq.*; see also *Edward Guntrip*, The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?, Melb.J.Int'l L. 4 (2003), 376, 389 *et seq.*

[16] *Rauch* (note 3), 239.

[17] Maltese Note Verbale of 17 August 1967 to United Nations Secretary-General, UN Doc. A/6695 (1967).

[18] *Proelss* (note 14), 199; *Wolfrum* (note 12), 320.

[19] *Rüdiger Wolfrum*, Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?, GYIL 24 (1981), 200, 226; *Wolfgang Graf Vitzthum*, International Seabed Area, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, vol. VI (2012), 137, 142.

towards the fact that Art. 141 (and Art. 88) were not meant to bring about the complete demilitarization of the Area and the high seas.[20] WOLFRUM argues that the provision is nothing but a reference to Art 2 (4) of the Charter of the United Nations,[21] which – he contends – renders Art. 141 redundant and without normative content.[22] This is supported by the early General Assembly resolution of 1967.[23] If Art. 301, with its reference to the Charter of the United Nations, is interpreted as a definition of 'peaceful purposes' for the entire Convention,[24] this means that any measure of self-defense pursuant to Art. 51 of the Charter must be regarded as 'peaceful use'.[25] Other than Art. 88 for the uses of the high seas, Art. 141 includes a reservation in favour of the other provisions of Part XI. However, this wording may not be understood as applying a more stringent interpretation of Art. 141: It is a consequence of the different regimes governing the spaces.[26] While the use of the high seas is governed by a doctrine of freedom, the use of the Area is governed by an elaborate principle that may put further limitations on uses that are peaceful and generally permitted in the water column overlying the Area. Similarly, the wording 'used exclusively' in Art. 141, which stands opposed to 'reserved' in Art. 88, is merely a semantic residue of the drafting process.[27] The conclusive interpretation of 'peaceful purposes' in Art. 141 must thus be that of a non-aggressive meaning, corresponding with the content of Art. 2 (4) of the Charter of the United Nations.

2. 'open to […] all States, whether coastal or land-locked, without discrimination'

9 While Art. 140 provides for the non-discriminatory sharing of the benefits obtained from activities in the Area, Art. 141 is focused on promoting equity at an earlier point in time. The inclusive participation regime of Part XI of the Convention is tripartite: States are vested with non-discriminatory participation at the institutional level by inclusion in the Assembly (Art. 159), at the activity level by equal access to the Area (Art. 141) and at the profit level by sharing of benefits derived from activities in the Area (Art. 140 (2)).[28] Building on the background of the common heritage of mankind, Art. 141 extends the non-discriminatory, universal usage right of the Area not only to States Parties, but to all States, however lacks an inclusion of peoples without full independence, who may only participate in the equal sharing of benefits pursuant to Art. 140 (1). Given the ultimately State-centred regime of obligations, liability and sponsoring envisaged by Art. 139 and Art. 153, the exclusion of peoples from usage of the deep seabed is consistent. However, their share in the benefits is reflected by their inclusion in the term 'mankind.' The same is valid for the exclusion of non-signatory States from activities in the Area by Art. 153 (2)(b): The common heritage regime imposed by the Convention would be ineffective if such States were allowed to conduct mining without having to respect the relevant rules.[29] The non-discriminatory and equal access to usage of the Area is only granted 'without prejudice to the other provisions of [Part

[20] See also *Wolfgang Durner*, Common Goods (2000), 176; referring to *John Kish*, The Law of International Spaces (1973), 143 *et seq.*

[21] Art. 2 (4) Charter of the United Nations reads: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

[22] *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, 338; *Boczek* (note 9), 371.

[23] See *supra*, note 2.

[24] Advocated by *Durner* (note 20), 177; and *Rauch* (note 3), 240 *et seq.*

[25] *Rauch* (note 3), 242.

[26] *Alex G. Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143, 156.

[27] See *Boczek* (note 9), 374, for a comprehensive overview on the literal drafting of the two provisions.

[28] *René-Jean Dupuy*, The Area as the Common Heritage of Mankind, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea (1991), 579, 582 *et seq.*; *Durner* (note 20), 216 *et seq.*

[29] *Wolfrum* (note 22), 341.

XI]'. This reference also includes the Annexes III and IV of the Convention (→ Art. 318) as well as the entire usage regime (to be) elaborated by the Authority since it is based on the provisions of Part XI.[30]

Article 142
Rights and legitimate interests of coastal States

1. Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie.

2. Consultations, including a system of prior notification, shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests. In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required.

3. Neither this Part nor any rights granted or exercised pursuant thereto shall affect the rights of coastal States to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area.

Bibliography: *David Anderson*, The Principle of Reasonableness in the Law of the Sea, in: Holger P. Hestermeyer et al. (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 657–670; *Neil MacCormick*, Reasonableness and Objectivity, Notre Dame L.Rev. 74 (1999), 1575–1603; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Christopher G. Weeramantry*, Universalising International Law (2004); *Rüdiger Wolfrum*, Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations, in: Rüdiger Wolfrum/Volker Röben (eds.), Legitimacy in International Law (2008), 1–24

Documents: GA Res. 2749 (XXV) of 17 December 1970

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I. Purpose and Function

1 Art. 142 enshrines the principle of reasonable use for the purposes of the Convention. It intends to prevent conflicts between the Authority and the mining contractors on the one hand and the coastal States on the other hand by protecting the interests of coastal States.

2 One group of legitimate interests protected by Art. 142 is the sovereign rights of coastal States over seabed areas that fall under their jurisdiction. In the case of resources lying across the limits of such jurisdiction,[1] the danger that the exploitation on the side falling under the administration of the Authority will keep coastal States from the full enjoyment of their rights is obvious. The first prevention measure installed by Art. 142 (1) is a test of due regard,

[30] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf, para. 105.

[1] For a definition of 'resources', see *Scovazzi* on Art. 133 MN 11–12.

an aspect of the principle of reasonable use,[2] that provides a flexible tool for the adequate resolution of conflicts in the case of cross-jurisdiction resources. In addition, potential conflicts are prevented by consultations and prior notification of the coastal State under Art. 142 (2). If the actual exploitation of resources under coastal State jurisdiction is possible, prior consent by the relevant State is required.

The other dimension of the coastal States' rights protected by Art. 142 is the States' rights – and duties – of protection of the coastal environment, dealt with in Art. 142 (3). It states that none of the provisions of Part XI shall have an impact on the coastal States' rights under the Convention to protect their coastline. 3

Through Art. 142, the drafters of the Convention recognized the existence and importance of coastal States' rights adjacent to the new regime governing the deep seabed Area. 4

II. Historical Background

The idea promoted in Art. 142 was already incorporated in the Declaration of Principles of 1970,[3] which stated: 5

> '12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.
>
> 13. Nothing herein shall affect:
>
> […]
>
> (b) The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the area, subject to the international regime to be established.'

Only slight alterations were made by a subsequent proposal by thirteen Latin American States.[4] However, at the Second Session of UNCLOS III in 1974, controversies on many aspects of the article surfaced, which led to very ambiguous language in the draft articles prepared by the First Committee after those discussions.[5] Amongst the contentious issues were whether to include a system of prior notification, of consultations, of concurrence, a combined approach or none; whether to put the measures taken by the threatened State under a proportionality test; whether to regulate the matter through a universal duty of co-operation or omit the article entirely and whether to differentiate between those resources adjacent to the borders of national jurisdiction and those transcending the said borders.[6] 6

Further discussions brought about a consolidated text of the article in 1975, similar to the present one.[7] However, it referred to 'resources' instead of 'resource deposits' and lacked a requirement of consent of the neighbouring State. Both additions were introduced by the Revised Single Negotiating Text in 1976,[8] which presented a version that remained mainly unchanged until the adoption of the Convention. 7

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[2] *David Anderson*, The Principle of Reasonableness in the Law of the Sea, in: Holger P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 657, 663.

[3] GA Res. 2749 (XXV) of 17 December 1970.

[4] Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), Art. 8.

[5] UNCLOS III, Draft Articles Considered by the Committee at its Informal Meetings (Articles 1–21), UN Doc A/CONF.62/C.1/L.3 (1974), OR III, 157, 162 (Art. 15).

[6] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 154 (MN 142.4 *et seq.*).

[7] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 139 (Art. 14).

[8] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 130 (Art. 14).

III. Elements

1. Obligation of Due Regard

8 As stated in Art. 142 (1), a due regard test applies to all activities in the Area, regardless of the nature of the entity conducting them. The obligation of due regard is one aspect of the principle of reasonableness,[9] generally enshrined in Art. 300.[10] Such tests of reasonableness, as a common phenomenon of national and international law, allow a contextual test of the conduct in question on an objective basis;[11] in the case of Art. 142, the test prescribes the balancing of the interests of coastal States and the entities conducting the activities in the Area by taking into account all relevant circumstances.

2. Rights and Legitimate Interests of Coastal States

9 The question looming over the application of the test set out in Art. 142 (1) is which rights and interests of coastal States may be seen as protected by this provision. Through the requirement of legitimacy, the scope of application concerning interests is narrowed down; however, this introduces yet another indefinite term. By being prescribed by law, rights inherently qualify as legitimate; interests, in contrast thereto, are to be separately assessed. The term 'legitimate interests' is repeatedly used in the Convention.[12] The focus of the assessment to be employed is thus not the notion of legitimacy in general,[13] but the question of which legitimate interests coastal States could possibly have.

10 The 'legitimate interests'-test is future-oriented: Since the perception of legitimacy changes over time, so will the content of the provision.[14] Through its openness, it encompasses all motivations that are commonly perceived as 'right', but have not crystallized into substantive rights yet. In this sense, legitimate interests also resemble the requirement of good faith in Art. 300. The rights to be taken into account primarily include the right of any coastal State to explore and exploit the resources of its continental shelf.[15]

3. System of Consultations and Prior Notification

11 In order to effectively protect the rights of coastal States where resource deposits cross the borders of national jurisdiction, Art. 142 (2) provides for consultations and prior notification with the State concerned. If there is a possibility of exploitation of the transboundary resources (→ Art. 63 (2)), the consent of the State is required. Notably, both procedural requirements extend only to the rights and legitimate interests mentioned in Art. 142 (1), not to the environmental protection rights dealt with in Art. 143 (3). This is evident from the wording – 'such' rights – and from the systematic composition of the provision.

4. Environmental Protection Rights of Coastal States

12 Art. 142 (3) deals with rights of coastal States related to environmental protection. It expressly preserves the rights of coastal States to prevent, mitigate or eliminate grave and imminent danger to their coastline (or related interests) from pollution, threat of pollution or

[9] *Anderson* (note 2), 663.
[10] See further *O'Brien* on Art. 300.
[11] *Neil MacCormick*, Reasonableness and Objectivity, Notre Dame L.Rev. 74 (1999), 1575, 1576 *et seq*.
[12] See Arts. 47 (6), 125 (3), 187 (c)(ii), 267 and 274.
[13] For a broad discussion of legitimacy and the different usages of the term see *Rüdiger Wolfrum*, Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations, in: Rüdiger Wolfrum./Volker Röben (eds.), Legitimacy in International Law (2008), 1, 6.
[14] *Christopher G. Weeramantry*, Universalising International Law (2004), 202.
[15] See *Maggio* on Art. 77.

other hazardous occurrences in connection with the activities in the Area; however, the States may act according to those rights only in a manner that is consistent with the 'relevant provisions of Part XII'. Those provisions include Art. 209, providing for national legislation preventing pollution in the Area,[16] and Art. 221, dealing with the right of a State to enforce measures beyond its territorial sea following a marine casualty.[17] The latter article is extended by Art. 142 (3), according to which measures by a State are no longer confined to the aftermath of a marine casualty.[18]

Article 143
Marine scientific research

1. Marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII.

2. The Authority may carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, and shall coordinate and disseminate the results of such research and analysis when available.

3. States Parties may carry out marine scientific research in the Area. States Parties shall promote international cooperation in marine scientific research in the Area by:

(a) **participating in international programmes and encouraging cooperation in marine scientific research by personnel of different countries and of the Authority;**

(b) **ensuring that programmes are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed States with a view to:**
   (i) **strengthening their research capabilities;**
   (ii) **training their personnel and the personnel of the Authority in the techniques and applications of research;**
   (iii) **fostering the employment of their qualified personnel in research in the Area;**

(c) **effectively disseminating the results of research and analysis when available, through the Authority or other international channels when appropriate.**

Bibliography: *Aldo Chircop*, Advances in Ocean Knowledge and Skill: Implications for the Marine Scientific Research Regime, in: Myron H. Nordquist/Ronan Long/Tomas H. Heidar/John Norton Moore (eds.), Law, Science & Ocean Management (2007), 575–615; *Alex Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143–176; *Montserrat Gorina-Ysern*, An International Regime for Marine Scientific Research (2003); *Paul Gragl*, Marine Scientific Research, in David Attard/Malgosia Fitzmaurice/Norman Martínez Gutierrez (eds.), The IMLI Manual on International Maritime Law, vol. I – The Law of the Sea (2014), Ch. 14, 369–430; *Margaret F. Hayes*, Charismatic Microfauna: Marine Genetic Resources and the Law of the Sea, in: Myron H. Nordquist/Ronan Long/Tomas H. Heidar/John Norton Moore (eds.), Law, Science & Ocean Management (2007), 683–700; *Anja Höfelmeier/Silja Vöneky*, Rechtsfragen bei Forschungsaktivitäten über dem Festlandsockel, Ordnung der Wissenschaft 2 (2014), 43–54; *David Kenneth Leary*, International Law and the Genetic Resources of the Deep Sea (2007); *Jean-Pierre Lévy*, The International Seabed Authority: 20 years (2014), available at: https://www.isa.org.jm/sites/default/files/files/documents/isba-20.pdf; *Fernanda Millicay*, A Legal Regime for the Biodiversity of the Area, in: Myron H. Nordquist/Ronan Long/Tomas H. Heidar/John Norton Moore (eds.), Law, Science & Ocean Management (2007), 739–850; *Marko Pavliha/Normal A. Martínez Gutiérrez*, Marine Scientific Research and the 1982 United Nations Convention on the Law of the Sea (2010) Ocean and Coastal Law Journal 16, 115–133; *J. Ashley Roach*, Marine Scientific Research and the New Law of the Sea, ODIL 27 (1996), 59–72; *J. Ashley Roach*, Marine Scientific Research in the Area, in Michael W. Lodge/Myron H. Nordquist (eds.), Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan (2014), 265–281; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Tullio Scovazzi*, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL

[16] See *Wacht* on Art. 209.
[17] See *Bartenstein* on Art. 221 MN 11–13.
[18] Nordquist/Nandan/Rosenne (note 6), 158 (MN 142.9(e)).

19 (2004), 383–409; *Alfred H. A. Soons*, Marine Scientific Research and the Law of the Sea (1982); *Yoshifumi Tanaka*, Obligation to Co-operate in Marine Scientific Research and the Conservation of Marine Living Resources, ZaöRV 65 (2005), 937–965; *Tullio Treves,* Marine Scientific Research, MPEPIL, available at: http://www.mpepil.com; *Michael C. Wood*, International Seabed Authority, MPEPIL, available at: http://www.mpepil.com; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287–355

Documents: CBD Subsidiary Body on Scientific, Technical and Technological Advise (SBSTTA), Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work, UN Doc. UNEP/CBD/SBSTTA/8/INF/3/Rev. 1 (2003); GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970; GA, Oceans and Law of the Sea: Report of the Secretary General, UN Doc. A/60/63/Add.2 (2005); GA, Study on the Naval Arms Race: Report of the Secretary-General, UN Doc. A/40/535 (1985); GA Res. 69/292 of 19 June 2015; GA Res. 58/240 of 23 December 2003; ISA, Environmental, Legal and Technical Challenges for Deep Sea Mining, Briefing Paper 02/2016 (2016), available at: https://www.isa.org.jm/sites/default/files/files/documents/bp2-2016-chile-final.pdf; ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex; ISA, Report of the Secretary General of the Authority for 2003, ISA Doc. ISBA/9/A/3 (2003); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015); UN DOALOS, Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea (2010), available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/msr_guide%202010_final.pdf; UNEP, Bioprospecting in the Global Commons: Legal Issues Brief 5.1., available at: http://www.unep.org/delc/Portals/119/Biosprecting-Issuepaper.pdf

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I. Purpose and Function

1 The general principles for marine scientific research (MSR) are laid down in Part XIII[1] and the conduct of MSR beyond areas of national jurisdiction is governed by that part as well, as is expressly stated in Art. 143. Nevertheless, Arts. 143 and 256 are the two specific provisions with regard to MSR 'in the Area',[2] which is defined in Art. 1 (1)(1).[3] According to Art. 143

[1] *Tullio Treves*, Marine Scientific Research, MPEPIL, paras. 28–29, available at: http://www.mpepil.com. See Arts. 238 *et seq*.

[2] See *Huh/Nishimoto* on Art. 256.

[3] See *Tanaka* on Art. 1 MN 6–7.

(3), States Parties have certain obligations to co-operate with each other and with the Authority International Seabed Authority (referred to in the Convention and hereinafter as 'the Authority') and according to Art. 143 (2) the Authority possesses broad competences in field of MSR. This is important as the high costs of MSR in the Area cause only few States and few private companies to have the ability to conduct research there.[4]

The scope of Art. 143 has to be interpreted in the light of other provisions of the Convention governing scientific research. Art. 143 shows that there is no *per se* or absolute freedom[5] to carry out scientific research in the Area. The freedom of scientific research as part of the freedom of the high seas according to Art. 87 (1)(f) and Art. 257 is not the decisive principle as far as Art. 143 is applicable.[6] In order to delineate the scope of application of Art. 143, one needs to differentiate between MSR 'in the Area' on the one hand, and 'in the high seas' on the other, and between those activities that are MSR and those that do not constitute 'marine scientific' research or cannot count as 'research' at all. 2

The importance of MSR in the Area is obvious: In 1977, scientists had already discovered unique ecosystems at sites in the deep seabed,[7] and in 2005 it was estimated that the Area may be home to 10 million species of organisms;[8] today we know that we are just beginning to understand the organisms in the deep seabed that possess unique genetic characteristics, particularly the ability to survive in extreme temperatures and extreme conditions.[9] Besides this, the advances made in exploration requires the acquisition of fundamental environmental data concerning the Area in order to avoid an irrational and unsustainable use of the Area and its resources, which Art. 136 declares to be the common heritage of mankind.[10] However, MSR itself can pose a threat to the unique ecosystems in the Area, which means that there is the need to diminish adverse impacts from scientific investigations, for instance through better coordination of MSR programmes.[11] Although only the extraction of mineral resources was deemed to be important in the negotiations of Part XI,[12] the main aspects of MSR – the need to carry out MSR and the need to coordinate and devote it to peace and mankind – are reflected in Art. 143. 3

II. Historical Background

The regulation of MSR was first considered during the UNCLOS I in 1958; further discussion on MSR took place within the Sea-Bed Committee (Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction).[13] In 1970 the UN General Assembly agreed on the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction[14], which 4

[4] *Cf. Tullio Scovazzi*, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL 19 (2004), 398; ISA, Report of the Secretary General of the Authority for 2003, ISA Doc. ISBA/9/A/3 (2003), 63.

[5] *Scovazzi* (note 4), 398.

[6] See *Guilfoyle* on Art. 87 MN 12; *Huh/Nishimoto* on Art. 257.

[7] *Fernanda Millicay*, A Legal Regime for the Biodiversity of the Area, in: Myron H. Nordquist *et al.* (eds.), Law, Science & Ocean Management (2007), 770.

[8] *Yoshifumi Tanaka*, Obligation to Co-operate in Marine Scientific Research and the Conservation of Marine Living Resources, ZaöRV 65 (2005), 944.

[9] *Millicay* (note 7), 770–773.

[10] For this position see ISA, Environmental, Legal and Technical Challenges for Deep Sea Mining, Briefing Paper 02/2016 (2016), available at: https://www.isa.org.jm/sites/default/files/files/documents/bp2-2016-chile-final.pdf.

[11] *Tanaka* (note 8), 944.

[12] *Millicay* (note 7), 770.

[13] UN DOALOS, Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea (2010), 1–2, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/msr_guide%202010_final.pdf.

[14] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970.

provides that States shall promote international cooperation in scientific research exclusively for peaceful purposes through international programmes, publication and dissemination of information (para. 10). In addition, the Declaration called upon States to strengthen the research capabilities of developing States (para. 10).

5 During the UNCLOS III (1973–1982) many questions with regard to scientific research were disputed.[15] Most importantly there was no consensus on a definition of the term 'marine scientific research' although many proposals were made.[16] Hence, the Convention not only lacks a clear distinction between, *inter alia*, pure and applied science[17] as well as research of direct and of no direct significance for the exploration and exploitation of marine resources,[18] but also the MSR regime as a whole remains unclear and constitutes a 'legal grey area'.[19] This finding is even more true with regard to MSR in the Area: Whether MSR in the water column beyond areas of national jurisdiction should be governed by the Part XI and the present article was debated at UNCLOS III, but no clear answer was given to that question.[20]

6 During negotiations in the UNCLOS III, discussion of scientific research was mainly delegated to the Third Committee, but the Second and the First Committee, the latter of which dealt with seabed mining and the Area, also conducted negotiations on this issue. Therefore, provisions for MSR are not exclusively laid down in Part XIII and some incoherencies are embedded in the Convention.

III. Elements

1. Marine Scientific Research in the Area

7 **a) Marine Scientific Research.** The term 'marine scientific research' is not defined in the Convention (see *supra*, MN 5)[21] but general provisions for MSR are laid down in Part XIII.[22] According to the ordinary meaning of the terms 'science' and 'scientific research', they can be understood as actions whose content and form are to be seen as a serious and systematic attempt to achieve knowledge or truth.[23]

8 A crucial element of scientific research is that it serves – in the end – humankind and the international community as a whole, because its main aim is to achieve knowledge.[24] This element is independent of who carries out the scientific activity and whether applied scientific research or basic scientific research is involved. This is stressed by Art. 143 and other relevant provisions of the Convention, as they expressly state that the study of, and increase in, scientific knowledge of the marine environment for the benefit of all mankind are

[15] *David Kenneth Leary*, International Law and the Genetic Resources of the Deep Sea (2007), 190–192.

[16] *Paul Gragl*, Marine Scientific Research, in David Attard/Malgosia Fitzmaurice/Norman Martínez Gutierrez (eds.), The IMLI Manual on International Maritime Law, vol. I – The Law of the Sea (2014), 369, 399 *et seq.*

[17] *Ibid.*, 401; UN DOALOS (note 13), 3.

[18] UN DOALOS(note 13), 4–5.

[19] *Gragl* (note 16), 398.

[20] UN DOALOS (note 13), 16, with further references. *Cf. Leary* (note 15), 191 *et seq.*

[21] It is debated whether this is an advantage or drawback, *cf.* for the former: *Aldo Chircop*, Advances in Ocean Knowledge and Skill: Implications for the Marine Scientific Research Regime, in: Nordquist *et al.* (note 7), 575, 597–598, 600; for the latter: *Treves* (note 1), para. 29.

[22] See *Matz-Lück* on Art. 238; *Treves* (note 1), para. 28–29.

[23] *Cf.* the definition of marine scientific research during the Second Conference on the Law of the Sea: 'any study, whether fundamental or applied, intended to increase knowledge about the marine environment, including all its resources and living organisms, and embraces all related scientific activity': Sea-Bed Committee, Working Paper Submitted by Canada, UN Doc A/AC.138/SC.III/I.18 (1972), GAOR 27th Sess. Suppl. 21, 203. See as well for instance the decisions of the German Federal Constitutional Court on the Freedom of Science (Art. 5 (3) of the German Constitution), *inter alia* Federal Constitutional Court (Germany), BVerfGE 35, 79, 113; and *Chircop* (note 21), 611.

[24] *Cf. Chircop* (note 21), 611: 'The general perception is that marine scientific research is good for the common good because it produces knowledge as a public good.'

the objectives of MSR as provided for in the Convention (*cf.* Art. 246 (3)).[25] MSR therefore includes those activities (studies and experimental work) undertaken to expand knowledge of the marine environment and its processes.[26] In particular, it is not limited to research on mineral resources.[27] Therefore it includes *prima facie* all activities with a primary scientific purpose in the Area, as for instance physical oceanography, marine chemistry, marine biology, marine geology, and geophysics.[28] However MSR is not carried out if the *main or primary aim* of the activity is economic gain or commercial purpose (see *infra*, MN 12).[29]

In order to determine the concrete scope of the term 'marine scientific research' according to Art. 143, one has to interpret this provision in accordance with the object and purpose of the Convention and with other relevant provisions thereof dealing with research and related activities. As will be shown below, the decisive provisions that have to be taken into account are, *inter alia*, Arts. 19 (2)(j), 2 1(1)(g), 40, 54, 77 (1), 245, and Art. 246:[30] **9**

aa) Hydrography and hydrographic surveys. With regard to Art. 143 and other provisions of the Convention, it is controversial whether hydrography and hydrographic surveys have to be seen as being part of MSR.[31] Hydrography encompasses activities undertaken to collect routine meteorological and oceanographic observations and to obtain information for the making of navigational charts and for the safety of navigation,[32] and can also take place in the Area. Arts. 21 (1)(g), and 40 use the term 'hydrographic surveying' separately from the term 'research'. Furthermore, there are no specific rules for hydrographic surveys in Part XIII. This seems to support the view of some that hydrographic surveys are not MSR.[33] On the other hand, excluding hydrographic surveys from the notion of MSR is not backed by the wording of Part XIII, as there is no provision that expressly states that hydrographic surveys are not MSR. Even the wording of other provisions, such as Art. 21 (1)(g), is not clear in this regard. A reasonable interpretation of Art. 21 (1)(g) therefore should stress that this provision refers (only) to those kinds of hydrographic surveys that are not carried out for scientific purposes. Although some States support the view that hydrographic surveying is not part of the notion of MSR,[34] it is coherent with the object and purpose of the Convention to conclude that Part XIII and Art. 143 include those hydrographic surveys that are conducted mainly for scientific purposes.[35] This means that if hydrographic surveys are a serious and systematic attempt to achieve knowledge, they constitute MSR.[36] **10**

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[25] See *Huh/Nishimoto* on Art. 246 MN 19–22.

[26] *Cf.* Arts. 243 and 246 (3); *Treves* (note 1), para. 1; *Gragl* (note 16), 407. For the US position *cf. J. Ashley Roach*, Marine Scientific Research in the Area, in Michael W. Lodge/Myron H. Nordquist (eds.), Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan (2014), 265, 272; *J. Ashley Roach*, Marine Scientific Research and the New Law of the Sea, ODIL 27 (1996), 59, 60. To the notion according to international law in general *Tanaka* (note 8), 938 *et seq.*: " (…) any scientific study or related investigation, wherever conducted, having the marine environment as its object.".

[27] *Scovazzi* (note 4), 397.

[28] *Treves* (note 1), para. 1; *Marko Pavliha/Normal A. Martínez Gutiérrez*, Marine Scientific Research and the 1982 United Nations Convention on the Law of the Sea (2010) Ocean and Coastal Law Journal 16, 115.

[29] CBD Subsidiary Body on Scientific, Technical and Technological Advise (SBSTTA), Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work, UN Doc. UNEP/CBD/SBSTTA/8/INF/3/Rev. 1 (2003), para. 39, 47. See as well *Millicay* (note 7), 781. For a different view *Scovazzi* (note 4), 402–403.

[30] See Arts. 19(2)(j), 21(1)(g), 40, 54, 245 and 246.

[31] *Cf. Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 330 *et seq.*; *Treves* (note 1), paras. 2, 8.

[32] UN DOALOS (note 13), 16, para. 56; *Roach* 2014 (note 26), 274 *et seq.*; *Alfred H. A. Soons*, Marine Scientific Research and the Law of the Sea (1982), 125, 157.

[33] *Treves* (note 1), MN 2.

[34] For the United States, *cf. Roach* 1996 (note 26), 60.

[35] *Anja Höfelmeier/Silja Vöneky*, Rechtsfragen bei Forschungsaktivitäten über dem Festlandsockel, Ordnung der Wissenschaft 2 (2014), 43, 47. This view is supported by Art. 246 (5)(a). For a different view *cf. Gragl* (note 16), 407.

[36] This view is supported by Art. 246 (5)(a). See *Huh/Nishimoto* on Art. 246 MN 28–31.

11 **bb) Research with regard to exploration and exploitation of natural resources from the Area.** Research with regard to the exploration and exploitation of natural resources in the Area is not *per se* excluded from the scope of the term 'marine scientific research'. Though, it is correct that there are specific provisions for activities in the Area and 'activities in the Area' are defined in Art. 1 (1)(3) as including all activities not only of exploitation, but also of 'exploration' for the resources in the Area, Art. 143 (2) expressly states that the Authority may carry out MSR 'concerning' the resources of the Area. This shows that the notion of MSR concerning the resources overlaps with the notion of the exploration of the resources and that there are MSR projects of direct significance for resource exploration and exploitation.[37] This interpretation is supported by and in coherence with the wording of Art. 246 (5)(a), which refers to research projects that are 'of direct significance for the exploration and exploitation of natural resources, whether living or non-living'.[38]

12 **cc) Bioprospecting.** It is unclear whether so-called 'bioprospecting', i. e. the process of gathering information from the biosphere on the molecular composition of genetic resources for the development of new commercial products,[39] is covered by the term 'marine scientific research'.[40] Bioprospecting is seen as an important activity in the Area as organisms in the deep seabed present unique genetic characteristics – they possess the ability to survive extreme temperatures and extreme conditions; therefore these organisms are of great interest not only to science but also to private companies.[41] Looking at the activity of bioprospecting, it is evident that it includes scientific activity and methodology. However the difference between science and bioprospecting lies in the 'use of knowledge and results of such activities',[42] as bioprospecting has mainly practical (i. e. commercial) purposes. As long as the primary aim of bioprospecting is not a serious and systematic attempt to achieve knowledge and as long as there is not the primary aim to disseminate this knowledge to a scientific community, bioprospecting does not constitute MSR that can be carried out for the benefit of mankind as a whole, as required by Art. 143 (1).[43] This interpretation does not mean that 'any intent of economic gain' or 'any time there are prospects of profit' automatically changes the 'nature of the marine scientific research activity' under the regime of the Convention, as is sometimes suggested.[44] The decisive factor for deciding whether an activity is MSR or not is the main or primary purpose of the activity: that is, whether it is to increase human knowledge or to achieve financial gain. If the main intent is to increase human knowledge, the discovery of commercially valuable information does not change the character of the activity. Even if the lines between scientific research and activities, which are driven by commercial interests, are blurred in practice today,[45] it does not mean that the different types of activities that are linked to or constitute scientific research in the Area are all the same and can be governed by the same legal regimes. This result – that bioprospecting does not constitute MSR in the sense of Art. 143 – certainly does not solve all problems interrelated to bioprospecting. But, since during the negotiations of the Convention the potential value of genetic resources was not known and not considered,[46] it is not astonishing that with regard to bioprospecting a comprehensive regime does not exist and many

[37] *Cf. Treves* (note 1), para. 1: With regard to prospecting or exploring for marine resources, the 'borderline may be difficult to draw'; *Chircop* (note 21), 598.

[38] *Cf. Höfelmeier/Vöneky* (note 35), 47–48.

[39] SBSTTA Programme of Work (note 29), para. 49; *Gragl* (note 16), 406; *cf. Leary* (note 15), 155, 157.

[40] Within the Authority, the debate on the protection of biodiversity started in 2003.

[41] *Scovazzi* (note 4), 399.

[42] GA, Oceans and Law of the Sea: Report of the Secretary General, UN Doc. A/60/63/Add.2 (2005), para. 202; *cf.* also *Treves* (note 1), para. 4.

[43] *Cf.* SBSTTA Programme of Work (note 29), para. 39; *Gragl* (note 16), 406–407. Doubtful *Scovazzi* (note 4), 402–403. For a different view: *Margaret F. Hayes*, Charismatic Microfauna: Marine Genetic Resources and the Law of the Sea, in: Nordquist *et al.* (note 7), 683, 691 *et seq.* See also *Chircop* (note 21), 611.

[44] For this view, see *Scovazzi* (note 4), 402.

[45] *Cf. Leary* (note 15), 186.

[46] *Scovazzi* (note 4), 404; *Millicay* (note 7), 819.

lacunae[47] are present, which cannot be filled through the interpretation of the existing rules – nor by new codes of conducts[48] that could be developed by the main stakeholders[49] – but has to be bridged by new international rules.[50] Therefore, it was an important step forward that in 2013 the European Union and its Member States started to request the preparation of an implementation agreement similar to the one devised for Part XI[51] and finally States Parties requested 'the starting of a process towards the adoption of an international instrument within the framework of the Convention'.[52] At the end of 2015, the General Assembly decided

> 'to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction'.[53]

The Preparatory Committee for this agreement started its work in 2016[54] and addressed its main goals and principles. The aims show that the Convention and the regime of Art. 143 are important but not sufficient to solve the problems of bioprospecting, since the objects are, *inter alia*, to

> 'conserve and sustainably use marine biological diversity of areas beyond national jurisdiction; address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology […]; address gaps […] in relation to the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction; address fragmentation in relation to the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction; enhance integration and create synergies, including at the regional level; strengthen and implement the framework provided in the United Nations Convention on the Law of the Sea (UNCLOS).'[55]

dd) Military surveys. Military surveys are not part of MSR. The Convention does not specifically address military surveys and military survey operations but military surveys can be defined as marine data collection for military purposes.[56] They do not constitute scientific research as there is no serious and systematic attempt to achieve knowledge and no aim to disseminate the findings to a scientific community.[57] Since those surveys need flexibility and are linked to the inherent right of individual or collective self-defense of States, according to Art. 51 the Charter of the United Nations, it can be held that they shall not be restricted by **13**

[47] For this result see for instance GA Res. 58/240 of 23 December 2003; UNEP, Bioprospecting in the Global Commons: Legal Issues Brief 5.1., available at: http://www.unep.org/delc/Portals/119/Biosprecting-Issuepaper.pdf.

[48] *Cf. Scovazzi* (note 4), 407 *et seq.* For an example of a code of conduct in the field of marine scientific research as a instrument of self-regulation, *cf. Leary* (note 15), 196 *et seq.*

[49] Whether the Authority should be included is unclear, doubtful for instance, *Cf. Leary* (note 15), 224; *cf. Millicay* (note 7), 787. For a positive approach towards the Authority in general, *cf. Michael C. Wood*, International Seabed Authority, MPEPIL, para. 54, available at: http://www.mpepil.com.

[50] *Scovazzi* (note 4), 404, 406 *et seq.*; *Millicay* (note 7), 817–818.

[51] *Jean-Pierre Lévy*, The International Seabed Authority: 20 years (2014), 49 *et seq.*, available at: https://www.isa.org.jm/sites/default/files/files/documents/isba-20.pdf.

[52] *Cf.* the work of the 'The Ad Hoc Open-ended Informal Working Group to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction', available at: http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm.

[53] GA Res. 69/292 of 19 June 2015.

[54] Preparatory Committee established by GA Res. 69/292: Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, available at http://www.un.org/depts/los/biodiversity/prepcom.htm.

[55] Chair's Overview of the First Session of the Preparatory Committee, Annex I, Chair's Compilation of Issues Raised During the First Session of the Preparatory Committee, available at http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf.

[56] *Roach* 2014 (note 26), 275.

[57] For the US position, see *Roach* 1996 (note 26), 61.

the rules of the Convention, including Art. 143.[58] This interpretation is coherent with Art. 141[59] as this provision is a reference to Art 2 (4) UN Charter[60] and any measure of self-defense pursuant to Art. 51 UN Charter must be regarded as 'peaceful use' (see *infra*, MN 17).

14 **ee) Underwater cultural heritage.** Additionally, the exploration and exploitation of underwater cultural heritage are excluded from MSR, as the Convention contains separate regimes for those activities (*cf.* Arts. 149, 303)[61].[62] The latter rules constitute *leges speciales* even though the exploration of underwater cultural heritage involves, *inter alia*, the search for items of cultural heritage.[63] This is not part of MSR, as the search for items of cultural heritage is not part of 'marine' natural science according to the ordinary meaning of the term.

15 **ff) Operational oceanography and collection of marine meteorological data.** As far as operational oceanography and the collection of marine meteorological data depend on research in the Area, they nevertheless do not constitute 'marine scientific' research as they refer to the routine collection of ocean observations:[64] It seems convincing at first glance to argue that these are not activities to expand scientific knowledge of the marine environment and its processes, but this does not take into account that the marine environment is more integrated in scope than what UNCLOS III negotiators might have had in mind.[65] However, it is held that since this kind of data collection is important, *inter alia*, for timely and accurate storm warnings for the safety of life at sea[66], it shall not be restricted by rules of the Convention and Art. 143.[67] This result is backed by supportive statements: The Chairman of the Third Committee of UNCLOS III stated, responding to the World Meteorological Organization, that they had 'already been recognized as routine observations and data collecting which were not covered by part XIII' of the Convention;[68] and the US expressed the view that the conduct of surveys and collection of meteorological data is 'an exercise of the freedoms of navigation and other internationally lawful uses of the sea'.[69]

16 **b) In the Area.** Art. 143 (1) only applies to MSR 'in the Area'. As defined by Art. 1 (1)(1), the Area consists of the seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction.[70] The principles governing the Area, including Art. 143, therefore do not affect the legal status of the superjacent waters, *cf.* Art. 135.[71] These waters are part of the high seas and governed by the principle of freedom of research according to Art. 87 (1)(f) and, as *lex specialis*, according to Art. 240.[72] As a result, MSR in the Area refers to research conducted

[58] For the US position, see *Roach* 2014 (note 26), 275. See as well GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970.

[59] See *Vöneky/Höfelmeier* on Art. 141 MN 8.

[60] Art. 2 (4) Charter of the United Nations reads: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

[61] See *Scovazzi* on Art. 149 and on Art. 303.

[62] *Treves* (note 1), para. 1; *Roach* 2014 (note 26), 277.

[63] *Roach* 2014 (note 26), 278.

[64] *Ibid.*, 275; for this result as well *Chircop* (note 21), 598.

[65] *Chircop* (note 21), 599.

[66] *Roach* 2014 (note 26), 276.

[67] *Cf. Ibid.*, 276.

[68] UNCLOS III, Report of the Chairman of the Third Committee, Un Doc. A/CONF.62/L.61, OR XIV, 133, 134; *cf. Treves* (note 1), para. 3.

[69] UNESCO IOC, IOC/ABE-LOS Sub-Group on the IOC Legal Framework for the Collection of Oceanographic Data within the Context of UNCLOS, UN Doc. IOC/ABE-LOS VII/8, 19. With regard to ABE-LOS *cf.* also *Chircop* (note 21), 613.

[70] See *Tanaka* on Art 1 MN 6–7.

[71] See also Art. 78 (1); *Maggio* on Art. 78 MN 9–10.

[72] Arts. 87 and Art. 240.

on the seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction. It is questionable whether this excludes research *concerning* the Area which is conducted in the superjacent waters *without physical contact* to the seabed. Some authors argue that physical contact with the seabed is decisive for the applicability of Art. 143.[73] Against this view, however, one can bring forward that Art. 143 (1) has to be read in light of Art. 143 (2). The wording of the latter refers to both MSR 'concerning the Area and its resources' in the first sentence, as well as such research 'in the area' in the second sentence. It would be incoherent and contrary to the principle of contextual interpretation enshrined in Art. 31 of the Vienna Convention on the Law of Treaties[74] to assume that Art. 143 (1) and parts of Art. 143 (2) referred to MSR in a different manner than the remainder of Art. 143. Hence, one has to conclude that Art. 143 (1) includes research *concerning* the seabed, ocean floor and subsoil thereof conducted in the superjacent waters even *without physical contact* with the seabed, ocean floor and subsoil thereof. This interpretation is in line with Art. 135 as it does not affect the *legal status* of the waters superjacent to the Area or that of the air space above those waters.

2. Peaceful Purposes and Benefit of Mankind as a Whole

According to Art. 143 (1), MSR in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole. This reflects the demands of Arts. 140 and 141 and the principles of common heritage of mankind (Art. 136). Besides, according to Arts. 147 (2)(d), 240 (a), 242 (1), 246 (3), MSR is required to be conducted for peaceful purposes. One can find the notion as well as part of Arts. 88, 141, 155 (2), and 301. The term 'peaceful purposes' is not defined in the Convention but Art. 143 has to be read in context with Art. 141, as the meaning of the term peaceful purposes is the same in both articles. As the *travaux prepáratoires* show, there was no consensus that the notion 'peaceful purposes' precludes military activities; moreover it is the common view that there can be military activities for peaceful purposes[75] and that military activities which are consistent with the rules and principles of the UN Charter are not prohibited by the Convention.[76] This means that the interpretation of 'peaceful purposes' in Art. 141 and Art. 143 corresponds with the content of Art. 2 (4) UN Charter. Hence MSR carried out for measures of self-defense pursuant to Art. 51 UN Charter is not prohibited (see *supra*, MN 13).[77] **17**

The term 'benefit of mankind' is also not defined in the Convention, but Art. 143 repeats Art. 140 which renders 'mankind as a whole' the ultimate beneficiary of the proclamation of the Area as 'common heritage of mankind'. As mankind includes all human beings on earth and future generations, global long-term concerns and aspects of sustainable development have to be taken into account when conducting research in the Area.[78] Besides, the benefit-of-mankind principle demands the participation of all States in the equitable sharing of benefits and the equalization of the effective conditions for all States to conduct deep seabed mining.[79] **18**

3. Reference to Part XIII

MSR in the area must not violate Part XIII (Arts. 238–265), which lays down the general principles and rules for MSR.[80] These include some principles already mentioned by Art. 143, **19**

[73] *Cf. Soons* (note 32), 227.
[74] 22 May 1969, 1155 UNTS 331.
[75] *Roach* 2014 (note 26), 280, his was the position of the US; *cf.* UNCLOS III, 67th Plenary Meeting, UN Doc. A/CONF.62/SR.67 (1976), OR V, 56 (para. 2).
[76] GA, Study on the Naval Arms Race: Report of the Secretary-General, UN Doc. A/40/535 (1985), para. 188.
[77] See *Vöneky/Höfelmeier* on Art. 141 MN 8.
[78] See *Vöneky/Höfelmeier* on Art. 140 MN 7.
[79] This interpretation has been suggested by *Dupuy* (note 27), 581 and taken over by Wolfrum: *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 339.
[80] See Part XIII UNCLOS.

i. e. that MSR shall be conducted exclusively for peaceful purposes (*cf.* Art. 240). Other principles of Part XIII that are decisive to note as general standards of MSR are for instance that MSR shall be conducted with appropriate scientific methods and means compatible with this Convention, shall not unjustifiably interfere with other legitimate uses of the sea compatible with the Convention, and shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention, including those for the protection and preservation of the marine environment (Art. 240 (b)-(d)). Art. 256 of Part XIII specifically deals with MSR in the Area and provides that 'all States […] have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area'. It is questionable how this norm should be interpreted to be coherent with Art. 143 (3), as according to the wording of the latter provision only 'States Parties' are allowed to carry out MSR in the Area (see *infra*, MN 27 *et seq.*).

4. Specific Competences and Duties of the Authority

20 **a) Content of para. 2.** Art. 143 (2) spells out the broad competences and duties of the Authority as an autonomous international organization[81] for MSR in the Area: The Authority organizes and controls activities in the Area, most importantly with regard to administering the resources (Arts. 153, 157);[82] furthermore, the Authority has the competence (but no duty) to carry out MSR concerning the Area and its resources ('may carry out') itself or enter into contracts with other entities for that purpose. As the State Parties are allowed to carry out MSR as well, as stated in Art. 143 (3) (see *infra*, MN 27 *et seq.*), the competences have a cooperative character.[83] The competences of the Authority are important for the whole regime of MSR, as research in the Area is very expensive[84] and needs so many skills that few single States and companies have the capacity to undertake it.

21 As Art. 143 (2) refers to MSR 'concerning the Area and its resources' and resources are narrowly defined in Art. 133, it is unclear whether Art. 143 (2) deals only with mineral resources, as some argue.[85] However, a more convincing interpretation is that the provision relates to research concerning the Area in general, including but not limited to specific mineral resources. Otherwise the competences of the Authority would be diminished, and the scope of Art. 143 (1) and (2) would be incoherent.[86] Additionally, the Authority has the duty to 'promote and encourage' the conduct of MSR in the Area, i. e. has a general responsibility in this regard.[87] An emphasis is on research related to the environmental impact of activities in the Area.[88]

22 It is in line with the aim of MSR in the Area according to Art. 143 (1) – the benefit of mankind – that the Authority has the obligation to coordinate and disseminate the results of this research and analysis. This is a decisive duty as only few States can carry out research in the Area and existing knowledge about the deep seabed has many gaps. The Authority has the potential to be a central 'clearing house' for the exchange of information about MSR and the results of this research.[89] However this obligation of the Authority is limited to those results and analyses that are 'available'. Therefore, it is questionable whether Art. 143 (2) can be interpreted to oblige States or private contractors to transfer all research results or analyses of their MSR to the Authority (see *infra*, MN 25 *et seq.*).

23 **b) Related provisions.** In order to avoid a limitation of MSR and a conflict with the rules of Art. 143, the existing regulations on prospecting and exploration of minerals adopted by

[81] *Wood* (note 49), para. 1 *et seq.*
[82] UN DOALOS (note 13), 17, para. 60.
[83] *Scovazzi* (note 4), 398.
[84] *Cf. Leary* (note 15), 187–188.
[85] *Scovazzi* (note 4), 397, note 47.
[86] For this result see as well *Scovazzi* (note 4), 397, note 47.
[87] UN DOALOS (note 13), 17, para. 60.
[88] *Ibid.*, 17 (para. 60).
[89] ISA Report of the Secretary General 2003 (note 4).

the Authority[90] lay down that they 'shall not in any way affect […] the right to conduct scientific research in the Area pursuant to articles 143 and 256 of the Convention'.[91]

Further provisions broadening the competences of the Authority are part of the Annex of the 1994 Agreement on Implementation of Part XI of UNCLOS, S. 1, para. 5 (h) and S. 2, para. 1 (b); they provide another basis for actions of the Authority in the Area with regard to MSR. As long as the first plan of work for exploitation is not yet approved,[92] MSR in the Area is devoted to the environmental impact of activities in the Area. 24

c) Practice of the Authority. It has become increasingly important for the work of the Authority to promote and encourage MSR in the Area and to collect and disseminate information about the deep seabed.[93] The work programme of the Authority has included since 2004, inter alia, the 25

> 'promotion and encouragement of marine scientific research in the Area through, among other things, a continuing programme of technical workshops, the dissemination of the results of such research and collaboration with contractors and the international scientific community and information-gathering and the establishment and development of unique databases of scientific and technical information, with a view to obtaining a better understanding of the deep ocean environment.'[94]

Besides, since 1998 the Authority has convened international workshops on scientific and technical matters in order to provide it with the best available scientific advice for the formulation of rules, regulations and procedures for managing activities in the Area.[95]

To implement Art. 143, the Authority has sponsored research in accordance with its mandate[96] and established an Endowment Fund for Marine Scientific Research in the Area in 2006 that promotes and encourages the conduct of scientific research in the Area (see ISBA/12/A/11).[97] The Endowment Fund is one of two main tools with which the Authority 'seeks to carry out its responsibilities under Art. 143 and 144 to build the capacity of developing States in deep sea research and technology and to promote marine scientific research in the Area';[98] the other tools are the training programmes provided by contractors as a requirement of their contracts for exploration in the Area.[99] The objective of the Fund is 26

> 'to promote and encourage the conduct of marine scientific research in the Area for the benefit of humankind as a whole, in particular by supporting the participation of qualified scientists and technical personnel from developing countries in marine scientific research programmes, including through training, technical assistance and scientific cooperation programmes.'

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[90] In accordance with the procedural provisions laid down in Art. 160 (2)(f)(ii) and 162 (2)(o)(ii) UNCLOS, the Authority adopted Regulations on the Prospecting and Exploration for Polymetallic Nodules (ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex, amended 24 July 2014); for Polymetallic Sulphides (ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex), and for Cobalt-rich Ferromanganese Crusts (ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex); *cf. Wood* (note 49), para. 41 *et seq.*

[91] Reg. 1 (4), which is identical for the Nodules, Sulphides and Crusts Regulations, reads: 'These Regulations shall not in any way affect the freedom of scientific research, pursuant to article 87 of the Convention, or the right to conduct marine scientific research in the Area pursuant to articles 143 and 256 of the Convention. Nothing in these Regulations shall be construed in such a way as to restrict the exercise by States of the freedom of the high seas as reflected in article 87 of the Convention.'

[92] For the approval of the plans of work for exploration, *cf. Wood* (note 49), para. 36.

[93] *Ibid.*, para. 47, 53.

[94] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015), para. 4, *cf.* ISA, Selected Decisions and Documents of the Twenty-First Session (2015), available at: https://www.isa.org.jm/sites/default/files/files/documents/en.pdf; *cf.* also *Wood* (note 49), para. 37.

[95] ISA Report of the Secretary-General (note 94), para. 74.

[96] See at https://www.isa.org.jm/.

[97] ISA Report of the Secretary-General (note 94), para. 31. Detailed rules and procedures for the administration and utilization of the Fund were adopted in 2007 (see ISA Doc. ISBA/13/A/6 (2007), Annex). *Cf.* UN DOALOS (note 13), 32–33, para. 117; *Wood* (note 49), para. 10, 31.

[98] ISA Report of the Secretary-General (note 95), para. 83.

[99] *Ibid.*

Contributions can be made not only by members of the Authority, other States, and relevant international organizations, but also by academic, scientific and technical institutions, philanthropic organizations and private persons.[100]

5. Specific Rights and Duties of States Parties (para. 3)

27 **a) Content of para. 3.** According to Art. 143 (3), State Parties have one important right and one important obligation with regard to MSR in the Area: Firstly, they are allowed to carry out MSR; secondly, they are obliged to promote ('shall promote') international cooperation in MSR. To understand this provision, it is important to note that the Convention does not distinguish between State-owned and private organizations and companies doing MSR.[101] Besides, if one compares the wording of Art. 143 (3) (referring to States Parties) with the wording of Art. 143 (2) (referring to the Authority), it is striking that only the Authority may carry out MSR 'concerning' the Area 'and its resources', but States Parties may carry out MSR 'in the Area' (a wording that repeats that of Art. 143 (1)).[102] It is therefore questionable whether Art. 143 (2) has a broader realm of application than Art. 143 (3) (and Art. 143 (1)). However, in order to achieve a coherent interpretation of Art. 143 and avoid an artificial differentiation between the competences, rights, and duties of the Authority and of the State Parties, it seems convincing to conclude that Art. 143 (3) refers – as in Art. 143 (1) and (2) – to any kind of MSR[103] 'in' and 'concerning' the Area (see *supra*, MN 16).

28 As bioprospecting is not part of the term MSR according to the meaning of the Convention and in Art. 143 (see *supra*, MN 12), it is not regulated in Art. 143 (3). Hence, States Parties cannot deduce a right to undertake bioprospecting from Art. 143 (3). Nevertheless, it is part of MSR if samples of organisms are gathered in order to carry out MSR if, and only if, the primary or main aim of the activity is a scientific one (see *supra*, MN 12). Not part of MSR are, however, activities where samples of organisms that are gathered 'in connection with'[104] carrying out MSR; otherwise the lines between bioprospecting and MSR would be blurred[105] and the coherence of the regime of MSR with the principles of common heritage of mankind could be undermined.

29 Art. 143 (3)(a-c) stresses that State Parties not only have the right to conduct MSR in the Area but are also required to promote international cooperation in MSR by, *inter alia*, participating in international programmes (a); encouraging cooperation in research by personnel from different countries (a); ensuring that programmes are developed through the Authority or other international organizations for the benefit of developing States and technologically less developed States in order to strengthen their research capabilities, training their personnel, and fostering the employment of their qualified personnel (b), and by effectively disseminating the results of research and their analysis (c). However, the last obligation only applies if the research results are available (see *infra*, MN 30). Those provisions spell out in more detail what the 'common heritage of mankind' principle and the purpose of research 'for the benefit of mankind as a whole' means for the State Parties; they reach further than the obligations to cooperate as part of Section 2 of Part XIII.[106]

30 As it is quite far reaching that State Parties have to 'effectively disseminate' the results of research and their analysis, if they are available, it is important to discuss the meaning of the term 'availability' in the context of Art. 143 and Part XI. One could argue that if State Parties

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[100] *Cf. ibid.*, para. 32.
[101] *Pavliha/Martínez Gutiérrez* (note 28), 118.
[102] Different *Scovazzi* (note 4), 397.
[103] *Ibid.*, 398.
[104] *Alex Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007), 143, 155, 158.
[105] For a different view, however, *ibid.*, 158.
[106] *Ibid.*, 158.

'carry out' MSR, the results of research and their analyses are available as soon as researchers achieve results and/or complete their analyses. In this sense 'availability' would not mean that the research results or analyses have to be published before they need to be disseminated in accordance with the present provision. Besides, availability would not depend on whether some outcomes of the research or analyses are patented or shall be patented.[107] Not to link the availability of research results to external factors, such as possibilities to publish or to patent results of MSR, seems convincing at least if the State Party has not only permitted or encouraged the research but funded the MSR or has control over the MSR.[108] A broad interpretation of the notion of availability of research results is in coherence with the aim of Art. 143 that MSR shall be carried out for the benefit of mankind. If one understands availability as the fact that results have been achieved, this reflects the changed and changing landscape of scientific research, where research is carried out more and more by private entities with the long-term objective of financial gain which means that some results of research are never published. To argue for a narrow interpretation of availability would mean, though, that it depends on (sometimes national) patent laws and procedures, the publishing policies of the researcher, research institutions and scientific journals whether the results of research would need to be disseminated pursuant to Art. 143. This is contrary to the 'benefit of mankind' principle since these kinds of preconditions depend on national laws and policies as well as the specific interests of the researcher and the research institutions that can (but do not necessarily) reflect the interests of mankind. In any case, it does not seem to be convincing to interpret 'availability' in a way that a State could deny to have available research results merely because the researcher has not submitted the results to the State Party. Hence, Art. 143 (3), read in context with Art. 143 (1), obliges the State Parties to make sure that every result of MSR (positive and negative) that is found by one of its researchers is disseminated.

b) Effect on Non-Party States. It is disputed whether States that are not party to the Convention are allowed to conduct MSR in the Area.[109] An answer to this question has to be found in coherence with Art. 256, which provides that 'all States' and competent international organizations have the right to conduct MSR 'in conformity with the provisions of Part XI', i. e. in conformity with Art. 143 (3).[110] Some authors suggest that because of both articles (only) States Parties, as defined in Art. 1 (2)(1),[111] are allowed to engage in research linked to the *prospecting and exploration for mineral resources* in the Area,[112] but *every* State has the right to conduct *marine scientific research* or other activities in the Area as far as mineral resources are *not* concerned.[113] This is not convincing as the wording of Art. 143 (3) shows that in the Area only State Parties have the right to carry out MSR. This interpretation does not conflict with Art. 256, which is merely a reference to the *leges speciales* contained in Part XI. 31

[107] *Cf.* Art. 241. Concerning intellectual property rights in general in the Area, *cf. Millicay* (note 7), 773 *et seq.*, 791 *et seq.*, 822 *et seq.*

[108] For a different view however *Millicay* (note 7), 819.

[109] *Cf. Roach* 2014 (note 26), 270. *Cf.* also *Vöneky/Höfelmeier* on Art. 138 MN 8–10; *Vöneky/Höfelmeier* on Art. 137 MN 14.

[110] *Pavliha/Martínez Gutiérrez* (note 28), 120.

[111] Art. 1 (2)(1): '[…] States which have consented to be bound by this Convention and for which this Convention is enforced'; see *Tanaka* on Art. 1 MN 18–19. See also *Franckx/Benatar* on Art. 305 MN 15–35.

[112] *Montserrat Gorina-Ysern*, An International Regime for Marine Scientific Research (2003), 322; *Roach* 2014 (note 26), 270 with further references pro and contra.

[113] *Roach* 2014 (note 26), 270, 271.

Article 144
Transfer of technology

1. The Authority shall take measures in accordance with this Convention:
(a) **to acquire technology and scientific knowledge relating to *activities in the Area*; and**
(b) **to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.**

2. To this end the Authority and States Parties shall cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote:
(a) **programmes for the transfer of technology to the Enterprise and to developing States with regard to *activities in the Area*, including, inter alia, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;**
(b) **measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.**

Bibliography: *Edward D. Brown,* The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: Breakthrough to Universality?, Marine Policy 19 (1995) 5–20; *Ariel W. Gonzáles*, Cutting a Gordian Knot?: Towards a Practical and Realistic Scheme for the Transfer of Marine Technology, in: Myron H. Nordquist/Ronan Long/Tomas H. Heidar/John Norton Moore (eds.), Law, Science & Ocean Management (2007), 345–379; *Wolfgang Graf Vitzthum*, International Seabed Area, in: MPEPIL, available at: http://opil.ouplaw.com; *A. Marvasti*, An Assessment of the International Technology Transfer Systems and the New Law of the Sea, Ocean & Costal Management 39 (1998), 197–210; *James Stavridis*, Marine Technology Transfer and the Law of the Sea, Naval War College Review July-August 1983 (1983), 38–49; *Peter-Tobias Stoll*, Transfer of Technology, in: Rüdiger Wolfrum (ed.), United Nations: Law, Policies and Practice, Vol. 2 (1995), paras. 31–38; *Michael Waibel/William P. Alford*, Technology Transfer, in: MPEPIL, available at: http://opil.ouplaw.com; *Rüdiger Wolfrum*, Common Heritage of Mankind, in: MPEPIL, available at: http://opil.ouplaw.com

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 10

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I. Purpose and Function

1 Art. 144 lays down the main rules for the transfer of technology and scientific knowledge concerning activities in the Area and is an important part of the establishment of an institutionalized system of technology transfer in relation to deep seabed mining (Part XI and Annex III). Art. 144 (1) first of all provides that the International Seabed Authority (referred to in the Convention and hereinafter as 'the Authority') has major duties concerning technology and scientific knowledge related to the Area, i. e. mining technology: The first paragraph obliges the Authority to take measures to acquire technology and scientific knowledge and to promote and encourage the transfer to developing States of such technology and scientific knowledge. As

far as scientific knowledge has to be acquired and transferred, Art. 144 complements the duties of the Authority according to Art. 143 (2).[1]

Besides, Art. 144 spells out in further detail the element of equal distribution of benefits as part of the principle of the common heritage of mankind[2] and is one of the provisions of the Convention, especially of Part XI, which is 'designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs'.[3] According to Art. 140 (2) in conjunction with Art. 160 (2)(f)(i), the Authority is responsible for the equitable sharing of all benefits derived from the Area. According to these articles, the interests and needs of developing States have to be considered. Art. 144 provides for the universal distribution of technology and knowledge as well as affirmative action to the advantage of less developed States. 2

Not only Art. 144, but also Part XIV (development and transfer of marine technology, especially Arts. 266, 267, and 273)[4] and Arts. 202 of Part XII (protection and preservation of the marine environment), 244 of Part XIII (marine scientific research), include duties for the transfer of technology in the Convention.[5] The aim of Art. 144 and the other provisions is to build capacity and ensure effective implementation of the Convention by transferring technologies related to the Convention's aims and especially the aims of Part XI governing the Area. As in most international treaty law provisions dealing with technology transfer, Art. 144 itself includes no mandatory rules to transfer technology but only best effort commitments, which has the drawback of being difficult to monitor.[6] Nevertheless, the question of the technology transfer in respect to deep seabed mining was controversial (see *infra*, MN 5 *et seq.*).[7] 3

The regime on the transfer of technology in respect to deep seabed mining is therefore now elaborated and modified by the Agreement on the Implementation of Part XI of the Convention[8] (1994 Implementation Agreement, see *infra*, MN 12 et seq.) that has to be interpreted and applied with the Convention as a single instrument:[9] S. 5 (1) of the Annex of the 1994 Agreement provides the specific terms for the transfer of technology that will prevail in the event of inconsistencies between the two instruments. 4

II. Historical Background

Negotiations during the Third UN Conference on the Law of the Sea (UNCLOS III, 1973–1982) focused not only on the legal status of the international seabed, but also on the future 5

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[1] See *Vöneky/Beck* on Art. 143 MN 20–26.

[2] See *Vöneky/Höfelmeier* on Art. 136.

[3] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 10, para. 157.

[4] *Ariel W. Gonzáles*, Cutting a Gordian Knot?: Towards a Practical and Realistic Scheme for the Transfer of Marine Technology, in: Myron H. Nordquist/Ronan Long/Tomas H. Heidar/John Norton Moore (eds.), Law, Science & Ocean Management (2007), 345 *et seq*.

[5] For non-binding rules see as well the 2003 'IOC Criteria and Guidelines on Transfer of Marine Technology' (CGTMT) set up by the Advisory Body of Experts on the Law of the Sea according to the mandate established in Art. 271 of UNCLOS; adopted by the XXII Session of the Assembly of the Intergovernmental Oceanographic Commission (2003), available at http://unesdoc.unesco.org/images/0013/001391/139193m.pdf. *Cf. Gonzáles* (note 4), 351 *et seq*., 362 *et seq*.

[6] For an overview *cf. Michael Waibel/William P. Alford*, Technology Transfer, paras. 1 *et seq*., 43., in: MPEPIL, available at: http://opil.ouplaw.com/home/EPIL.

[7] *Peter-Tobias Stoll*, Transfer of Technology, in: Rüdiger Wolfrum (ed.), United Nations: Law, Policies and Practice, Vol. 2 (1995), para. 32.

[8] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982; GA Res. 48/263, 28 July 1994 (in force 28 July 1994).

[9] Art. 2 1994 Implementation Agreement. *Cf. Edward D. Brown*, The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: Breakthrough to Universality?, Marine Policy 19 (1995), 5, 9.

exploitation system and – last but not least – the economic effects of deep seabed mining.[10] As a result, the different technology transfer provisions were an important element in the UNCLOS negotiations.[11] The discussions took place in the First Committee that dealt with seabed mining and the Area. It is not astonishing that some industrialized States supported a free exploitation of the deep seabed, but developing States wanted to avoid a 'first come, first served' rule and stressed the principle of benefit of mankind for the use of the resources of the deep seabed.[12] In the end, the position of the developing States was reflected in the final wording of the Convention.[13] Art. 144 can be seen as an important element in combatting the fear of some States during the negotiations about their access to seabed mining technology; the concern was that the participation of private companies could monopolize their technological advances.[14] This outcome was possible since major States, like the US, that were against any internationalization of the deep seabed, had to 'bargain' with regard to this in order to achieve other important tasks, such as the transit through international straits.[15]

6 Art. 144 and other provisions of the Convention that include technology transfer are in line with the demands of the New International Economic Order (NIEO) in the 1970s that promoted a new model of development, looking more to the needs of the developing countries.[16] Not only technology that relates to activities in the Area but all technology was seen, by some States, as part of the common heritage of mankind[17] and a global public good that should benefit all human beings, as is provided by the human right in Art. 15 (1) of the 1966 International Covenant of Economic, Social, and Cultural Rights.[18] The general methods of transferring technology are, *inter alia*, licensing, importation of technology, investment, exchange between experts, publication of research, patent documentation, foreign direct investment etc.[19] However, those means may conflict with the idea of property rights.[20]

7 As effective technology transfer to developing States and least developed States cannot be achieved by reliance on global technology markets,[21] it was rational to specify in Art. 5 Annex III that States that participate in deep seabed mining or have access to technology must take effective measures to ensure 'fair and reasonable commercial terms and conditions' with regard to the access to technology for the Enterprise in case they cannot acquire it on similar terms and conditions on the open market;[22] furthermore every applicant for a deep seabed mining license had a duty to make the technology available on 'fair and reasonable terms and conditions' to the enterprise.[23] The aim is that the Authority and its Enterprise have access to the relevant technology as defined in Art. 5 (8) Annex III.[24] However, as the

[10] *Wolfgang Graf Vitzthum*, International Seabed Area, in: MPEPIL, para. 8, available at: http://opil.ouplaw.com; *Rüdiger Wolfrum*, Common Heritage of Mankind, paras. 18 *et seq.*, in: MPEPIL, available at: http://opil.ouplaw.com.

[11] *Stoll* (note 7), para. 31.

[12] *James Stavridis*, Marine Technology Transfer and the Law of the Sea, Naval War College Review July-August 1983 (1983), 38, 44 et seq.; *Graf Vitzthum* (note 10), para. 8.

[13] *A. Marvasti*, An Assessment of the International Technology Transfer Systems and the New Law of the Sea, Ocean & Costal Management 39 (1998), 197, 198.

[14] *Stoll* (note 7), para. 34, *Waibel/Alford* (note 6), para. 45.

[15] *Stavridis* (note 12), 44; *Graf Vitzthum* (note 10), para. 8.

[16] *Stavridis* (note 12), 42; *Stoll* (note 7), para. 31.

[17] *Waibel/Alford* (note 6), para. 39.

[18] *Ibid.*, para. 4. For a first multilateral non-binding attempt of a Draft Code on Technology Transfer by UNCTAD in 1976 and 1978, *ibid.*, para. 38.

[19] *Waibel/Alford* (note 6), para. 6; similar *Marvasti* (note 13), 200.

[20] *Waibel/Alford* (note 6), paras. 4, 10 *et seq.*

[21] *Ibid.*, para. 6.

[22] *Cf.* Art. 5 (5) Annex III; *Stoll* (note 7), para. 36. For a critical view, *cf. Marvasti* (note 13), 200; *Stavridis* (note 12), 39.

[23] Annex III Art. 5 (3)(a). *Cf. Stavridis* (note 12), 39.

[24] *Stoll* (note 7), para. 35.

Convention stated this rule for the mandatory transfer of technology, too many developed States refused to ratify the Convention.[25] The compulsory transfer of (private) technology to the enterprise and developing States were seen as undermining intellectual property rights and not giving enough protection for investments; some have been carried out before the Convention was finalized.[26] The drawbacks of the technology transfer provisions of the Convention and Annex III according to the developed States were – inter alia – the mandatory technology transfer, the notion of 'fair price', the damage to the patent system, and the 'competitive edge' given to the Enterprise.[27] Changes to the Part XI provisions by two resolutions in 1982 did not sufficiently diminish the concerns of some of the developed States, including the US.[28]

Finally, changes in the economic and international order and the end of the 'cold war'[29] made it possible that Part XI and Annex III of the Convention were modified by the 1994 Agreement on the Implementation of Part XI of the Convention; this Agreement substantively changed the rules of Part XI.[30] The factual bases of the negotiations of the Agreement were quite different from those of the Convention since exploration and technological development in marine mining were done by developing countries as well – for instance by India, China, and South Korea – and not solely by western industrialized States.[31] Today, the relevant provisions for the transfer of technology concerning the Area are only contained in Part IX and S. 5 of the Annex to the 1994 Implementation Agreement (see infra, MN 12). **8**

III. Elements

1. Art. 144

Art. 144 states that the task of the Authority is to acquire technology for ocean mining and encourage the transfer of this technology to developing countries[32] and that the duty of States and the Authority is to cooperate to achieve this aim. The first paragraph obliges the Authority to take measures to acquire technology and scientific knowledge and to promote and encourage their transfer to developing States (see *supra* MN 1). According to the second paragraph, the Authority and States Parties are obliged to cooperate in promoting the transfer of technology and scientific knowledge for the benefit of the Enterprise and all States Parties;[33] this includes the duty to initiate and promote programmes for the transfer of technology not only to the Enterprise but also to developing States as well as measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States. **9**

Important terms of Art. 144 are specified in other Parts of the Convention: What the Area constitutes is defined in Art. 1 (1)(1);[34] 'activities in the Area' are determined in Art. 1(3), including all activities not only of exploitation, but also of exploration for the **10**

[25] *Ibid.*, para. 31; *Marvasti* (note 13), 199, 205.
[26] *Stavridis* (note 12), 41 et seq., 44.
[27] *Marvasti* (note 13), 205.
[28] Esp. Resolution II (UNCLOS III, Report of the President of the Conference in Accordance with Rule 37 of the Rules of Procedure, UN Doc. A/CONF.62/L.132 and ADD.1 (1982), OR XVI, 236; and UNCLOS III, Report of the President of the Conference, UN Doc. A/CONF:62/L.141 and ADD.1 (1982), OR XVI, 247) guaranteed exclusive rights to conduct exploratory activities short of commercial production to 'pioneer investors' (four States and four consortia); concerning the 'influence of powerful lobbying groups and large individual corporations' that lead to the notion of 'pioneer investors' see *Stavridis* (note 12), 44; *cf. Graf Vitzthum* (note 10), para. 9 *et seq.*; *Marvasti* (note 13), 200, 205; *Brown* (note 9), 10, 14.
[29] *Graf Vitzthum* (note 10), para. 11.
[30] 1994 Implementation Agreement; *Marvasti* (note 13), 206; *Brown* (note 9), 10.
[31] *Marvasti* (note 13), 206.
[32] *Stoll* (note 7), para. 35.
[33] The term State Parties is defined in Art. 1(2)(1); see *Tanaka* on Art. 1 MN 18–19.
[34] *Tanaka* on Art. 1 MN 6–7.

resources in the Area;[35] the Enterprise is the organ of the Authority charged with mineral administration in the Area.[36]

11 Nevertheless, some of the notions of Art. 144 are still unclear. The term 'technology' was defined as part of Art. 5 (8) Annex III as

> 'the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis.'

However, some suggest that this is a very broad definition.[37] Besides, according to the 1994 Implementation Agreement, Art. 5 Annex III is not applicable since the entry into force of the Agreement (see *infra*, MN 12 *et seq.*). Additionally, there is no definition of the term 'technology transfer' in the Convention. Some authors define it as the principle of 'efficient and equitable allocation of existing technology […]'.[38] First uses of the term in international law occurred during the 1960s, but the precise definition according to Part XI of the Convention and its object and purpose has to be determined in coherence with the provisions that lay down the general principles governing the Area, i. e. the common heritage of mankind (Art. 136), the principles that all activities in the Area be carried out to the benefit of mankind as a whole (Art. 140), and the sole use of the Area for peaceful purposes (Art. 141); most importantly, the interpretation has to be in line with the 1994 Implementation Agreement, which is *lex specialis* in relation to Part XI (*cf.* Art. 2 1994 Implementation Agreement) (see *infra*, MN 12).[39]

2. Section 5 Annex of the Agreement on Implementation of Part XI

12 The 1994 Implementation Agreement was negotiated and agreed on in order to 'dramatically' change[40] the seabed mining regime and the rules on technology transfer, as those were not acceptable for some developed States, which in consequence refused to ratify the Convention (see *supra* MN 7). First of all, it is important to stress that it includes a provision in S. 5 (2) that stipulates the inapplicability of Art. 5 Annex III (see *supra* MN 8).[41] S. 5 (1) of the Annex of the Agreement specifies the rules for the transfer of technology and introduces a more market-oriented approach[42] that treats, *inter alia*, the Enterprise on the same basis as commercial producers.[43] If technology shall be transferred to the Enterprise or developing States, those actors must first of all seek to obtain it 'on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements.'[44] This is in line with the provisions of Agreement on Implementation of Part XI that lay down that the Enterprise will conduct its mining operations by way of joint ventures.[45] If these efforts are not successful, the Authority only 'may request' contractors and their respective sponsoring State or States to cooperate in

> 'facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States seeking to acquire such technology on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights.'[46]

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[35] *Tanaka* on Art. 1 MN 11.
[36] *Cf.* Arts. 170, 153(2)(a); 1994 Implementation Agreement, Annex, S. 2.
[37] *Stavridis* (note 12), 39.
[38] *Waibel/Alford* (note 6), para. 1.
[39] *Brown* (note 9), 9 et seq.
[40] *Graf Vitzthum* (note 10), para. 22.
[41] Express wording 1994 Implementation Agreement, Annex, S. 5 (2): 'The provisions of Annex III, article 5, of the Convention shall not apply.'
[42] *Marvasti* (note 13), 206.
[43] *Ibid.*, 206; for more changes in the role of the Enterprise, *Brown* (note 9), 11.
[44] 1994 Implementation Agreement, Annex, S. 5 (1)(a).
[45] 1994 Implementation Agreement, Annex, S. 2 (3). For the proposal to utilize joint ventures to solve the problems connected to Art. 144, *cf. Stavridis* (note 12), 46.
[46] 1994 Implementation Agreement, Annex, S. 5 (1)(b). *Cf. Brown* (note 9), 12.

There is only a duty of States Parties 'to cooperate fully and effectively with the Authority for this purpose'.[47] Last but not least, States Parties are obliged

> 'to promote international technical and scientific cooperation with regard to activities in the Area either between the parties concerned or by developing training, technical assistance and scientific cooperation programmes in marine science and technology and the protection and preservation of the marine environment.'[48]

This, however, is only an obligation *'as a general rule'*, which means that exceptions with good cause are lawful.

Due to this new regime of the Agreement on the Implementation of Part XI, it is not hard to see why some authors express their concern that the 'communitarian imprint of Part XI' is almost 'entirely abandoned' by the Agreement on the Implementation of Part XI; indeed, it seems unclear how the new, modified regime of technology transfer can meet the expectations of the State Parties to serve the benefit of mankind as a whole.[49] 13

Article 145
Protection of the marine environment

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 inter alia:

(a) **the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;**

(b) **the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.**

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[47] *Ibid.*

[48] 1994 Implementation Agreement, Annex, S. 5 (1)(c).

[49] *Graf Vitzthum* (note 10), paras. 23, 25.

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I. Purpose and Function

1 The protection of the marine environment from harm caused by human activities is a core principle of the UNCLOS and the object and purpose of Art. 145 with respect to activities in the Area.[1] The Convention's preamble enshrines the objective of the Convention to promote, *inter alia*, 'the study, protection and preservation of the marine environment.'[2] Furthermore Part XII (Arts. 192–237) of the Convention deals extensively with the protection and preservation of the marine environment in general: Art. 192 establishes a general obligation of all States Parties to protect and preserve the marine environment.[3] Contained in the second Section of Part XI laying down 'Principles Governing the Area', Art. 145 particularly deals with the protection of the marine environment with respect to human activities in the Area, which belongs to the common heritage of mankind (*cf.* Art. 136).[4] Activities in the Area have to be carried out 'for the benefit of mankind as a whole'.[5] To protect the common heritage of mankind means – as *a conditio sine qua non* – to protect the environment of that heritage.[6]

2 The function of Art. 145 is two-fold: The first sentence stipulates a general and rather broadly phrased obligation that 'necessary measures shall be taken' to ensure the protection of the marine environment from harmful effects that may arise from activities in the Area.[7] More specifically, the remainder of the Article entrusts the Authority with the task of adopting appropriate rules, regulations, and procedures to protect the environment of the Area. The regulations adopted by the Authority in application of the present Article lay down in even greater detail the obligations of all relevant actors with respect to the protection of the marine environment when conducting activities in the Area.[8] These rules are further complemented by provisions of Annex III of the Convention (in particular Art. 17(2)(f) thereof) and the 1994 Implementing Agreement. Together with the Convention, these instruments form a single legal regime on the protection of the marine environment with respect to deep seabed activities.

II. Historical Background

3 It is one of the major achievements of the Convention that it provides a unifying legal framework for the protection of the marine environment.[9] The protection of the marine environment with respect to activities in the international seabed area appeared on the agenda for the first time in 1969 when the newly established Sea-Bed Committee concluded that

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[1] See generally *Doris König*, Marine Environment, International Protection, in MPEPIL, available at: http://opil.ouplaw.com/.

[2] Preambular paragraph 4; see also *Lagoni* on the Preamble.

[3] See *Czybulka* on Art. 192.

[4] See *Vöneky/Höfelmeier* on Art. 136.

[5] See *Vöneky/Höfelmeier* on Art. 140 MN 6 *et seq.*

[6] *John Warren Kindt*, The Environmental Aspects of Deep Seabed Mining, UCLA Journal of Environmental Law and Policy 8 (1989), 125, 144.

[7] See *Rüdiger Wolfrum*, Purposes and Principles of International Environmental Law, GYIL 33 (1990), 308. He states that the provision is 'dissatisfying with regard to environmental protection as it is void of substance', but also recognizes that the provision would be supplemented by regulations of the Authority; for an assessment, see *infra*, MN 39 *et seq.*

[8] Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2003), 190 (MN 1).

[9] *König* (note 1), para. 5. See *Catherine Redgwell*, From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2009), 180.

> 'there exists general acceptance of the necessity for the adoption of appropriate safeguards against the dangers of pollution. The adoption of appropriate safeguards to protect the living resources of the marine environment as well as of safety measures concerning activities in the area were not objected to.'[10]

Notably, the issue of environmental protection was not yet understood as being required by the common heritage principle, but was mentioned in the context of the protection of interests of coastal States.[11]

The present Art. 145, as most of the provisions contained in the Section 2 of Part XI (Arts. 136–149, setting out the 'Principles Governing the Area'), is derived from para. 11 of the 1970 Declaration of Principles.[12] This paragraph, which originated from a proposal submitted by Norway to the Sea-Bed Committee in 1970,[13] reads: 4

> 'With respect to activities in the area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, inter alia: (a) The prevention of pollution and contamination and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment; (b) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.'[14]

The Declaration of Principles hence was the first document that expressly called upon States to take measures preventing hazards to the marine environment arising out of activities in the international seabed area.

While substantial disagreement between developing and industrialized States with regard to Part XI delayed the adoption of the Convention for numerous years,[15] Art. 145 was not a source of controversy and was, with two exceptions (see *infra*, MN 6), not substantially modified between 1977 and the final adoption of the Convention in 1982.[16] In general, environmental matters were much less controversial at UNCLOS III than questions regarding the use of resources of the Area: The negotiations on Part XII, which covers the protection of the marine environment in general, were mostly finalized by 1977, at the same time as those on Art. 145.[17] 5

Despite the general continuity of para. 11 of the 1970 Declaration of Principles and the final version of Art. 145, two important changes have to be mentioned: Firstly, the power to adopt and implement rules and regulations was shifted from States to the International Seabed Authority (an institution which was already referred to in the 1970 Declaration as the 6

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[10] Sea-Bed Committee, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, GAOR 24, Suppl. 22 (A/7622) (1969), para. 96, see also paras. 65–68. Digitalised versions of the reports from the Sea-Bed Commission to the UN General Assembly are available online from the UN Dag Hammarskjöld Library at: http://www.un.org/Depts/dhl/.

[11] *Ibid*., at para. 65.

[12] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749(XXV) of 17 December 1970 (hereinafter: 'Declaration of Principles'); see also Nordquist/Nandan/Rosenne (note 8), MN 145.

[13] Sea-Bed Committee, A/AC.138/SC.1/L.2, para. 11(a), reproduced in SBC Report 1970, 25 GAOR Supp. 21. (A/8071) (1970), Appendix II, at 33. A number of developing states had tabled a similar proposal (A/AC.138/SC.1/L.1, paragraph 11(a), *ibid.*, Appendix I, at 29) that, other than the Norwegian text, contained a reference to the 'protection and conservation of the living resources of the sea', but also the safety of life and property which was dealt with separately and resulted in Art. 146.

[14] Declaration of Principles, *supra* n. 12, at para. 11.

[15] See e. g. *Satya N. Nandan/Michael W. Lodge/Shabtai Rosenne*, The Development of the Regime for Deep Seabed Mining, in: Nordquist/Nandan/Rosenne (note 8); *Shabtai Rosenne/Julia Gebhard*, Conferences on the Law of the Sea, MPEPIL, paras. 22–37, available at: http://opil.ouplaw.com; *Wolfgang Graf Vitzthum*, International Seabed Area, MPEPIL, paras. 6–11, available at: http://opil.ouplaw.com.

[16] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, xx (Art. 145); for a detailed account on the amendment history see Nordquist/Nandan/Rosenne (note 8), 145.

[17] ICNT (note 16), 192–238; see also *Shabtai Rosenne/Alexander Yankov/Neal R. Grandy*, Part XII: Introduction, in: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 3 (para. 12).

'appropriate international machinery' that should be established). Secondly, the activities for which measures protecting the marine environment were to be taken were defined more narrowly: While an intermediary negotiating text even referred to 'all' activities in the area,[18] that reference was later dropped, and the term 'activities in the Area' was given a definition in Art. 1(1)(3).[19] Also, Art. 145 (a) was complemented by a specific list of the types of activities (including drilling, dredging, and the construction of installations) for which measures are required. However, in light of the aforementioned definition, this list must not be understood as being exhaustive (see *infra*, MN 29.)

7 Art. 145 is one of the few provisions of Part XI that were not altered by the 1994 Implementation Agreement.[20] However, this was not due to a lack of concern for environmental issues: Not only does the 1994 Agreement's preamble reaffirm the 'importance of the Convention for the protection and preservation of the marine environment and of the growing concern for the global environment',[21] but it also added substantive requirements aimed at environmental protection. It provides that the Authority shall concentrate, *inter alia*, on adopting 'rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment' until the approval of the first plan of work for exploitation.[22] It also adds to Annex III Arts. 6 and 7 a requirement that an application for approval of a plan of work shall by 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' (see *infra*, MN 44).[23]

III. Elements

1. Protection of the marine environment

8 **a) Scope of application: 'Activities in the Area'.** Generally, the Convention distinguishes between the zones under national jurisdiction and the 'Area'.[24] The latter is defined as 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Art. 1 (1)(1)).[25] Art. 145 and Part XI as a whole merely apply to the 'Area' but not to seabed activities in areas under national jurisdiction.[26] Such activities in the territorial sea (see Arts. 2–32) or in the exclusive economic zone (EEZ) (see Arts. 55–75)) of any State are covered by Art. 208. Being similar in substance to Art. 145, Art. 208 requires States, not the Authority, to 'adopt laws and regulations to prevent, reduce and control pollution of the marine environment' arising from, *inter alia*, seabed activities under their national jurisdiction, and such domestic provisions must 'be no less effective than international rules, standards and recommended practices and procedures'.[27]

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[18] Sea-Bed Committee, A/AC.138/94/Add.1, reproduced in SBC Report 1973 vol. II, 28 GAOR Supp. 21 (A/9021), 39 at 63 Art. 13.

[19] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137 (Art. 12).

[20] Environmental considerations appeared on the list of issues to be dealth with in the consulations leading up to the Agreement, see Nordquist/Nandan/Rosenne (note 8), MN 146; but later were 'no longer considered to be a controversial issue in the context of deep seabed mining', see GA, Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Report of the Secretary-General, UN Doc. A/48/950 (1994), para. 9.

[21] GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 GA Res. 48/263 of 28 July 1994, preambular para. 3.

[22] 1994 Implementation Agreement, S. 1, para. 5 (g).

[23] 1994 Implementation Agreement, S. 1, para. 7; on Annex III Arts. 6 and 7 see *Le Gurun*.

[24] *König* (note 1), 24–25.

[25] See *Tanaka* on Art. 1 MN 6–7.

[26] See Art. 134 (1). Activities in the Territorial Sea (see Arts. 2–32) or in the EEZ (see Arts. 55–75, see in particular Art. 45(1) (a)) of any State are covered by Art. 208.

[27] See *infra*, MN 38.

Art. 145 applies to all 'activities' in the Area, which is defined by Art. 1 (1)(3) as encompassing 'all activities of exploration for, and exploitation of, the resources of the Area'.[28] However, the Convention does not clarify what is meant by the terms 'exploration' and 'exploitation'. In its 2011 Advisory Opinion, the Seabed Disputer Chamber of the International Tribunal for the Law of the Sea (ITLOS) expressly referred to the (non-exhaustive) list of activities contained in Art. 145 (a) (see *infra*, MN 29) and considered these activities to be part of the notion of 'activities in the Area'.[29] It further pointed to Annex III, Art. 17 (2)(f), which distinguishes between 'activities in the Area' on the one hand and 'shipboard processing immediately above a mine site of minerals derived from that mine site' on the other.[30] In conclusion, the Chamber endorsed the distinction drawn therein and held that only activities 'directly connected' with the recovery of minerals from the seabed were covered by the term 'activities in the Area'.[31] This excluded shipboard processing and transportation,[32] even though these activities are covered by the definition of 'exploitation' in the ISA Regulations.[33] However, the Chamber held that water evacuation and the 'preliminary separation of materials of no commercial interest, including their disposal at sea,' was included in the term 'activities in the Area'.[34] Otherwise, according to the Chamber, the responsibility of sponsoring States would not extend to those activities 'which are among the most hazardous to the environment'; this would be contrary to the general obligation of States Parties to protect and preserve the marine environment pursuant to Art. 192.[35] The distinction spelled out by the Chamber is of great significance mainly for the liability regime.[36] Moreover, it is an important clarification on the material scope of many provisions of Part XI, including Art. 145. **9**

Another important question of interpretation regards the legal status of living resources in the Area and their genetic material. Genetic resources are of great interest *inter alia* for scientific research and the biotechnology industry, since organisms living at or beneath the seabed have distinctive genetic structures that enable their survival even under most extreme and severe conditions caused *inter alia* by the lack of sunlight.[37] Hence the question arises whether Art. 145 (as well as Part XI of the Convention as a whole) also applies to the exploration and exploitation of living and genetic resources in the Area or whether these resources are covered by the regime of the freedom of the high seas.[38] Art. 133 (a) defines the term 'resources' for the Area and Part XI as 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules'.[39] While the **10**

[28] See *Tanaka* on Art. 1 MN 11.

[29] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 85, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[30] *Ibid.*, paras. 86–88. In Art. 133, the Convention distinguishes between the term 'resource', which denotes mineral resources '*in situ* in the Area at or beneath the sea-bed', whereas 'resources recovered from the Area' are referred to as 'minerals', see *Scovazzi* on Art. 133 MN 11 *et seq*.

[31] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 95.

[32] *Ibid.*, para. 95–96.

[33] *Cf.* Reg. 1(3)(b) Crusts Regulations (ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex); Reg. 1(3)(a) Sulphides Regulations (ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex); Reg. 1(3)(a) Nodules Regulations (ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex (amended 24 July 2014 ISBA/20/A/9)).

[34] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 95.

[35] *Ibid.*, para. 97.

[36] *David Freestone*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, AJIL 105 (2011), 755, 757–758.

[37] *Graf Vitzthum* (note 15), para. 12; *Lyle Glowka*, Genetic Resources, Marine Scientific Research and the International Seabed Area, RECIEL 8 (1999) 56, 56–58.

[38] See generally *Alexander Proelss*, Marine Genetic Resources under UNCLOS and the CBD, GYIL 51 (2008), 417, 422–432; for the positions by States on this issue see GA, Report of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, UN Doc. A/61/65 (2006), paras. 71–72.

[39] See *Scovazzi* on Art. 133 MN 11 *et seq*.

drafting history of Part XI also contains some references to living resources,[40] the present regime is framed to cover mineral resources[41] and Art. 133 (b) clearly limits the material scope of application to mineral resource-related activities.[42] Thus, in general, Art. 145 does not apply to the exploration and exportation of living resources. However, Art. 145 provides for the protection of marine genetic resources with respect to the mining of mineral resources, since these resources are part of the marine environment and its flora and fauna.[43] A more fundamental (and difficult) question is whether such resources are part of the common heritage of mankind pursuant to Art. 136.[44] In the end, the increasing interest to use the living and genetic resources originating from maritime areas beyond national jurisdiction led to calls for negotiating an additional Implementing Agreement on biodiversity, as the lack of regulation on this matter is considered a decisive *lacuna*.[45]

11 **b) Effective protection for the marine environment from harmful effects. aa) Meaning and scope of the term.** Art. 145 aims to protect the marine environment from harm caused by activities in the Area.[46] The Convention does not define the terms 'marine environment' and 'harmful effects'. However, Art. 145 determines some of the elements of the marine environment that are covered, namely the flora and fauna of the environment, its ecological balance, the natural resources of the Area and the coastline. In addition, Art. 1 (1)(4) defines the term 'pollution of the marine environment' as the 'introduction by man' of substances or energy which has or is likely to have negative effects on living resources and marine life, human health and legitimate uses of the sea.[47] It is questionable how the notions of 'pollution' and 'harmful effects' are interlinked in the Convention. Due to the fact that the negotiators of the Convention had single sources of pollution in mind – since the modern integrated ecosystem approach was not yet developed in the 1970s[48] – much speaks in favor of an overlapping content. Hence, one can assume that the effects of marine pollution, as defined in Art. 1 (1)(4), are 'harmful effects' to the marine environment in the sense of Art. 145. This does not mean, however, that the causation of harmful effects is limited to marine pollution. Instead, 'harmful effects' also include other detrimental effects to the marine environment caused by human intrusion in that environment. This is shown by the broad wording of Art. 145(a) that speaks of the prevention, reduction and control of 'pollution *and other hazards*' to the marine environment.

12 Definitions of the terms 'marine environment' and 'serious harm to the environment' (see *infra*, MN 13 and 14) are contained in the Regulations on Prospecting and Exploration which

[40] *Alex G. Oude Elferink*, The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas, IJMCL 22 (2007) 143, 152–153.

[41] *Ibid.*, 152.

[42] *Proelss* (note 38), 424–426; *Graf Vitzthum* (note 15), para. 13; *Rüdiger Wolfrum*, Hohe See und Tiefseeboden, in Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, MN 140; also note that not all provisions of Part XI do refer to 'activities' as defined by Art. 133 (b), see for instance Art. 138 (speaking of the 'general conduct of States in relation to the Area'), Arts. 141 and 149 (making no reference to a specific kind of undertaking).

[43] *Aline Jaeckel*, An Environmental Management Strategy for the International Seabed Authority? The Legal Basis, IJMCL 30 (2015), 93, 101.

[44] See also *Vöneky/Höfelmeier* on Art. 136 MN 22; *Elferink* (note 40), 150; *Tullio Scovazzi*, Mining Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL 19 (2004), 383, 399–404.

[45] *Elisabeth Druel/Kristina M. Gjerde*, Sustaining Marine Life Beyond Boundaries: Options for an Implementing Agreement for Marine Biodiversity beyond National Jurisdiction under the United Nations Convention on the Law of the Sea, Marine Policy 49 (2014), 90.

[46] Regarding the reference to 'activities in the Area', see *supra*, MN 8 *et seq.*

[47] Art. 1 (1)(4) reads: '"pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'.

[48] See *Robin Warner*, Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework (2009), 74–97.

were first adopted by the Authority in 2000.[49] Despite not being directly applicable to the Convention, the definitions and other provisions developed in the Regulations complement the basic provisions of the Convention and can therefore serve as a useful tool for determining the scope of the Convention's articles.[50] They constitute a (conclusive) subsequent agreement between the parties regarding the interpretation and application pursuant to Art. 31 (3)(a) of the 1969 Vienna Convention on the Law of Treaties (VCLT),[51] since the Regulations were adopted by the Assembly of the ISA, of which all States Parties to the Convention are members. Thus they belong to the context according to which the operative provisions of the present Convention have to be interpreted.

13 According to the Regulations, the term 'marine environment' includes

> 'the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof'.[52]

According to the object and purpose of the Convention, the general obligation of States to protect and preserve the marine environment as a whole, and the subsequent acceptance by States of integrated, holistic approaches to environmental conservation and ecosystem management,[53] the notion of 'marine environment' needs to be understood broadly.[54] Hence, the term encompasses all aspects which determine the conditions for marine life in the water column, coastal areas, on the seabed and within the subsoil, as well as other parts of the 'environmental continuum of the oceans'.[55] Importantly, since Art. 145 does not contain a spatial delineation, also long-distance effects must be prevented.

14 While Art. 145 provides for the prevention of 'harmful effects', the Regulations only refer to 'serious harm' to the marine environment. This is defined as

> 'any effect from activities in the Area on the marine environment which represents a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices'.[56]

While the meaning of term 'adverse changes' may not substantially differ from that of 'harmful effects', the Regulations contain the additional criterion that the adverse change must be 'significant'.[57] Since Art. 145 does not stipulate such a threshold, it could be questioned whether its scope is actually wider than the definition contained in the Regulations. Notably, most international treaties on the environment include a certain threshold (like 'serious' or 'significant' harm) in order to exclude *de minimis* pollution or damage.[58] Since the term 'harmful effects' is uniquely used in Part XI of the Convention (which was

[49] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex.

[50] See *James L. Kateka*, Protection and Preservation of the Marine Environment in the Area under UNCLOS, in: Holger P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 919, 923.

[51] One might also consider the Regulations to constitute not agreements but subsequent practice by the parties in implementing the agreement in terms of Art. 31(3)(b) VCLT, see *Oliver Dörr*, Article 31, in: Oliver Dörr/Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties. A Commentary (2012), 521 (MN 75).

[52] Reg. 1 (3)(c) Sulphides Regulations; Reg. 1 (3)(d) Crusts Regulations; Reg. 1 (3)(c) Nodules Regulations.

[53] *Cf. Warner* (note 48), 74–97.

[54] Nordquist/Nandan/Rosenne (note 8), at 145.8(a).

[55] *Ibid.*

[56] Reg. 1 (3)(f) Sulphides Regulations; Reg. 1 (3)(f) Crusts Regulations; Reg. 1 (3)(f) Nodules Regulations.

[57] In the view of the International Law Commission, '"significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect [… which] must be susceptible of being measured by factual and objective standards.', ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries UN Doc. A/56/10 (2001), 148.

[58] *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law & the Environment (3rd edn. 2009), 184–186; *K. Sachariew*, The Definition of Thresholds of Tolerance for Transboundary Environmental Injury Under International Law: Development and Present Status, NLR 37 (1990), 193.

negotiated separately from Part XII), one could consider the omission of a threshold to be an editorial mistake. However, Part XI of the Convention contains several references to danger of 'serious harm to the marine environment' (Arts. 162 (2)(w),(x) and 165 (2) (k),(l)), which demonstrates that the use and omission of such a threshold in the provisions of Part XI was intentional. Viewed as a whole, this could lead to the conclusion that Art. 145 requires measures to be taken to ensure the effective prevention of harmful effects of *any* kind and scope. In addition, the obligation to 'ensure' effective prevention is particularly strict and could even be construed as an obligation of result.[59] However, since it was known at the time of the negotiations that seabed mining would unavoidably incur certain destructive effects on the seabed environment (see *infra*, MN 15), it is not convincing to assume that Art. 145 requires all kinds of harm to be entirely averted, since this would render seabed mining impossible *in toto*. Besides, such a strict interpretation would be incoherent with Art. 145(a) as this provision states only the need to regulate 'the prevention, reduction and control' of pollution and other hazards to the marine environment. Considering that Part XI in general aims at promoting the exploitation of the Area (which is important since Art. 145 requires that measures protecting the marine environment are in accordance with other provisions of the Convention, see *infra*, MN 23), it lies with the Authority to operationalize the first sentence of Art. 145 in coherence with the other provisions. The Authority tried to resolve the tension between environmental protection and exploitation by introducing the threshold of 'significant' harm in the Regulations and tacitly accepting harm beneath this threshold as lawful. But even this term is ambiguous and requires further elaboration or even a determination on a case-by-case basis.[60]

15 **bb) Characteristics of the seabed and ocean-floor environment and predicted environmental impacts of mining activities.** The special characteristics of the deep-sea environment and the known potential impacts of activities are summarized in this section in order to demonstrate the special relevance of Art. 145: When the negotiations of the Convention concluded in 1982, States had little knowledge about the environmental impacts of activities in the Area.[61] However, it was realized early that every kind of deep seabed mining would cause substantive environmental destruction, akin to strip mining in terrestrial environments.[62] Today, the deep seabed is seen as one of the most species rich habitats on the planet[63] but the scientific knowledge of the deep seabed is still limited compared to other marine ecosystems, despite the substantial progress that has been made in recent years.[64] Hence, some fear that the deep-sea ecosystem may be substantially changed before its natural state is fully understood.[65]

16 In general, the deep-sea floor is characterized by low physical energy, the absence of sunlight, low biological productivity and very slow sediment accumulation rates.[66] Despite this hostile environment biologists found that these areas can feature very high local species

[59] Notably, Art. 3 of the ILC Draft Articles on Prevention of Transboundary Harm (note 56), merely requires States 'take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof', which is an obligation of due diligence, see: *ibid.*, commentary to Art. 3, para. 3.

[60] *Ibid.*, commentary to Art. 2, para. 4.

[61] *Cf. Richard A. Frank*, Environmental Aspects of Deepsea Mining, Va.J.Int'l L. 15 (1975), 815, at 818, who still assumed that most of the ocean bottom where the deepsea mining had least biological activity but also noted the little scientific knowledge; see also *Kindt* (note 6), 128–130, who discusses the 'theoretical effects' of deep seabed mining.

[62] *Peter A. Jumars*, Limits in Predicting and Detecting Benthic Community Responses to Manganese Nodule Mining, Marine Mining 3 (1981), 213.

[63] *Graf Vitzthum* (note 15), para. 12.

[64] *Adrian G. Glover/Craig R. Smith*, The Deep-sea Floor Ecosystem: Current Status and Prospects of Anthropogenic Change by the Year 2025, Environmental Conservation 30 (2003), 219; *Eva Ramirez-Llodra et al.*, Man and the Last Great Wilderness: Human Impact on the Deep Sea, 6 PLoS one e22588 (2011).

[65] *Glover/Smith* (note 64), 237.

[66] *Ibid.*, 220; *David Thistle*, The Deep-Sea Floor: An Overview, in: Paul A. Tyler (ed.), Ecosystems of the Deep Oceans (2003), 5–37.

diversity.[67] In contrast, the areas around so-called 'hydrothermal vents' (i. e., warm water springs from tectonically active areas) feature very special ecosystems reliant on specially adapted micro-organisms which are able to conduct chemosynthesis.[68] So far more than 500–700 species such as worms, crabs, shrimps and fish have been discovered, many of which are unique to their particular regions or even locations.[69]

There is no empirical data on the environmental effects of large-scale seabed mining, since no such activities have been conducted yet.[70] Therefore only the 'potential impact' of human activities on the deep seabed can be discussed.[71] A primary environmental concern is that seabed mining needs to be conducted at a very large scale in order to be economically feasible.[72] What is also clear is that the impacts will greatly depend on the type of the activity.[73] A number of research projects conducted in the 1970s and 1980s tried to assess the potential impacts of deep seabed activities with *in situ* experiments.[74] It is now clear that most types of mining techniques will cause the immediate and total extinction of the fauna present at the mine site.[75] Compared to other mining methods, most scientific knowledge exists on the effects of harvesting polymetallic nodules.[76] A clear direct impact of nodule mining will be the removal of the nodules, which form a unique habitat[77] and which will need millions of years to re-grow.[78] It is also expected that nodule-mining will release a massive sediment plume into the water column.[79] While it is expected that heavier particles will soon rain out onto the sea floor, a plume of finer materials seems to remain in the water-column longer and will drift away with the near-bottom currents, impacting much wider areas than the actual mining zone.[80] **17**

Art. 145 is decisive for the protection of the deep-sea environment. This article is very flexible, since it can accommodate more recent scientific findings, technological development, as well as potential new mining methods. At the same time, the strict wording of the obligation 'to ensure effective protection' calls for the application of a precautionary approach as long as scientific knowledge is still fragmented (see *infra*, MN 41). **18**

c) Addressee of the obligation. The first sentence of Art. 145 provides that necessary measures 'shall be taken', but does not state explicitly who is required to take such measures. **19**

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[67] *Glover/Smith* (note 64), 220.

[68] *Verena Tunnicliffe/Kim S. Juniper/Myriam Sibuet*, Reducing Environments of the Deep-Sea Floor, in: Tyler (note 66), 81; see also *Scovazzi* (note 44), 395.

[69] See Daniel Desbruyères/Michel Segonzac/Monika Bright (eds.), Handbook of Deep-Sea Hydrothermal Vent Fauna (2nd edn. 2006).

[70] *Kateka* (note 50), 920.

[71] See the survey prepared by International Seabed Authority: ISA, A Summary of Available Information in the Public Domain on the Likely Impact of Exploration and Mining Activities for Nodules on the Marine Environment: Submitted to the ITLOS for Proceedings in Case No. 17 (2010), available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/ISA_1.pdf.

[72] *Hjalmar Thiel*, Anthropogenic Impacts on the Deep Sea, in: Tyler (note 66), 427, 450–452.

[73] *S. Petersen/A. Krätschell/N. Augustin/J. Jamieson/J. R. Hein/M. D. Hannington*, News from the Seabed: Geological Characteristics and Resource Potential of Deep-sea Mineral Resources, Marine Policy 70 (2016), 175, 185, 11.

[74] See e. g. *Jumars* (note 62); *Rahul Sharma et al.*, Sediment Redistribution During Simulated Benthic Disturbance and its Implications on Deep Seabed Mining, Deep-Sea Research II 48 (2001), 3363; *Hjalmar Thiel et al.*, The Large-Scale Environmental Impact Experiment DISCOL—Reflection and Foresight, Deep-Sea Research II 48 (2001), 3869;on the DISCOL project see *Hjalmar Thiel*, Environmental Impact Resulting from Deep-Sea Mining and Risk Assessment, in: Rüdiger Wolfrum (ed.), Law of the Sea at the Crossroads. The continuing search for a universally accepted régime, Proceedings of a interdisciplinary symposium of the Kiel Institute of International Law, July 10 to 14, 1990 (1991), 87; also note the currently (2015–2017) running project 'Ecological Aspects of Deep-Sea Mining' which aims at assessing the long-term effects of disturbances caused by the DISCOL project in the l980s, see https://jpio-miningimpact.geomar.de/home.

[75] For an overview with further references see *Thiel* (note 72), 446–452; *Glover/Smith* (note 64), 229–232; ISA Summary (note 71); *Ramirez-Llodra et al.* (note 64), 11–14.

[76] *Thiel* (note 72), 448–450; *Glover/Smith* (note 64), 229, 231–232.

[77] *Glover/Smith* (note 64), at 230 with further references.

[78] *Ibid.*, with further references.

[79] *Jumars* (note 62), 216–223.

[80] *Thiel* 1991 (note 74), 90; *Jumars* (note 62), 61.

According to the wording used in the Declaration of Principles, the duty to take measures was still with the States ('States shall take necessary measures […]'). In the Convention text, this wording changed into passive voice when the power of enacting rules and regulations, contained in the second sentence, was transferred to the Authority. The first sentence now indicates the establishment of a general obligation addressed to all relevant actors who can be bound by the Convention. These are, besides the Authority, primarily the States Parties. They are already obliged to protect and preserve the marine environment by, *inter alia*, Arts. 192, 194 and 209.[81]

20 The obligation of States to take measures relates to Art. 139. According to that provision, States have the 'responsibility to ensure' that private entities sponsored by them who engage in activities in the Area comply with the provisions of the Convention. Private actors are not subjects of international law and thus not directly bound by the Convention. Art. 139 hence establishes a 'mechanism' through which the rules of the sea-bed regime 'become effective for sponsored contractors which find their legal basis in domestic law'.[82] The exact content of the obligation of States Parties to ensure compliance of private contractors sponsored by them was one important aspect of the Seabed Disputes Chamber's 2011 Advisory Opinion.[83] The Chamber mainly held that this 'responsibility to ensure' was an obligation of 'due diligence'.[84] While it heavily relied on the Regulations for assessing the exact content of this regulation, the Chamber also identified a number of 'direct obligations' incumbent on sponsoring States that apply whether or not a certain undertaking is covered by the Regulations.[85]

21 In addition, any private entity who wants to engage in activities in the Area is required by Art. 153 (3) and Annex III Art. 3 (5) to enter into a contract with the Authority regarding the approval of a 'Plan of Work' on these activities.[86] The 'Standard clauses for exploration contract [sic]' annexed to the Authority's Regulations on Exploration all repeat and further specify the obligation of the contractor to take measures necessary for the protection of the marine environment.[87]

22 **d) Necessary measures.** The first sentence of Art. 145 requires 'necessary measures' to be taken in order 'to ensure effective protection of the marine environment'. It does not further specify the nature or quality of those measures, but entrusts the Authority with the adoption of rules, regulations and procedures 'to that end'. In accordance with the procedural provisions contained in Arts. 160 (2)(f)(ii) and 162 (2)(o)(ii), the Authority to date has adopted Regulations on the prospecting and exploration for polymetallic nodules,[88] cobalt-rich ferromanganese crusts[89] and polymetallic sulphides[90], which include, *inter alia*, environmental provisions (see *infra*, MN 39 *et seq.*). The development of a regulatory framework for the exploitation of such minerals is currently underway (see *infra*, MN 51 *et seq.*).

23 **e) Other applicable provisions of the Convention.** Art. 145 requires that the measures taken to ensure the effective protection for the marine environment need to be 'in accordance with this Convention'. This serves as a clarification that other norms of the Convention must not be violated when taking measures for the protection of the marine environment with

[81] *Cf. Georg Dahm/Jost Delbrück/Rüdiger Wolfrum*, Völkerrecht, vol. I/2 (2002), § 128 para. 7, who argue that all States are obligated by the Convention, not just States Parties. However, international treaties, such as the present Convention, can only have binding legal force between its parties, but do not bind third parties. Non-party States are nevertheless bound to the core obligation of Art. 145 insofar as the regime is part of customary international law (see *Vöneky/Höfelmeier* on Art. 138 MN 8 *et seq.*).

[82] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 108.

[83] *Ibid.*

[84] *Ibid.*, paras. 110–116.

[85] *Ibid.*, paras.121–123.

[86] Reg. 23–26 Sulphides Regulations; Reg. 25–28 Crusts Regulations; Reg. 23–26 Nodules Regulations.

[87] See the common S. 5 of the 'Standard clauses for exploration contract' contained in: Crusts Regulations, Annex IV; Nodules Regulations, Annex IV; Sulphides Regulations, Annex IV.

[88] See *supra*, note 33.

[89] *Ibid.*

[90] *Ibid.*

respect to activities in the Area. Although this seems to be self-evident, it is a useful clarification, as some consider Part XI as a self-contained regime[91] or as *lex specialis* to which the general framework of the Convention does not apply.[92] In particular, Arts. 194, 208, 209 and 215, all contained in Part XII of the Convention that deals with the protection of the marine environment, are relevant provisions complementing the present article (see *infra*, MN 35 *et seq.*). The uniqueness of the habitats of the Area and their vulnerability call, for instance, for the application of Art. 194 (5), according to which the measures taken to protect and preserve the environment 'shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.[93]

2. Authorization of the Authority for the adoption of rules

The second sentence of Art. 145 authorizes and obliges the Authority to adopt rules, regulations and procedures for the protection of the environment. The article does not merely contain an authorization, but lays down a legal obligation of the Authority to establish environmental rules, regulations and procedures.[94] Art. 145 (a) and (b) both specify the potential harms and activities of particular concern that shall be addressed by these regulations. However, the term 'inter alia' clarifies that the listed harms and activities are non-exhaustive, so that additional environmental threats and other dangerous activities shall be addressed by the Authority's regulations. This provision is complemented by the second sentence of Art. 209 (1), which requires that once established, such rules, regulations and procedures shall be 're-examined from time to time as necessary'[95] (see *infra*, MN 37). 24

a) Pollution and hazard control. Art. 145 (a) indicates measures of protection that the Authority should include in its rules, regulations and procedures, and further names certain hazardous activities to which these regulations should pay particular attention. 25

Firstly, pollution and other hazards to the marine environment shall be prevented, reduced and controlled. The term 'pollution of the marine environment' is explicitly defined by Art. 1 (1)(4) as 26

> 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'.[96]

Hence, the term 'pollution' does not merely require contamination, but also requires that such contamination has, or is likely to have, adverse effects on certain goods and amenities. The list is meant to be non-exhaustive as indicated by the term 'including'. The reference to 'other hazards' used in the present provision indicates that the obligation to prevent, reduce and control is not only limited to substances and energy, as indicated in the definition, but can also encompass other negative effects on the marine environment specifically caused by seabed activities (see *supra*, MN 11 *et seq.*).

Secondly, the present provision expressly includes the coastline into the scope of 'marine environment'. As mentioned before, the Convention does not define 'marine environment',[97] 27

[91] *Marcel Brus*, Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework (1995), 21; on the term 'self-contained regime' see: *Eckard Klein*, Self-Contained Regime, MPEPIL, available at: http://opil.ouplaw.com/.

[92] *Alex G. Oude Elferink/Erik Jaap Molenaar*, The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments (2010), 13.

[93] *Scovazzi* (note 44), 396. See *Czybulka* on Art. 194 MN 30 *et seq.*

[94] ISA, Written Statement to the Proceedings in ITLOS Case No. 17 (2010), para. 4.25, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/ISA_Written_Statement.pdf.

[95] See *Wacht* on Art. 209 MN 10 *et seq.*

[96] See *Tanaka* on Art 1 MN 12–15.

[97] See *supra*, MN 11.

and the definition introduced in the Regulations does not include a spatial delineation (see *supra*, MN 11 *et seq.*). Hence, it could be questioned whether the coastline is generally deemed to be part of the marine environment. However, the term marine environment must be interpreted holistically as including all ecological components of the marine world. This is supported by the definition of 'pollution' contained in Art. 1 (1)(4), which indicates a number of these components, such as living resources and marine life, human health and a number of human uses, and expressly includes estuaries.

28 Thirdly, interference with the ecological balance of the marine environment shall be prevented, reduced and controlled. Again, neither the Convention nor the norms laid down by the Authority specify the term 'ecological balance'. Apart from Art. 234 (dealing with ice-covered areas), it is not part of a rule of the Convention. A common definition for an 'ecological balance' refers to 'a state of dynamic equilibrium within a community of organisms in which genetic, species and ecosystem diversity remain relatively stable, subject to gradual changes through natural succession'.[98] Hence, the present provision can be interpreted as requiring the protection of the existing biodiversity in the Area.

29 Finally, Art. 145 (a) contains a list of activities that are deemed to be particularly hazardous and require 'particular attention' regarding the protection of the marine environment from their harmful effects. The Seabed Disputes Chamber confirmed that these activities were included in the notion of 'activities in the Area' as used in Part XI, and that the Authority should adopt rules, regulations and procedures in respect to these activities.[99] However, the Chamber's assessment is incomplete insofar as the words 'such activities as' clearly indicate that the list is non-exhaustive and the obligation of the Authority is hence not limited to the kinds of activities expressly mentioned.

30 **b) Protection and conservation of the Area's natural resources.** Art. 145 (b) requires the Authority to adopt regulations for, *inter alia*, 'the protection and preservation of the *natural resources* of the Area and the prevention of damage to the *flora and fauna of the marine environment*'.

31 The term 'natural resources' is neither generally defined nor is it consistently used throughout the Convention. While it always refers to 'the living organisms and certain nonliving matter in a given ocean area or space',[100] the spatial scope of the term varies throughout the Convention. With respect to the EEZ, Art. 56 (1) refers to living and non-living resources 'of the waters subjacent to the seabed and of the seabed and its subsoil', while Art. 77 (4), regarding sovereign rights on the Continental Shelf, limits the term to

> 'the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'[101]

Hence, in light of the definition of the term 'Area' in Art. 1 (1)(1), the term 'natural resources of the Area' in the present Art. 145 (b) needs to be construed as encompassing only natural resources of the sea-bed and ocean floor and subsoil thereof, but not of the water column.[102] The vertical scope is therefore similar to the one described in Art. 77 (4). Nevertheless, Art. 145 (b) lacks the limitation of the term 'living resources' to 'sedentary species' as contained in Art. 77 (4). The term 'natural resources of the Area' thus refers to all living organisms and mineral resources *in situ* in the Area, i. e. on or beneath the sea-bed. This narrow interpretation leaves no lacuna since other elements of Art. 145 require measures for the protection of the marine environment and its flora and fauna, which includes all vertical zones.

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[98] *Julian Dunster/Katherine Dunster*, Dictionary of Natural Resource Management (1996), 100.

[99] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 85.

[100] Natural resources, in: George K. Walker (ed.), Definitions for the Law of the Sea. Terms Not Defined by the 1982 Convention (2012), 254.

[101] See *Maggio* on Art 77 MN 24 *et seq.*

[102] Walker (note 100), 256.

Art. 145 (b) further requires measures to be taken for the prevention of damage to the flora and fauna of the marine environment. These terms are not used in other provisions of the Convention. The term 'flora' means the plant species found in one or more regions,[103] while 'fauna' equivalently refers to the animal community residing there.[104] Since the preservation of animals and plants living in the Area is already included in the broad definitions of the foregoing terms, it is questionable whether this notion is of particular legal relevance. In any event, commercial exploitation activities in the Area will have substantially destructive effect at least on a local scale where mining is conducted, and it is commonly accepted today that the flora and fauna located there will be heavily affected (albeit with different restoration chances and durations).[105] Notably, the Regulations issued by the Authority do not refer to the term 'flora and fauna'. 32

c) Additional provisions in Annex III and the 1994 Agreement complementing the Authority's authorization. The provisions contained in the present article are complemented by Annex III Art. 17. Art. 17 (1) lists the various matters that shall be covered by the Authority's rules, regulations and procedures. Art. 17 (2) stipulates 'objective criteria' that should be fully reflected by the rules, regulations and procedures established by the Authority. Art. 17 (2)(f), dealing with the criteria for the rules, regulations and procedures for the protection of the marine environment, clarifies and extends the scope established by Art. 145: Besides the actual activities at the seabed, regulations shall also cover 'shipboard processing immediately above a mine site' of minerals gathered there. Referring to this provision, the Seabed Disputes Chamber of ITLOS in its 2011 Advisory Opinion acknowledged that both kinds of activity 'are to be seen as part of the same kind of activities' and hence that shipboard processing, as long as it was directly linked to the extraction of minerals from the seabed, was included in the term 'activities in the Area' as referred to in the Convention (see *supra*, MN 9).[106] Annex III Art. 17(2)(f) further adds 'coring' to the list of specific operations that should be covered by the regulations, and specifies the term 'disposal of waste' used in Art. 145 (a) as encompassing 'disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents'. 33

The 1994 Implementation Agreement spells out Art. 145 in greater detail. Most importantly, S. 2 para. 7 adds the requirement that an application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed exploration activities and a description of a program for oceanographic and baseline environmental studies (see *infra*, MN 44). Secondly, S. 2 para. 5(g) adds the establishment of applicable standards for the protection and preservation of the marine environment to the list of priorities which the Authority should concentrate on until the adoption of the first plan of work for exploitation. 34

3. Relation to Part XII of the Convention

Art. 145 is closely linked to Part XII of the Convention which lays down the general principles for the protection of the marine environment. While most of the rules contained in Part XII are also applicable to the Area, a number of provisions specifically deal with activities conducted in the Area:[107] Since, according to the present Article, measures for the protection of the marine environment have to be taken 'in accordance with this Convention', these norms and their interplay are also relevant for the interpretation of Art. 145 (see *supra*, MN 23). 35

Art. 192 contains the general obligation of States to protect and preserve the marine environment. More specifically, Art. 194 (1) requires States to prevent, reduce and control 36

[103] *Dunster/Dunster* (note 98), 131.
[104] *Ibid.*, at 120.
[105] See *supra*, MN 15 *et seq.*
[106] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 88.
[107] Nordquist/Nandan/Rosenne (note 8), 145.8(c).

pollution of the marine environment 'from any source'. Art. 194 (3)(c) specifies this obligation with respect to seabed activities. In particular, States have to take measures to minimize pollution from installations and devices used for seabed activities, ensure safety of operations, and 'regulat[e] the design, construction, equipment, operation and manning of such installations or devices'.[108] Art. 194 (5) requires that measures for the preservation of fragile ecosystems and the habitat of endangered species be taken (see *supra*, MN 23).[109]

37 Art. 209 deals with pollution from activities in the Area. Art. 209 (1) repeats, in essence, the provision of the present Art. 145. By requiring that 'rules, regulations and procedures shall be in accordance with Part XI', the provision links Part XII with Part XI.[110] Notably, the second sentence of Art. 209 (1) lays down a requirement not contained in Art. 145, namely that 'such rules, regulations and procedures shall be re-examined from time to time as necessary' (see *supra*, MN 24). Art. 209 (2) has a different purpose. It obliges States to adopt laws and regulations within their own jurisdiction to prevent pollution of the marine environment from activities in the Area undertaken under their flag or under their authority. It needs to be recalled that during UNCLOS III it was discussed whether only States would be tasked with enacting the necessary legislation before the Authority was equipped with legislative competences (see *supra*, MN 6). Notably, Art. 209 (2) requires that laws and regulations by States 'shall be no less effective than the international rules, regulations and procedures' established pursuant to Part XI. The environmental rules set by the Authority are therefore minimum standards that bind the States Parties. Art. 209 is complemented by Art. 215 which provides that the enforcement of rules, regulations, and procedures established under Part XI shall be governed by that Part, which includes the special provisions for the settlement of disputes contained in Arts. 186 to 191.[111]

38 Finally, Art. 208 covers sea-bed activities subject to national jurisdiction, meaning activities in the territorial sea (see Art. 2–32) or in the EEZ (see Arts. 55–75).[112] States are required to adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities which shall be no less effective than international rules, standards and recommended practices and procedures. The obligation of States to enforce their laws and regulations in this respect is covered by Art. 214.[113]

4. Provisions on protection of the marine environment in the Regulations of the Authority

39 **a) Regulations on Prospecting and Exploration.** In accordance with the procedural provisions laid down in Arts. 160 (2)(f)(ii) and 162 (2)(o)(ii), the Authority adopted Regulations on the Prospecting and Exploration for Polymetallic Nodules in 2000.[114] Following a Russian demand pursuant to Art. 163,[115] the Authority later added Regulations on the Prospecting and Exploration for Polymetallic Sulphides in 2010[116] and for Cobalt-rich Ferromanganese Crusts in 2012.[117] While during the negotiations of the first set of Regulations on Nodules the provisions relating to the protection and preservation of the marine

[108] See *Czybulka* on Art. 194 MN 23 *et seq.*
[109] *Scovazzi* (note 44), 396.
[110] Nordquist/Rosenne/Yankov (note 17), 147 (MN 209.1).
[111] Nordquist/Rosenne/Yankov (note 17).
[112] See *Wacht* on Art. 208.
[113] See *König* on Art. 214.
[114] Nodules Regulations first adopted by the Assembly in 2000, amended in 2013, see note 33.
[115] On the historical background, see *Anju Pandey*, Exploration of Deep Seabed Polymetallic Sulphides: Scientific Rationale and Regulations of the International Seabed Authority, International Journal of Mining Science and Technology 23 (2013), 457, 460.
[116] Sulphides Regulations (note 33), adopted by the Assembly in 2010.
[117] Crusts Regulations (note 33), adopted by the Assembly in 2012.

environment were among the most controversial,[118] they now appear almost identically as Part V of each set of Regulations. Since Art. 153 (1) provides that activities in the Area shall be carried out in accordance with, *inter alia*, the rules, regulations and procedures of the Authority, the Regulations are legal instruments that bind all States Parties,[119] which according to Art. 139 (1) are also responsible for ensuring compliance of the private operators which they sponsor.[120]

aa) Application of a precautionary approach. The Regulations expressly require the 40
Authority, sponsoring States and contractors to apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration.[121] This principle, in essence, provides that lack of full scientific certainty shall not be used as a reason for not taking measures to protect the environment from threats of serious or irreversible damage.[122] In the view of the Seabed Disputes Chamber, the precautionary approach is applicable to all activities in the Area, even those outside the scope of the Regulations.[123] It further held that the Rio Declaration 'has initiated a trend towards making this approach part of customary international law',[124] while not stating that it already had customary status. The Chamber also remained silent on the scope and exact content of the precautionary approach, which are both still highly disputed questions.[125]

The precautionary approach is of practical relevance for activities in the Area, given that 41
knowledge about the environmental impacts of mining the deep seabed is still significantly fragmented (see *supra*, MN 15 *et seq.*). A rigorous application of the principle could render seabed activities impermissible as long as there is no full scientific certainty on the environmental threats of mining and how they need to be addressed. It remains to be seen whether such a strict interpretation of the precautionary principle will actually be sustained by the Authority. ITLOS gave hints how the precautionary approach could work in its Order of Provisional Measures in the Southern Bluefin Tuna Case: Without expressively referring to the precautionary approach, it applied its content by ordering measures to preserve fish stocks although it could not 'conclusively assess the scientific evidence' presented to it.[126]

bb) Application of best environmental practices. The Regulations further require the 42
Authority, sponsoring States and contractors to apply 'best environmental practices'.[127] However, they neither define this term nor provide criteria on how to assess what are the best environmental practices. The term is related to, but must not be confused with, other similar notions such as 'best available technology/technique' or 'best practicable means'.[128]

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[118] *Michael W. Lodge*, International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Journal of Energy & Natural Resources Law 20 (2002), 270, 287.

[119] See *Siegfried* on Art. 153 MN 5.

[120] See *Vöneky/Höfelmeier* on Art. 139 MN 10 *et seq.*

[121] Reg. 31 (2) and (5) Nodules Regulations; Reg. 33 (2) and (5) Sulphides and Crusts Regulations.

[122] Principle 15, UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), reads: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

[123] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 131.

[124] *Ibid.*, at para. 135.

[125] For general assessments, see *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 252–256; *Meinhard Schröder*, Precautionary Approach/Principle, MPEPIL, available at: http://opil.ouplaw.com/; *Antônio Augusto Cançado Trindade*, Principle 15, in: Jorge E. Viñuales (ed.), The Rio Declaration on Environment and Development. A Commentary (2015), 403.

[126] ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, 27 August 1999, ITLOS Reports (1999), 274 (para. 77); see also the Separate Opinion of Judge Tullio Treves, para. 8–11; for an assessment see: *Simon Marr*, The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources, EJIL 11 (2000), 815.

[127] Re. 31 (2) Nodules Regulations; Reg. 33 (2) Sulphides and Crusts Regulations.

[128] *Alexandre Charles Kiss/Dinah Shelton*, International Environmental Law (3rd edn. 2004), 227–228; *Elizabeth A. Kirk*, Science and the International Regulation of Marine Pollution, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of The Law of the Sea (2015), 516, 521–522.

Those terms have been part of international treaties protecting the (marine) environment since 1992.[129] For instance, the Convention for the Protection of the Marine Environment of the North-East Atlantic defines 'best environmental practice' as 'the application of the most appropriate combination of environmental control measures and strategies', followed by a catalogue of criteria.[130] In light of this definition, the Recommendations issued by the Legal and Technical Commission on, *inter alia*, environmental impact assessments (see *infra*, MN 47) may be regarded as describing best environmental practice.[131]

43 The notion of 'best environmental practices' was not included in the first version of the Nodules Regulations of 2000, which merely required each contractor to use the 'best technology available to it'.[132] It was, however, used in the Sulphides and Crusts Regulations of 2010. Discussing this discrepancy between the Nodules Regulations on the one hand and the Sulphides and Crusts Regulations on the other, the Seabed Disputes Chamber held in 2011 that 'best environmental practices' described a higher standard than 'best available technology'.[133] Going even further, the Chamber held that this change represented an abandonment of the privilege for developing countries contained in Principle 15 of the Rio Declaration, according to which States should apply the precautionary approach only 'according to their capabilities'.[134] This reference to different capabilities did not apply to the obligation to follow 'best environmental practices'.[135] After the Nodules Regulations were amended in 2013, all Regulations now uniformly require the application of 'best environmental practices'.[136]

44 **cc) Performance of environmental impact assessments.** While Art. 206 requires the performance of an Environmental Impact Assessment (EIA) for hazardous activities under the jurisdiction of States,[137] the Convention lacks such an explicit provision with regard to activities in the Area. This gap was filled by S. 2 para. 7 of the 1994 Implementation Agreement, which requires that an application for approval of a plan of work submitted to the Authority shall be accompanied by, firstly, an assessment of the potential environmental impacts of the proposed exploration activities and, secondly, a description of a program for oceanographic and baseline environmental studies. Since Art. 153 requires both States and private operators who want to engage in activities in the Area to apply for approval of a plan of work by the Authority,[138] the performance of an EIA is now generally required for activities in the Area.[139]

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[129] See, *inter alia*, OSPAR Convention: Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992), 2354 UNTS 67, Appendix 2, para. 6; Convention on the Protection of the Marine Environment of the Baltic Sea Area (09 April 1992), 1507 UNTS 167, Art. 3(3); Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (amended 07 March 1996) UNTC A-22281, Annex IV, para. 6.

[130] Appendix 2, para. 6 OSPAR Convention. This Convention also contains a definition of the term 'best available technology', meaning 'the latest stage of development (state of the art) of processes, of facilities or of methods of operation which indicate the practical suitability of a particular measure for limiting discharges, emissions and waste', Appendix 2, para. 2 OSPAR Convention; see *Ellen Hey/Ton IJlstra/André Nollkaemper*, 1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic: A Critical Analysis, IJMCL 8 (1993), 1, at 15–18.

[131] *Michael W. Lodge et al.*, Seabed Mining: International Seabed Authority Environmental Management Plan for the Clarion–Clipperton Zone. A Partnership Approach, Marine Policy 49 (2014), 66, 68.

[132] Reg. 31 (3) 2000 Nodules Regulations (note 49).

[133] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 136.

[134] *Ibid.*, para. 161.

[135] *Ibid.*

[136] Reg. 31 (2) Nodules Regulations (note 33).

[137] See *Blitza* on Art. 206.

[138] 1994 Implementation Agreement, Annex, S. 2, para. 4, clarifies that '[t]he obligations applicable to contractors shall apply to the Enterprise', which is equally required to conclude a contract with the Authority on the approval of a plan of work.

[139] This was confirmed by ITLOS in its 2011 Advisory Opinion, where it held that an EIA was included in the system of consultation and prior notifications set out in Art. 142, and hence even necessary for activities in the Area which are not covered by the Regulations, *cf. Responsibilities and Obligations of Sponsoring States* (note 29),

The Regulations adopted by the Authority give substance to these general obligations, following a three-step approach: Firstly, the Regulations require contractors and sponsoring States to cooperate with the Authority in the establishment and implementation of programs for monitoring and evaluating the impacts of deep seabed mining on the marine environment.[140] This includes the designation of 'impact reference zones' and 'preservation reference zones' which enable the comparison of changes in the biodiversity of the marine environment with and without seabed mining.[141] 45

In a second step, the content of these obligations is specified in the 'Standard clauses' contained in Annex IV to the Regulations, which are to be incorporated in the contracts on exploration concluded between the Authority and contractors.[142] These clauses require the contractor to submit an impact assessment of the potential effects on the marine environment before the start of the planned activities. The contractor is also required to gather environmental baseline data and to establish environmental baselines against which the effects of its activities can be assessed.[143] It further has to establish and carry out a program to monitor and report the environmental effects of its activities as they progress.[144] 46

Finally, in a third step, the requirements laid down in the Regulations and the Standard clauses are complemented by Recommendations on EIA issued by the Legal and Technical Commission of the Authority pursuant to Reg. 41 of the Sulphides and Crusts Regulations (Nodules Reg. 39).[145] While their title suggests that they were only issued 'for the guidance of contractors', the Regulations require that contractors take these recommendations into account when establishing environmental baselines.[146] While this does not establish a strict legal obligation, it at least requires operators to consider the recommendations and may require an operator that does not adhere to specific provisions to justify its deviation. The Recommendations contain lists of activities requiring an EIA[147] as well as a list of activities which are deemed to be non-hazardous and for which an EIA is not required.[148] Besides they lay down minimum requirements on the information that the contractor needs to provide.[149] Further requirements given in the Recommendations concern the baseline data to be collected (including data for physical and chemical oceanography, geology, sediment properties bioturbation, sedimentation; data sampling regarding biological communities shall use 'high-resolution bathymetric maps to plan the biological sampling strategy, taking into account variability in the environment').[150] Finally, the recommendations list which observations and measurements shall be made prior, during and after the performance of a specific activity.[151] The Recommendations on EIA are by far the most detailed legal instrument on environmental matters issued by the Authority. Because of this, it seems a major drawback that the Authority did not adopt them as clearly legally binding, but merely requires 47

paras. 148–150; see also *Alex G. Oude Elferink*, Environmental Impact Assessment in Areas beyond National Jurisdiction, IJMCL 27 (2012), 449–480; *Deqiang Ma/Qinhua Fang/Song Guan*, Current Legal Regime for Environmental Impact Assessment in Areas beyond National Jurisdiction and its Future Approaches, Environmental Impact Assessment Review 56 (2016), 23.

[140] Reg. 31 (6) Nodules Regulations; Reg. 33 (6) Sulphides/Crusts Regulations.

[141] *Ibid.*

[142] Re. 23 (1)(2) Nodules Regulations; Reg. 25 (1)(2) Sulphides/Crusts Regulations; on the requirement of private entities to conclude contracts with the Authority see *supra*, MN 21.

[143] S. 5.3Standard clauses for exploitation contract, Annex IV to the Nodules, Sulphides and Crusts Regulations,; see also Nodules Regulations, at 32 and Sulphides/Crusts Regulations, at 34.

[144] S. 5.4 Standard clauses.

[145] ISA Legal and Technical Commission, Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area, ISA Doc. ISBA/19/LTC/8 (2013); see *Lodge* (note 118), 288–289.

[146] Reg. 32 (1) Nodules Regulations; Reg. 34 (1) Sulphides/Crusts Regulations.

[147] ISA-LTC Recommendations on EIA (note 145), paras. 19–25.

[148] *Ibid.*, para. 18.

[149] *Ibid.*, para. 26–28.

[150] *Ibid.*, paras. 14–16.

[151] *Ibid.*, para. 29–33.

contractors to take them 'into account'. Also ITLOS avoided a clear statement on the legal status of the Recommendations, but merely held that they 'add precision and specificity to the obligation [to conduct an EIA] as it applies in the Area'.[152]

48 **dd) Emergency orders.** Pursuant to Art. 162 (2), the Council may issue emergency orders to prevent serious harm to the marine environment arising out of activities in the Area, which may include orders to suspend or adjust operations.[153] According to Annex III Art. 18 (3), such emergency orders may be executed without prejudice to the judicial remedies available to a contractor. The Regulations contain detailed procedures for such emergency orders. Besides requiring contractors to promptly inform the Secretary-General about environmental emergencies,[154] the Regulations empower the Secretary-General to take immediate measures of a temporary nature until the Council meets for taking appropriate decisions.[155] Prior to testing collection and processing systems, contractors are required to provide the Council with a guarantee of their financial and technical capability either to comply with emergency orders themselves, or to assure that the Council can take the necessary measures.[156]

49 **ee) Assessment.** Even though Part V of the Regulations can be seen as a significant advancement of Art. 145, it still leaves many *lacunae*. Most crucially, the regulations do not set any specific environmental standards. As mentioned before, deep seabed mining will necessarily cause substantial destructive effects on the environment, since the methods applied are akin to strip mining (see *supra*, MN 15 *et seq.*). The Regulations provide that whether there are 'significant adverse change in the marine environment' is to be 'determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices'.[157] However, none of the instruments issued by the Authority until today provide substantial guidance in this regard.[158]

50 **b) Environmental Management Plan for the Clarion-Clipperton Zone.** In 2012, the Council of the Authority adopted an Environmental Management Plan for the Clarion-Clipperton Zone.[159] This zone, which is located in the central Pacific, is deemed to be a prime location for commercially viable exploitation of polymetallic nodules.[160] Out of 27 exploration contracts concluded for the Area in total, 14 concern the exploration for nodules in the Clarion-Clipperton Zone.[161] The key feature of the Management Plan is the establishment of nine 'areas of particular interest' in which no exploration shall be authorized.[162] Apart from that, the Management Plan largely consists of a restatement of general and widely-accepted norms such as the precautionary approach, the need for a prior environmental impact assessment, availability of data etc., and does not establish new obligations for existing contractors.[163] In any event, the legal status of the plan is not clearly defined, since it does

[152] *Responsibilities and Obligations of Sponsoring States* (note 29), para. 149. On the Chamber's reasoning, see *Duncan French*, From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion, IJMCL 26 (2011), 525, 542–544.

[153] See *van Doorn* on Art. 162.

[154] Reg. 33 (1) Nodules Regulations; Reg. 35 (1) Sulphides/Crusts Regulations.

[155] Reg. 33 (3) Nodules Regulations; Reg. 35 (3) Sulphides/Crusts Regulations.

[156] Reg. 33 (8) Nodules Regulations; Reg. 35 (8) Sulphides/Crusts Regulations.

[157] Reg. 1 (3)(f) of the Nodules, Sulphides and Crusts Regulations.

[158] *Lodge* (note 118), 289, considers the criteria for determining whether an effect represents a significant adverse change in the marine environment to belong to 'the areas that will need to be elaborated further if they are to be made effective'.

[159] ISA, Environmental Management Plan for the Clarion-Clipperton Zone, ISA Doc. ISBA/17/LTC/7 (2011); ISA, Decision of the Council Relating to an Environmental Management Plan for the Clarion-Clipperton Zone, ISA Doc. ISBA/18/C/22 (2012).

[160] *Lodge et al.* (note 131), 66.

[161] See ISA, Deep Seabed Minerals Contractor: https://www.isa.org.jm/deep-seabed-minerals-contractors.

[162] ISA Decision of the Council (note 159), para. 6.

[163] *Aline Jaeckel*, Deep Seabed Mining and Adaptive Management: The Procedural Challenges for the International Seabed Authority, Marine Policy 70 (2016), 205, 208.

not fit into the existing system of regulations and recommendations. It is unclear how such plans could be used in the future management of exploitation.[164] This includes the implementation of flexibility mechanisms,[165] since the current legal regime does not provide for the amendment of conditions for exploitation after the conclusion of a contract.[166] One possible approach might be the use of emergency orders, which however were not exactly designed for the purpose of long-term flexible adoption of mining zones.[167]

c) Development of Regulations on Exploitation. So far, the Authority has only issued Regulations on Prospecting and Exploration of mineral resources, but not on Exploitation. However, the fact that the Authority has approved 27 exploration contracts since 2002 demonstrates a renewed interest in deep seabed mining.[168] The first six contracts will expire in 2016 and the affected contractors will have to decide whether they start mining (which appears unlikely) or apply to extend the exploration contract for another five years.[169] In light of the renewed interest in exploitation,[170] in particular of polymetallic nodules, and following a request by its Council,[171] the Authority is currently developing a provisional legal framework that shall ultimately lead to the adoption of a set of Regulations on exploitation at commercial scale.[172] In 2015, the Authority issued a report containing a 'Draft Framework on Exploitation Regulations', which was updated later in 2015 to reflect inputs from States Parties and stakeholders.[173] The suggested framework is similar to that under the current exploration regime, i. e. a uniform set of regulations for all types of mining and a standardized contract. 51

The prevention (or limitation) of harm to the marine environment caused by seabed mining remains a key challenge in the development of the Exploitation Regulations.[174] The Authority identified that a 'vast amount of work needs to be performed' in the Area of protection and preservation of the marine environment, which ranges from 52

> 'agreeing the thresholds of serious harm to the efficacy of [Preservation and Impact Reference Zones], developing workable environmental targets and indicators and the application of a precautionary-risk management framework.'[175]

This includes the adoption of an 'adaptive management approach', according to which mining operations would first be permitted on a small scale or for shorter periods of time.[176] Then, after the environmental effects are assessed and, if necessary, policies and environ-

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[164] *Ibid.*

[165] Environmental Management Plan for the Clarion-Clipperton Zone (note 159), para. 30–31.

[166] ISA, Proposal for the Designation of Certain Geographical Areas in the Clarion-Clipperton Fracture Zone: Note by the Secretariat, ISA Doc. ISBA/15/LTC/4 (2009).

[167] ISA, Addressing Serious Harm to the Marine Environment in the Regulations for the Exploitation of Mineral Resources in the Area. Submitted by the delegation of the Netherlands, ISA Doc. ISBA/21/C/13 (2015), para. 15.

[168] See note 161.

[169] *Ibid.*; see *Petersen et al.* (note 73), 10. According to Reg. 26 (2) Nodules Regulations and Reg. 28 (2) Sulphides/Crusts Regulations, extensions for the plan of work for explorations may be awarded for periods of not more than five years, 'if the contractor has been unable to complete the necessary preparatory work for proceeding to the exploitation stage or if the prevailing economic circumstances do not justify proceeding to the exploitation stage.' This also shows that the lack of a regulatory regime is not a reason justifying the postponement of exploitation.

[170] See *ibid.*

[171] ISA, Statement to the Council by the Delegation of Fiji, ISA Doc. ISBA/17/C/22 (2011).

[172] See *Allen L. Clark/Jennifer Cook Clark/Sam Pintz*, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area: ISA Technical Study: No. 11 (2013).

[173] ISA, Developing a Regulatory Framework for Deep Sea Mineral Exploitation in the Area: Draft Framework, High Level Issues and Action Plan, Version II (2015), available at: https://www.isa.org.jm/files/documents/EN/OffDocs/Rev_RegFramework_ActionPlan_14072015.pdf.

[174] *Erik van Doorn*, Environmental aspects of the Mining code: Preserving Humankind's Common Heritage while Opening Pardo's Box?, Marine Policy 70 (2016), 175.

[175] ISA Draft Framework (note 173), 30.

[176] *Ibid.*, 35.

mental measures are adapted to reflect the newly gained knowledge, mining would only then proceed at a larger scale.[177] However, whether this approach is adequate for deep seabed mining is doubtful for a number of reasons. First of all, the approach is not suitable for activities that require a long-term assessment of impacts,[178] which can potentially be caused by seabed disturbances (see *supra*, MN 17). Secondly, the current legal regime does not provide for the adjustment of environmental standards after an activity has been permitted, since the Authority can only set standards for new contractors.[179]

53 Finally, adaptive management conflicts with the precautionary approach, since cost-effective measures are postponed as long as there is no scientific certainty.[180] In addition, there is a tendency to increasingly accept the primary damage caused by seabed mining activities and resort to an obligation of restoration and compensation.[181] Some authors also fear that since the Authority has a (mostly financial) self-interest in exploitation, environmental concerns are at risk of being compromised over an early commencement of mining activities.[182] In any event, it remains to be seen whether the ultimate outcome of the process will be 'prescriptive regulations and detailed guidelines' with regard to the protection of the marine environment, as projected by the Authority.[183] In particular, the definition of thresholds of what constitutes (significant) harm that must be prevented should be pursued as a matter of urgency.

Article 146
Protection of human life

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.

Bibliography: *Aldo Chircop*, The International Maritime Organization, Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of The Law of the Sea (2015), 416–438; *Walter Kälin/Jörg Künzli*, The Law of International Human Rights Protection (2010); *Filippo Lorenzon*, Safety and Compliance, in Yvonne Baatz (ed.), Maritime Law (3rd edn. 2014), 339–367; *Thomas A. Mensah*, Maritime Safety Regulations, MPEPIL, available at: http://opil.ouplaw.com; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2003); *Niels Petersen*, Life, Right to, International Protection, MPEPIL, available at: http://opil.ouplaw.com; *S. Petersen/A. Krätschell/N. Augustin/J. Jamieson/J. R. Hein/M. D. Hannington*, News from the Seabed: Geological Characteristics and Resource Potential of Deep-sea Mineral Resources, Marine Policy 70 (2016), 175–187; *Nicola Wenzel*, Human Rights, Treaties, Extraterritorial Application and Effects, MPEPIL, available at: http://opil.ouplaw.com.

Documents: *Allen L. Clark/Jennifer Cook Clark/Sam Pintz*, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area: ISA Technical Study: No. 11 (2013); ISA, Developing a Regulatory Framework for Deep Sea Mineral Exploitation in the Area: Draft Framework, High Level Issues and Action Plan, Version II (2015), available at: https://www.isa.org.jm/files/documents/EN/OffDocs/Rev_RegFrame-

[177] *Ibid.*

[178] *Rosie Cooney/Andrew T. F. Lang*, Taking Uncertainty Seriously: Adaptive Governance and International Trade, EJIL 18 (2007), 523, 529.

[179] *Jaeckel* (note 163), 5.

[180] *Jacqueline Peel*, The Precautionary Principle in Practice: Environmental Decision-making and Scientific Uncertainty (2005), 154; *Jaeckel* (note 161), 1.

[181] ISA Addressing Serious Harm (note 167), Annex, paras. 7–10; ISA Statement to the Council (note 171), 35.

[182] *Jason C. Nelson*, The Contemporary Seabed Mining Regime: A Critical Analysis of the Mining Regulations Promulgated by the International Seabed Authority, Colorado J.Int'l Envtl.L.& Pol'y 16 (2005), 27, 45; see already *J. Daniel Nyhart*, The Interplay of Law and Technology in Deep Seabed Mining Issues, Va.J.Int'l L. 15 (1975), 827, 859.

[183] ISA Draft Framework (note 173), 30.

work_ActionPlan_14072015.pdf.; ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex (amended 24 July 2014 ISBA/20/A/9)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

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I. Purpose and Function

The purpose of Art. 146 is to ensure the effective protection of human life with respect to activities in the Area. This is in coherence with international human rights law, where the right to life is considered to be 'the most fundamental guarantee', because it is the precondition for the exercise of any other right.[1] According to their human rights obligations, States must not only not infringe the right to life of individuals, but they also bear a positive obligation to actively protect human life from third party violations;[2] this means, *inter alia*, that States have to require employers to ensure safe and healthy working conditions for their employees.[3] However, whether international human rights apply extraterritorially is still a disputed topic,[4] in particular with regard to positive obligations of States.[5] An even more specific question is whether international human rights can apply to activities in areas beyond the limits of national jurisdiction. In order to avoid disputes and *lacunae* in the protection of human life due to the special legal status of the Area as 'common heritage of mankind'[6] under international administration, Art. 146 expressly establishes the duty to protect human life with respect to activities in the Area. **1**

The systematic approach taken in the present provision resembles that of Art. 145: Similar to that provision, the first sentence of the present article stipulates a general requirement that 'necessary measures shall be taken' without expressly stating who bears that obligation. The second sentence provides that the Authority shall adopt rules, regulations and procedures to **2**

[1] *Niels Petersen*, Life, Right to, International Protection, MPEPIL, para. 1, available at: http://opil.ouplaw.com.

[2] *Walter Kälin/Jörg Künzli*, The Law of International Human Rights Protection (2010), 291–298; see Art. 2 (1) of the International Covenant on Civil and Political Rights; Art. 1 of the European Convention on Human Rights; and Art. 1 (1) of the American Convention on Human Rights.

[3] International Labour Organization, Convention (C155) concerning Occupational Safety and Health and the Working Environment (22 June 1981, effective 11 August 1983), Art. 16(1) reads: 'Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.'; see also Art. 7 (b) of the International Covenant on Economic, Social and Cultural Rights.

[4] There is a tendency to hold a State bound to human rights obligations when it exercises jurisdiction, irrespective whether on or off its own territory; for a general account and references to relevant cases and further scholarship, see *Kälin/Künzli* (note 2), 129–142; *Nicola Wenzel*, Human Rights, Treaties, Extraterritorial Application and Effects, MPEPIL, available at: http://opil.ouplaw.com.

[5] *Wenzel* (note 4), para. 22.

[6] See *Vöneky/Höfelmeier* on Art. 136.

this end. This legislative competence is repeated in Annex III Art. 17 (1)(b), which requires the Authority to 'adopt and uniformly apply rules, regulations and procedures' for, *inter alia*, 'mining standards and practices, including those relating to operational safety […].'

3 Due to its rather broad wording, Art. 146 encompasses a wide array of measures, ranging from technical precautions in the design and operation of vessels and installations and training of personnel to the observance of safe working practices in seabed mining.[7] However, since the Authority may only 'supplement existing international law as embodied in relevant treaties', its competence may be limited by a test of necessity (see *infra*, MN 12).

II. Historical Background

4 The need to take measures for the protection of human life in the context of activities in the Area was recognized early in the negotiations of Part XI of the Convention. Already in 1969, the Seabed Committee's Economic and Technical Sub-Committee received a proposal to complement existing international conventions

> 'so as to take into account problems relating to: (i) the safety of construction, equipment and operation of drilling rigs, production platforms, submersibles, and other devices used for the exploitation and transportation of sea-bed resources; (ii) the safety of the people working on them; […]'.[8]

At the same time there was no objection to the adoption of 'safety measures concerning activities in the area' in the Legal Sub-Committee.[9]

5 In the following year, a study of the UN Secretary-General on possible designs of the envisaged 'international machinery' (which should later become the International Seabed Authority, and is now referred to by the Convention as 'the Authority') raised the idea of giving that machinery regulatory powers concerning the protection of human life. The report assumed that the traditional principle of giving priority to distress signals would also be applied following an accident related to seabed activities.[10] At the same time, since safety would 'chiefly be secured' by technical means, there was 'considerable scope for the performance of a variety of functions by the machinery in this connection'.[11] The report also noted that there already was 'a considerable body of material which would need to be examined by the prospective machinery before appropriate recommendations and regulations were adopted, designed to ensure the safety of persons engaged in sea-bed operations'.[12]

6 While the general need to take additional legislative measures for the protection of human life was soon undisputed, views differed on who would be responsible for adopting appropriate rules as well as the procedure in which such rules would be adopted and amended.[13] However, as the development of the legal framework of the Authority progressed, the adoption of measures for the protection of human life was fitted into the regulatory powers that were given to the Authority. As most of the other articles of the second section of Part XI ("Principles Governing the Area"), the essence of Art. 146 was accepted early in the

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[7] SG, Study on International Machinery: A/AC.138/23, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. 2, UN Doc A/8071 (1970), 61 (para. 129).

[8] Seabed Committee, Report of the Economic and Technical Sub-Committee, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 24 GAOR Supp. 22 (A/7622) (1969), 43–80 (para. 97).

[9] *Ibid.*, 9–42 (para. 96).

[10] SG Study (note 7), para. 130.

[11] *Ibid.*

[12] *Ibid.*, para. 131, quoting a number of instruments relevant at that time.

[13] For a detailed account of the drafting history, see Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 200–205 (MN 146.2–146.6).

negotiations at UNCLOS III[14] and was not substantially changed between 1976 and the final adoption of the Convention in 1982.[15]

Art. 146 also did not belong to the provisions of Part XI that gave rise to the controversies on the feasibility of the international seabed regime that upheld the entire Convention's entry into force for several years.[16] Hence, Art. 146 is one of the few provisions of Part XI that were neither modified nor supplemented by the 1994 Agreement on Implementation.[17] 7

After the adoption of the Convention, UNCLOS III established the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, and entrusted Special Commission 3 of that Commission with, inter alia, developing draft regulations on prospecting, exploration and exploitation.[18] The Special Committee discussed rather elaborate standards on labor, health and safety with respect to activities in the Area.[19] A working paper tabled by the Secretariat laid down detailed provisions on, inter alia, adequate protection of workers employed in such activities, safe design and operation of installations, preparation of safety contingency plans and reporting mechanisms.[20] The discussion of that paper in Special Commission 3 was controversial.[21] A number of delegations deemed existing conventions adopted by the International Maritime Organization (IMO) and the International Labour Organization (ILO) adequate to cover activities in the Area and questioned the need to 'duplicate the provisions of those conventions in the seabed mining code'.[22] Other delegations pointed to the unique character of seabed mining which would require new standards, since 'current ones would not be appropriate in all cases'.[23] In the Regulations that were ultimately adopted by the Authority preference was given to a short and general provision instead of the detailed set of rules which was originally proposed (see *infra*, MN 17 *et seq.*). 8

III. Elements

1. Protection of human life

The first sentence of Art. 146 requires that 'necessary measures' have to be taken in order to 'ensure effective protection of human life' with respect to activities in the Area. Similar to a number of other articles contained in the present Section 2 on 'Principles Governing the Area',[24] the exact addressee is not specified on account of the passive language. It can be 9

[14] Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2003), 64 (MN INTRO.38).

[15] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125 (Art. 13).

[16] See generally Nordquist/Nandan/Rosenne (note 14), MN 35–37.

[17] GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. of 28 July 1994.

[18] UNCLOS III, Final Act of the Third United Nations Conference on the Law of the Sea, UN Doc. A/CONF./121 (1982), OR XVII, 139, 145 (Resolution I Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, para. 5 (g)); Nordquist/Nandan/Rosenne (note 14), MN 32–34.

[19] Preparatory Commission for ISA and ITLOS, Draft Regulations on Prospecting, Exploration and Exploitation of Polymetallic Nodules in the Area, Addendum: Labour, Health and Safety Standards: Working Paper by the Secretariat. UN Doc. LOS/PCN/SCN.3/WP.6/Add.8 (1992), reproduced in: Renate Platzöder (ed.), The Law of the Sea: Documents 1983–1992, vol. XV (1993), 161.

[20] *Ibid.*

[21] For a summary, see Preparatory Commission for ISA and ITLOS, Special Commission 3, Draft Final Report, UN Doc. LOS/PCN/SCN.3/1992/CRP.17 (1992), reproduced in Platzöder (note 19), 201, 211–212 (para. 61–66); for a more detailed account, see Preparatory Commission for ISA and ITLOS, Statement to the Plenary by the Chairman of Special Commission 3 on the Progress of Work in that Commission, UN Doc. LOS/PCN/L.99 (1992), reproduced in: Renate Platzöder (ed.), The Law of the Sea: Documents 1983–1992, vol. XIV (1993), 81, 82–86 (paras. 8–38).

[22] Preparatory Commission for ISA and ITLOS Special Commission 3 (note 21), para. 62.

[23] *Ibid.*, at para. 63.

[24] See Arts. 140, 141, 145, 147, 148 and 149.

assumed that the first sentence is intended to establish a general requirement, aimed to apply to all relevant actors that can be bound by the Convention. These are, beside the Authority, primarily the States parties.

10 The reference 'with respect to activities in the Area' indicates that the provision shall only apply in the context of such activities, as defined by Art. 1 (1)(3). This excludes a number of undertakings related to, but not constituting, activities in the Area, such as preparations on land and on the way to the mining sites, as well as transportation of recovered minerals to a point on land.[25] Hence, the article primarily protects workers immediately involved in seabed activities, i. e. onboard vessels or installations operating seabed vehicles or involved in the transportation of materials to the water surface, as well as workers conducting underwater operations. In this regard, the actual scope of the article may be wider than its wording implies. Art. 146 generally requires measures involving operational safety that serve the protection of human life. This includes an obligation to also prevent accidents of any kind, whether they have lethal effects or not. On the other hand, it cannot be assumed that Art. 146 also aims for the protection of human beings not related to seabed activities. In particular, the protection from certain long-term and/or long-distance environmental effects caused by seabed activities, which could have harmful effects on the life and health of human beings, is already governed by Art. 145.[26]

2. Authorization of the Authority for the adoption of rules

11 After the first sentence sets up the general obligation to take measures for the protection of human life, the subsequent sentence obligates the Authority to adopt rules, regulations and procedures to this end. The law-making power in this respect is part of a general legislative system that shall be established by the Authority pursuant to Annex III Art. 17 of the Convention.[27] Since Art. 153 (1) provides that activities in the Area shall be carried out in accordance with, inter alia, the rules, regulations and procedures of the Authority, these instruments are binding for all States Parties,[28] which according to Art. 139 (1) are also responsible for ensuring compliance of the private operators that they sponsor.[29]

12 **a) Test of necessity for additional rules.** Art. 146 only empowers the Authority to adopt rules, regulations and procedures on the protection of human life 'to supplement existing international law as embodied in relevant treaties'. This includes a test of necessity, according to which the Authority may only adopt rules and regulations if there is a specific need to supplement existing international law, i. e. to fill regulatory gaps. This requires first of all an analysis of the rules already in place.[30] Additionally, the question whether there is a need to 'supplement' also demands an assessment of the threats to human life posed by activities in the Area that will ultimately have to be addressed by new measures. For that reason, it is doubtful whether one can assume that the need to supplement existing law 'appears most unlikely'.[31]

13 **b) Existing international instruments for the protection of human life and their relevance for activities in the Area.** Besides Art. 146, a number of other provisions in the Convention deal with the safety at sea and the protection of human life. Most importantly,

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[25] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 96, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[26] See *Vöneky/Beck* on Art. 145 MN 11–14.

[27] Procedural provisions on the adoption of rules, regulations and procedures are provided by Arts. 160 (2)(f)(ii) and 162 (2)(o)(ii) UNCLOS, as well as in Art. 17 of Annex III.

[28] See *Siegfried* on Art 153 MN 5.

[29] See *Vöneky/Höfelmeier* on Art. 139 MN 10 *et seq.*

[30] Nordquist/Rosenne/Yankov (note 13), MN 146.7(a). This was acknowledged early in the negotiations of the present article, see SG Study (note 7), para. 131.

[31] *Cf.* Nordquist/Rosenne/Yankov (note 13), MN 146.7(a).

Art. 94 (4)(c) requires States to ensure that masters and crews of ships flying their flag comply with applicable international regulations on, inter alia, the safety of life at sea and the prevention of collisions.[32] According to Art. 98, States shall require the masters of ships flying their flag to render assistance to persons or ships in distress or in danger of being lost.[33] Other provisions relating to the protection of human life at sea can be found in Arts. 39 (2), 242 and 262.[34]

14 Regulations for maritime safety are mostly administered by the IMO. Most of the regulations focus on shipping activities. The most prominent instrument in this respect is the 1974 International Convention for the Safety of Life at Sea.[35] Its annex contains very comprehensive requirements on the construction, equipment and operation of ships, including on carriage of cargoes and dangerous goods, communications and safety of navigation. States are under an obligation to ensure the compliance of ships flying their flag with the regulations.[36] Its Chapter IX incorporates the 1994 International Management Code for the Safe Operation of Ships and for Pollution Prevention, which requires the establishment of Safety Management Systems to achieve the protection of both humans on board and the marine environment from hazards arising out of the operation of the ship.[37] All provisions contained in the Annex are updated regularly to incorporate new technological developments and challenges (on the procedure for amendments, see Art. VIII SOLAS Convention).[38] Other instruments developed under the auspices of the IMO include the 1972 International Convention for the Prevention of Collisions at Sea,[39] the 1966 International Convention on Load Lines,[40] the 1978 International Convention on Standards of Training, Certification and Watchkeeping of Seafarers,[41] and the 1979 Convention on Maritime Search and Rescue.[42] These international treaties are complemented by numerous codes and recommendations issued by the IMO which deal with technical and operational requirements in even greater detail.[43]

15 The International Labour Organization (ILO) has also developed regulations with relevance for maritime safety and the protection of human life. The 2006 Maritime Labour Convention, which aims to establish a comprehensive instrument on the rights and protection of seafarers,[44] contains provisions for their occupational health and safety, including the prevention of accidents.[45] The Convention shall apply to all seafarers,[46] who are defined as 'any person who is employed or engaged or works in any capacity on board a ship'[47] which is 'engaged in commercial activities' other than fishing.[48] This raises the question whether exploitation activities at the deep seabed are deemed to be commercial even if commercial exploitation is not (yet) in sight.

16 To a certain degree seabed activities will involve traditional maritime undertakings that are covered by other instruments, such as shipping of materials to the mining site and of

[32] See *Guilfoyle* on Art. 94 MN 10.
[33] See *Guilfoyle* on Art. 98.
[34] Nordquist/Rosenne/Yankov (note 13), MN 146.7(b).
[35] International Convention for the Safety of Life at Sea, as amended (01 November 1974, effective 25 May 1980; last amended on 20 May 2011, effective 01 January 2013), 1184 UNTC 3.
[36] *Thomas A. Mensah*, Maritime Safety Regulations, MPEPIL, para. 10, available at: http://opil.ouplaw.com.
[37] *Filippo Lorenzon*, Safety and Compliance, in Yvonne Baatz (ed.), Maritime Law (3 d edn. 2014), 339, 341.
[38] See *Aldo Chircop*, The International Maritime Organization, Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of The Law of the Sea (2015), 416, 429–432.
[39] 20 October 1972, entered into force 15 July 1977, 1050 UNTS 17.
[40] 5 April 1966, entered into force 21 July 1968, 640 UNTS 133.
[41] 07 July 1978, entered into force 28 April 1984, 1361 UNTS 190; see *Lorenzon* (note 37), at 352.
[42] 27 April 1979, entered into force 22 June 1985, 1405 UNTS 97.
[43] For an overview, see *Mensah* (note 36).
[44] ILO, Maritime Labour Convention (23 February 2006, effective 20 August 2013), Preambular paras. 2, 3, 5, 6.
[45] Regulation 4.3; see *Lorenzon* (note 37), 359.
[46] Art. 1 (2) Maritime Labour Convention.
[47] Art. 2 (1)(f) Maritime Labour Convention.
[48] Art. 2 (4) Maritime Labour Convention.

minerals to a point on land.[49] However, none of the aforementioned instruments contain specific provisions regarding activities at the deep seabed, such as the recovery of minerals from the seabed and their lifting to the water surface, evacuation of water from the minerals and preliminary separation and disposal of materials of no commercial interest.[50] All of these activities involve unique technological challenges and specific dangers to human life and safety. While plans for exploitation evolve further, it will have to be assessed whether the existing instruments are sufficient for addressing the protection of human life.

3. Regulations issued by the Authority regarding the protection of human life

17 In accordance with the procedural provisions laid down in Arts. 160 (2)(f)(ii) and 162 (2)(o)(ii) UNCLOS, the Authority adopted Regulations on the Prospecting and Exploration for Polymetallic Nodules in 2000,[51] for Polymetallic Sulphides in 2010,[52] and for Cobalt-rich Ferromanganese Crusts in 2012.[53] These Regulations contain only few provisions with regard to the protection of human life.

18 Under the system of exploration and exploitation established by Art. 153 and Annex III of the Convention, both States Parties and private entities who want to engage in such activities need to apply to the Authority for approval of a plan of work; such approvals take the form of a contract concluded between the Authority and the entity or State. When assessing the application, the Legal and Technical Commission has to scrutinize whether, inter alia, the proposed plan of work provides for 'effective protection of human health and safety'.[54]

19 The 'Standard clauses for exploration contract [sic]', which are contained in Annex III of each of the Regulations and shall become part of every contract, require the contractor to

> 'comply with the generally accepted international rules and standards established by competent international organizations or general diplomatic conferences concerning the safety of life at sea, and the prevention of collisions and such rules, regulations and procedures as may be adopted by the Authority relating to safety at sea.'[55]

By directly imposing an obligation on private operators, this clause complements Art. 139 which requires States Parties to ensure compliance of private operators sponsored by them with the seabed regime.[56] However, since the Authority has not adopted any rules, regulations or procedures to date that expressly relate to safety at sea (and development of a separate instrument cannot be expected in the closer future), only the reference to rules and standards by other international organizations (see *supra*, MN 13 *et seq.*) is of practical relevance up to now.

20 In the light of a renewed interest in exploitation of seabed minerals,[57] the Authority is currently developing a legal framework for the exploitation at commercial scale.[58] The Draft

[49] *Responsibilities and Obligations of Sponsoring States* (note 24), para. 96.

[50] *Ibid.*, paras. 94–95.

[51] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex (amended 24 July 2014 ISBA/20/A/9).

[52] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex.

[53] ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex.

[54] Reg. 23 (4)(a) Sulphides Regulations; Reg. 23 (4)(a) Crusts Regulations; Reg. 24 (4)(a) Nodules Regulations.

[55] S. 15.1 'Standard clauses for exploitation contract', Annex IV to the Nodules, Sulphides and Crusts Regulations.

[56] See *Vöneky/Höfelmeier* on Art. 139 MN 10 *et seq. Cf. Responsibilities and Obligations of Sponsoring States* (note 24), paras. 103–106, where the Tribunal held that the reference to Part XI in Art. 139 included 'the rules, regulations and procedures of the Authority and the contracts (or plans of work) for exploration and exploitation, which are based on Part XI and the relevant Annexes thereto'.

[57] See *S. Petersen et al.*, News from the Seabed: Geological Characteristics and Resource Potential of Deep-sea Mineral Resources, Marine Policy 70 (2016), 175.

[58] See *Allen L. Clark/Jennifer Cook Clark/Sam Pintz*, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area: ISA Technical Study: No. 11 (2013).

Framework on Exploitation Regulations issued by the Authority indicates the need to 'specify the additional measures that supplement existing international agreements'.[59] It further identifies the need to 'establish what supplementary duties and obligations the Authority has as a regulator in connection with health and safety' and in this regard requests the determination of additional standards specifically for deep seabed mining.[60]

In conclusion, Art. 146 seems to only have gained little practical relevance up until today: The obligation of States to protect human life at sea is already stipulated elsewhere (see *supra*, MN 1 and 13) and the Authority's regulatory powers on this matter are limited to the supplementation of already existing international law. Nevertheless, the Authority is the only institution with powers to enact regulations specifically for activities in the Area. When developing regulations for exploitation at commercial scale, the Authority should carefully assess whether the existing regime leaves regulatory gaps with a view to the specific challenges posed by seabed activities. It should then use the capacity granted to it by Art. 146 to enact effective additional rules that protect the life of humans involved in these activities which substantially supplement the already existing rules. 21

Article 147
Accommodation of activities in the Area and in the marine environment

1. Activities in the Area shall be carried out with reasonable regard for other activities in the marine environment.

2. Installations used for carrying out activities in the Area shall be subject to the following conditions:

(a) **such installations shall be erected, emplaced and removed solely in accordance with this Part and subject to the rules, regulations and procedures of the Authority. Due notice must be given of the erection, emplacement and removal of such installations, and permanent means for giving warning of their presence must be maintained;**

(b) **such installations may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity;**

(c) **safety zones shall be established around such installations with appropriate markings to ensure the safety of both navigation and the installations. The configuration and location of such safety zones shall not be such as to form a belt impeding the lawful access of shipping to particular maritime zones or navigation along international sea lanes;**

(d) **such installations shall be used exclusively for peaceful purposes;**

(e) **such installations do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.**

3. Other activities in the marine environment shall be conducted with reasonable regard for activities in the Area.

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[59] ISA, Developing a Regulatory Framework for Deep Sea Mineral Exploitation in the Area: Draft Framework, High Level Issues and Action Plan, Version II (2015), 28, available at: https://www.isa.org.jm/files/documents/EN/OffDocs/Rev_RegFramework_ActionPlan_14072015.pdf.

[60] *Ibid.*

(1995); *Olivier Corten*, Reasonableness in International Law, MPEPIL, available at: http://opil.ouplaw.com; *Alex G. Oude Elferink*, Artificial Islands, Installations and Structures, MPEPIL, available at: http://opil.ouplaw.com; *Alex G. Oude Elferink/Erik Jaap Molenaar*, The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments (2010); *Cordula Fitzpatrick*, Künstliche Inseln und Anlagen auf See: Der völkerrechtliche Rahmen für die Errichtung und den Betrieb künstlicher Inseln und Anlagen (1998); *Salah E. Honein*, The International Law Relating to Offshore Installations and Artificial Islands: An Industry Report (1991); *Myres S. McDougal*, The Hydrogen Bomb Tests and the International Law of the Sea, AJIL 49 (1955), 356–361; *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015); Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2003); *Donald R. Rothwell*, Sea Lanes, MPEPIL, available at: http://opil.ouplaw.com; *Alfred H. A. Soons*, Artificial Islands and Installations in International Law (1974); George K. Walker (ed.), Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention (2012); *Budislav Vukas*, The Law Of The Sea: Selected Writings (2004)

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749(XXV) of 17 December 1970; IHB, Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982: Appendix 1 – Glossary (2006); ILC, Memorandum on the Regime of the High Seas: Prepared by the Secretariat, UN Doc. A/CN.4/32 (1950); ILC, Regime of the High Seas and Regime of the Territorial Sea: Report by J. P. A. François, Special Rapporteur, UN Doc. A/CN.4/97 (1950); IMO, General Provisions on Ships' Routeing, IMO Res. A572(14) of 20 November 1985; IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.8 (2014); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex (amended 24 July 2014 ISBA/20/A/9)

Cases: ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion of 20 December 1980, ICJ Reports (1980), 73; ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175; ICJ, *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 3; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf; ITLOS, *The 'Camouco' Case* (Panama *v.* France), Judgment of 7 February 2000, ITLOS Reports (2000), 10; ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86; ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Prompt Release, Judgment of 23 December 2002, ITLOS Reports (2002), 10

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I. Purpose and Function

The general purpose of Art. 147 is to accommodate the coexistence of 'activities in the Area'[1] and other activities in the marine environment. To this end Art. 147 (1) and (3) require that activities in the Area are carried out with 'reasonable regard' for other activities in the marine environment, and vice versa. Art. 147 (2) deals with a specific subject-matter related to activities in the Area, namely '[i]nstallations used for carrying out activities in the Area'. This paragraph contains detailed requirements on the establishment and use of such installations. However, the normative scope of Art. 147 (1) and (2) is not limited to the subject-matter of installations, but applies to activities in the Area as a whole. **1**

II. Historical Background

When the International Law Commission began its work on the codification and progressive development of the law relating to the high seas in 1949, it soon acknowledged that there was a 'common interest of all States in the proper and rational use of the high seas' which should be the guiding principle for the development of maritime law.[2] In this context, the idea to limit the freedom of the high seas by a prohibition not 'to utilize the high seas in a manner which unreasonably prevents other States from enjoying that freedom' sparked early.[3] In the 1958 Convention on the High Seas,[4] a positive formulation was introduced. According to Art. 2 of that Convention, the freedom of the high seas 'shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas'.[5] This principle found practical application by the International Court of Justice (ICJ) in its *Fisheries Jurisdiction* judgments against Iceland.[6] In the present 1982 Convention, the same obligation appears slightly modified in Art. 87 (2).[7] However, the term 'reasonable regard' was replaced by 'due regard' after an intermediate draft spoke of 'due consideration'.[8] Notably, Art. 87 (2) includes an obligation that the freedom of the high seas 'shall be exercised by all States […] also with due regard for the rights under this Convention with respect to activities in the Area', which corresponds with Art. 147 (3) (see *infra*, MN 34).[9] **2**

It was already recognized in the 1970 Declaration of Principles that 'States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities'.[10] While the rights and **3**

[1] This term is defined by Art. 1 (1)(3), on its meaning and scope see also: *infra*, MN 10; and *Vöneky/Beck* on Art. 145 MN 8–10.

[2] ILC, Memorandum on the Regime of the High Seas: Prepared by the Secretariat, UN Doc. A/CN.4/32 (1950), 10; see *David Anderson*, The Principle of Reasonableness in the Law of the Sea, in: Holger P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 657, 657–658.

[3] ILC, Regime of the High Seas and Regime of the Territorial Sea: Report by J. P. A. François, Special Rapporteur, UN Doc. A/CN.4/97 (1950), para. 56; see *Myres S. McDougal*, The Hydrogen Bomb Tests and the International Law of the Sea, AJIL 49 (1955), 356, 361.

[4] 29 April 1958, effective 30 September 1962, 450 UNTS 82.

[5] For details of the historical emergence of the principle of reasonableness in the law of the sea, see *Anderson* (note 2), 657–663.

[6] ICJ, *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 3, paras. 67–72; ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175, paras. 59–64.

[7] See *Guilfoyle* on Art. 87 MN 8. See also Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995), 72 *et seq.*

[8] *Ibid.*, at para. 87.8 and n. 32.

[9] See *Guilfoyle* on Art. 87 MN 8.

[10] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749(XXV) of 17 December 1970, para. 12. A different analysis is made in: Myron Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of

interests of coastal States were later split off and are now governed by Art. 142,[11] the reference of the Declaration 'to all other States which may be affected' shows that the reconciliation of activities in the Area with other interests and activities was on the agenda early in the negotiations. However, during the negotiations at UNCLOS III, it was disputed what normative approach should be followed:[12] While some delegations proposed to include an obligation to avoid 'substantial' or 'unjustifiable' interference,[13] different proposals advocated for more positive language, namely that activities in the Area should be carried out with 'reasonable regard' for other activities.[14] The latter wording was agreed upon at the Third Session of UNCLOS III in 1975.[15]

4 The idea of adding a corresponding obligation that other activities in the marine environment should be carried out with reasonable regard for activities in the Area (para. 3) was first tabled by the Soviet Union in 1970.[16] The proposal did not face substantial disagreement and was subsequently included into the Convention as para. 3 of Art. 147, while its wording was aligned to that of the provision applying to activities in the Area contained in para. 1.[17]

5 Neither the 1958 Convention on the High Seas nor the 1970 Declaration of Principles included any explicit provision regarding installations used for carrying out activities in the high seas (and their seabed, which is now called 'the Area'). Hence, the erection of installations was deemed to be included in the freedom of the high seas as codified in Art. 2 of the Convention on the High Seas and therefore permissible as long as such installations would not unreasonably interfere with other legitimate uses of the high seas.[18]

6 The idea to establish criteria for installations used for carrying out activities in the Area was included the Soviet Union's draft articles of 1970, which contained detailed provisions covering many of the aspects that are now included in Art. 147 (2).[19] After the accommodation of activities and the question of installations were first dealt with separately,[20] the provisions dealing with both issues were merged into a single article in 1975.[21] This draft already included para. 2 with its five sub-items specifying conditions for installations. In general, the overarching structure of Art. 147 was maintained until the final adoption of the Convention, while its wording was revised mostly to harmonize it with other provisions of the Convention: Important changes concerned the chapeau of para. 2, which was aligned to other provision in the Convention referring to 'installations'; para. 2(b), from which the limitation to installations 'in the Area' was removed; and para. 2(e), which was adapted to reflect the terminology used in Art. 60 and 259 regarding the legal status of installations.[22]

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the Sea 1982: A Commentary, vol. VI (2003) 206, para. 147.2, where it is assumed that the Declaration 'did not include any statement relating to the accommodation of activities in the Area' and that Art. 147 is a result of discussions in Sub-Committee 1 of the Sea-Bed Committee. While this might be true on a word-by-word approach, the general need to avoid conflicts between seabed activities and traditional activities was already acknowledged by the Declaration.

[11] See *Vöneky/Höfelmeier* on Art. 142.

[12] For a detailed account of the drafting history, see Nordquist/Nandan/Rosenne (note 10), MN 147.2–147.8.

[13] Sea-Bed Committtee, United States Draft United Nations Convention on the International Sea-Bed Area, UN Doc. A/AC.138/25 (1970), Art. 8; Sea-Bed Committee, Tanzania: Draft Statute for an International Sea-bed Authority, UN Doc. A/AC.138/33 (1971), Art. 11; and Sea-Bed Committee, Malta: Draft Ocean Space Treaty, UN Doc. A/AC.138/53 (1971), Art. 72.

[14] Sea-Bed Committee, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work: Annex I (Report of Sub-Committee I), Appendix III, UN Doc. A/AC.138/94/Add.1 (1973), Art. 17.

[15] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137 (Art. 16).

[16] Sea-Bed Committee, USSR: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), Art. 12 (5).

[17] *Cf.* SBC Texts on Items 1 and 2 (note 14), Art. 17; ISNT (note 15), Art. 16.

[18] *Alfred H. A. Soons*, Artificial Islands and Installations in International Law (1974), 7–13.

[19] USSR Provisional Drafts (note 16), Art. 10.

[20] Nordquist/Nandan/Rosenne (note 10), MN 147.3; *cf.* SBC Texts on Items 1 and 2 (note 14), Art. 17, XXVI.

[21] ISNT (note 15), Art. 16.

[22] For details, Nordquist/Nandan/Rosenne (note 10), MN 147.5–147.8.

Art. 147 did not belong to the provisions of Part XI that gave rise to the controversies on the feasibility of the international seabed regime that upheld the entire Convention's entry into force for several years.[23] Hence, Art. 147 is one of the few provisions of Part XI that was neither modified nor supplemented by the 1994 Implementation Agreement.[24] 7

III. Elements

1. Obligation to conduct activities in the Area with reasonable regard to other activities in the marine environment (para. 1)

Art. 147 (1) requires that 'reasonable regard' is paid to other activities in the marine environment when carrying out activities in the Area. It establishes a general obligation that needs to be operationalized, i. e. translated into specific requirements that operators need to abide by. While Art. 147 (2) performs this exercise for a specific kind of undertaking, namely the establishment and operation of installations, the implications of the general reasonable regard obligation contained in Art. 147 (1) have to be determined on a case-by-case basis. 8

The present provision is complemented by Annex III Art. 17 (1)(b), which requires the Authority to adopt rules, regulations and procedures on, *inter alia*, the prevention of interference of prospecting, exploration and exploitation operations with other activities in the marine environment. 9

a) Activities in the Area. Art. 147 only applies to 'activities in the Area', which are defined by Art. 1 (1)(3) as 'all activities of exploration for, and exploitation of, the resources of the Area'.[25] Accordingly, undertakings that do not amount to 'activities in the Area' in the sense of Art. 1 (1)(3) are not covered by the seabed regime, but by the high seas regime established in Part VII of the Convention (Arts. 86–120). This is particularly relevant for the transportation of mining equipment to the mining site, as well as recovered minerals to a point on land. In its 2011 Advisory Opinion, the Seabed Disputes Chamber of ITLOS held that '[t]ransportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of "activities in the Area".'[26] It pointed to Annex IV Art. 1 (1) of the Convention, which lists 'transporting of minerals' separately from activities in the Area.[27] The Chamber further argued that the inclusion of transportation 'could create an unnecessary conflict with provisions of the Convention such as those that concern navigation on the high seas'.[28] On the other hand, the Chamber deemed all shipping activities that do not have a direct and immediate link to the exploration or extraction of minerals to not be part of 'activities in the Area' and hence not governed by Part XI but by the regime of the high seas (Part VII, Arts. 86–120).[29] 10

b) Other activities in the marine environment. The meaning of the term 'marine environment' in Art. 147 (1) is different than that of all other occurrences of the term in the Convention. While the Convention does not contain an express definition of 'marine environment', it consistently refers to 'marine environment' as denoting the natural circumstances of the sea which determine the conditions for marine life as well as other parts of the 11

[23] See generally Nordquist/Nandan/Rosenne (note 10), 57–63 (MN INTRO.35–37).

[24] GA, Agreement Relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. of 28 July 1994.

[25] See *Tanaka* on Art. 1 MN 11.

[26] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 96, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

'environmental continuum of the oceans'.[30] However, the meaning given to the same term in Art. 147 (1) is wider and refers – as a spatial reference – to the entire marine space (referred to by the Convention's Preamble as 'ocean space') across all jurisdictional zones.

12 The term 'activities' in this context is not related to 'activities in the Area' as defined by Art. 1(3), but denotes any kind of undertaking in the marine environment.[31] This includes, but is not limited to, other activities in the Area.[32] While it is not stated expressly, the scope of the article is naturally limited to 'other *lawful* activities' since the Convention would otherwise require due regard for illegitimate or illegal activities. For instance, due regard would not need to be paid to activities in the Area not permitted by the Authority under the system of exploration and exploitation established by the present Part XI.

13 **c) Reasonable regard.** The Convention does not define the term 'reasonable regard', which appears nowhere else in the Convention except in Art. 147. Instead, the Convention uses the term 'due regard' (which is not defined either) when stipulating similar obligations to respect the rights of other States or to consider other legitimate activities or interests.[33] On the other hand, one can find the term 'reasonable' frequently in the Convention.[34] This raises the questions of what 'reasonable' means according to the Convention and whether the meaning of 'reasonable regard' is equal to that of 'due regard'.

14 The notion of 'reasonableness' is used frequently in public international law in order to equip legal rules with a certain degree of flexibility.[35] The term refers to human reason, which opens the door to considerations of ethical or moral nature, as well as – as some suggest – conceptions of natural law,[36] better: elements of supra-legal principles of justice. Hence it is difficult to find an adequate definition.[37] The ICJ also held that '[…] what is reasonable and equitable in any given case must depend on its particular circumstances.'[38] However, in international courts and tribunals, what is reasonable is often not merely determined by an assessment of the factual circumstances of a case, but includes an evaluation of the arguments and justifications brought forward to 'reason' a certain conduct or behavior.[39] From this perspective, it seems even more difficult to make an *ex ante* assessment under what circumstances 'reasonable regard' is paid to other activities in the marine environment. The concept of reasonableness hence incurs similar difficulties than other general principles used in international law, such as 'equity' or 'good faith'.[40]

15 With regard to Art. 2 of the Convention on the High Seas, former ITLOS judge David Anderson proposed that '[t]he "reasonable regard" test requires a State which is contemplating a particular use of the high seas to consider the interest of other States in their own use of the high seas and to adjust or qualify its activity (whether in method or manner or in point of place or time) so as to avoid or minimize unnecessary interference with other.'[41] In principle, this definition is also suitable for the reasonable regard tests contained in the present article. It could be operationalized as follows: Firstly, a State needs to assess what other activities are

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[30] Nordquist/Nandan/Rosenne (note 10), 190 (MN 145.8(a)); see *Vöneky/Beck* on Art. 145 MN 11–14; *Wacht* on Art. 209.

[31] Nordquist/Nandan/Rosenne (note 10), MN 147.9(a).

[32] *Ibid.*

[33] The term 'due regard' appears, in different contexts, in Arts. 27 (4), 39 (3)(a), 56 (2), 58 (3), 60 (3), 66 (3)(a), 79 (5), 87 (2), 142 (1), 148, 161 (4), 162 (2)(d), 163 (3), 167 (2), 234 and 267 of the Convention; and in Art. 2 (1) of Annex II as well as Art. 5 (1) and 5 (2) of Annex III.

[34] *Cf.* Art. 144 (2); *Vöneky/Beck* on Art. 144 MN 11.

[35] *Olivier Corten*, Reasonableness in International Law, MPEPIL, para. 6, available at: http://opil.ouplaw.com.

[36] *Ibid.*

[37] *Ibid.*

[38] ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion of 20 December 1980, ICJ Reports (1980), 73, para. 49.

[39] *Corten* (note 35), para. 2.

[40] *Ibid.*, paras. 14–16.

[41] *Anderson* (note 2), 660; referring to the definition of 'due regard' proposed in Nordquist/Nandan/Rosenne (note 7), 84–85 (MN 87.9(i)); see *infra*, MN 17.

planned or already conducted in the vicinity of where it wants to conduct or sponsor seabed activities. Secondly, it needs to analyze whether these uses (substantially) interfere with each other (this may require consultations with other parties concerned). In a third step, the State needs to determine whether the conflicts can be resolved by adjusting its activities in terms of method and manner, or in place or time, so as to avoid unnecessary or disproportionate interferences.

16 Establishing criteria against which an individual case can be assessed is in line with the jurisprudence of ITLOS, which has already listed criteria for assessing the reasonableness of bonds or other financial security posted in order to achieve the release of vessels pursuant Art. 73 (2).[42] With regard to the present provision in Art. 147, the determination of whether the requirement of reasonable regard for other activities was abided by in an individual case, will be the task of the Seabed Disputes Chamber of ITLOS acting in accordance with Section 5 of Part XI.[43]

17 The question remains what the difference between 'reasonable regard' and 'due regard' is, or whether these concepts differ at all. The Convention also does not give a definition of 'due regard' and the meaning of this notion depends on the context in which it is used.[44] In the context of Art. 87 (2), which has the same object and purpose as the present Art. 147(1), namely to accommodate potentially conflicting activities in the high seas and the Area, the notion of 'due regard' has been defined by NORDQUIST ET AL. It requires that

> 'all States, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and to refrain from activities that interfere with the exercise by other States of the freedom of the high seas.'[45]

Art. 87 (2) also establishes an obligation corresponding to para. 3 of the present article, namely that the freedoms of the high seas shall be exercised with 'due regard' for activities in the Area.[46] Hence, the term 'reasonable regard' essentially describes the same standard as that of 'due regard', and the difference between both of the terms is 'purely semantic'.[47]

2. Conditions for installations used for activities in the Area (para. 2)

18 Art. 147 (2) establishes conditions for the establishment and operation of installations used for carrying out activities in the Area. The term 'installation' is neither defined by the Convention nor consistently used throughout its text. A definition developed by scholars refers to 'installation (off-shore)', as well as 'artificial island' and 'offshore installation', as a 'human-made edifice in the territorial sea, in the EEZ, on the continental shelf, in archipelagic waters, or in ocean space governed by UNCLOS, which is usually employed to explore for or exploit marine resources' or for a number of other purposes.[48] In contrast to the term 'island', which is defined by Art. 121 (1) as 'a naturally formed area of land, surrounded by water, which is above water at high tide', installations neither need to be above water at high

[42] ITLOS, *The 'Camouco' Case* (Panama *v.* France), Judgment of 7 February 2000, ITLOS Reports (2000), 10, para. 67; ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86, para. 76; ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Prompt Release, Judgment of 23 December 2002, ITLOS Reports (2002), 10, paras. 60–73; for an assessment, see *Chester Brown*, Reasonableness in the Law of the Sea: The Prompt Release of the Volga, Leiden JIL 16 (2003), 621, 625–626. See *Harrison* on Art. 73 MN 12 *et seq.* and *Treves* on Art. 292.

[43] See commentaries on Section 5, Part XI.

[44] Due regard, in: George K. Walker (ed.), Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention (2012), 182 (§ 56).

[45] Nordquist/Nandan/Rosenne (note 7), 84–85 (MN 87.9(i)).

[46] See *Guilfoyle* on Art. 87 MN 9.

[47] *Anderson* (note 2), 662.

[48] Artificial island, offshore installation, installation (offshore), in: Walker (note 44), 104 (§ 10); see also IHB, Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982: Appendix 1 – Glossary (2006), MN 47, available at: https://www.iho.int/iho_pubs/CB/C-51_Ed4-EN.pdf.

tide nor do they need to form land.[49] The term 'installation' hence also encompasses floating structures. The distinction from other floating units, such as 'ships' and 'vessels', could possibly be achieved by criteria such as whether a unit is able to navigate, i. e. whether it is self-propelled or not, as well as the amount of time such a unit remains in a fixed position.[50]

19 Since the wording of Art 147 (2) does not explicitly include 'artificial islands', it could be questioned whether artificial islands (if their erection in the deep sea is technically possible at all) is governed by Art. 147 (2). However, the object and purpose of Art. 147 (2) is to subject all permanent human-made edifices established for carrying out activities in the Area to the regime applicable to the Area and, in particular, to the authorization and control by the Authority (see also Art. 153 (5)).[51] Hence, the term 'installations', as used in Art. 147 (2), needs to be interpreted wider than in other contexts, namely as a collective term for permanent human-made edifices.[52]

20 Art. 147 (2) only applies to installations used for carrying out activities in the Area. The establishment of installations in the high seas which are not used for 'activities in the Area' is part of the freedoms of the high seas pursuant to Art. 87 (1)(d)[53] and not subject to similar restrictions.[54] Therefore, the demarcation of the scope of application of Art. 147 (2) is important. While ITLOS did not expressly discuss the question of installations, its 2011 Advisory Opinion still provides some guidance in this regard: First and foremost, Art. 147 (2) encompasses installations that are employed in the recovery of minerals from the seabed and their lifting to the water surface.[55] In light of the judgments of ITLOS, the provision would also include installations employed for works 'directly connected' with the aforementioned activities and conducted in the vicinity of the mining site, such as the separation of minerals from water and other materials of no commercial interest, including their disposal.[56]

21 Art. 147 (2)(a)-(e) include detailed requirements for the establishment and removal of these installations. These provisions in the present paragraph closely relate to those in Art. 60, which contains conditions for installations and structures in the exclusive economic zone (EEZ) and, despite being of slightly different structure, uses almost the same wording.[57]

22 **a) Compliance with the sea-bed regime, obligation to give of due notice and adequate warning (lit. a).** Art. 147 (2)(a) first sentence requires that the construction and removal of installations shall be in accordance with both Part XI of the Convention and with the 'rules, regulations and procedures of the Authority'. This does not give the Authority additional regulatory powers, but only constitutes a reference to the regulatory work of the Authority performed under other provisions. Relevant provisions with this regard include Art. 145 (requiring the Authority to adopt regulations to ensure effective protection of the marine environment) and Annex III Art. 17 (1)(b) (empowering the Authority to adopt rules, regulations and procedures on a number of specified matters relating to 'operations',

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[49] *Alex G. Oude Elferink*, Artificial Islands, Installations and Structures, MPEPIL, para. 3–5, available at: http://opil.ouplaw.com; these criteria are deduced from Art. 121 (1), which defines the term 'island' as a 'naturally formed area of land, surrounded by water, which is above water at high tide'.

[50] *Cf. Elferink* (note 49), para. 7.

[51] Express language in this regard was already discussed by the Sea-Bed Committee, *cf.* Sea-Bed Committee, Belgium: Artificial Islands and Installations, UN Doc. A/AC.138/91, reproduced in: 12 ILM 1210, 1213.

[52] *Salah E. Honein*, The International Law Relating to Offshore Installations and Artificial Islands: An Industry Report (1991), 28; *Cordula Fitzpatrick*, Künstliche Inseln und Anlagen auf See: Der völkerrechtliche Rahmen für die Errichtung und den Betrieb künstlicher Inseln und Anlagen (1998), 89, 196.

[53] This applies only to the high seas superjacent to the Area, since in the high seas superjacent the Continental Shelf, the coastal state has the exclusive right to construct artificial islands and installations pursuant to Art. 80, *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 156.

[54] The reference of Art. 87 (1)(d) to Part VI is only an informational reference to Art. 80 and does not render the conditions contained in Art. 60 (via Art. 80) applicable to the high seas above the Area, as wrongly assumed in Nordquist/Nandan/Rosenne (note 7), 83 (MN 87.9(f)); see *Elferink* (note 49), para. 17.

[55] *Cf. Responsibilities and Obligations of Sponsoring States* (note 26), para. 94.

[56] *Cf. Ibid.*, at paras. 94–96.

[57] Nordquist/Nandan/Rosenne (note 10), MN 147.9(b); see *Proelss* on Art. 60.

including the prevention of interference with other activities in the marine environment, Art. 17 (1)(b)(ix), and 'mining standards and practices', Art. 17 (1)(b)(xii)).[58] Compliance with the sea-bed regime is ensured by the Authority pursuant to Art. 153 (5). The second sentence of that provision expressly grants the Authority the right 'to inspect all installations in the Area used in connection with activities in the Area'.[59]

23 The 'Standard clauses for exploration contract [sic]', which are contained in Annex III to the Authority's Regulations on Prospecting and Exploration[60] and which are incorporated in each exploration contract concluded between a Contractor and the Authority,[61] require each Contractor to 'remove all installations, plant, equipment and materials in the exploration area' as well as to 'make the area [sic] safe so as not to constitute a danger to persons, shipping or to the marine environment' in the event of expiration or termination of the contract.[62] A similar provision is foreseen in the draft framework for Regulations on exploitation which is currently being developed.[63]

24 The obligations in the second sentence to give due notice to the erection, emplacement and removal of such installations and to maintain permanent means for giving warning of their presence, parallel the first sentence of Art. 60 (3), which uses the same terminology.[64] The International Maritime Organization (IMO) holds that, since it 'maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation […] the purpose of the publicity is likely to be served by some IMO involvement.'[65] Correspondingly, looking at the need to accommodate and coordinate different activities in the Area, the obligation also requires an involvement of the Authority in accordance with the regulations adopted to that end. However, so far the Authority has not yet made arrangements in this respect.

25 **b) Prohibition of installations that interfere with essential sea lanes or areas of intense fishing activity (lit. b).** The prohibition to establish installations in locations which may interfere with recognized sea lanes essential to international navigation contained in Art. 147 (2)(b) correlates with Art. 60 (7).[66] Nevertheless, the Convention leaves unclear what is meant by 'recognized sea lanes' and under which circumstances these lanes are considered to be 'essential to international navigation'.[67]

26 According to Art. 87 (2)(a), the freedom of the high seas includes, *inter alia*, the freedom of navigation. The Convention provides for the establishment of mandatory sea lanes and traffic separation schemes only with respect to the territorial sea (Art. 22) and international

[58] Nordquist/Nandan/Rosenne (note 10), MN 147.9(b).

[59] See *Siegfried* on Art. 150 MN 16.

[60] In accordance with the procedural provisions laid down in Arts. 160 (2)(f)(ii) and 162(2)(o)(ii) UNCLOS, the Authority adopted Regulations on the Prospecting and Exploration for Polymetallic Nodules, for Polymetallic Sulphides and for Cobalt-rich Ferromanganese Crusts: ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex (amended 24 July 2014 ISBA/20/A/9); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex.

[61] According to Art. 153 (3), the approval of a plan of work for exploration shall be in the form of a contract between the Authority and the entity that intends to carry out activities in the Area, see *Siegfried* on Art. 153 MN 9–10.

[62] Standard clauses for exploitation contract, Annex IV to the Nodules, Sulphides and Crusts Regulations, S. 21.8.

[63] ISA, Developing a Regulatory Framework for Deep Sea Mineral Exploitation in the Area: Draft Framework, High Level Issues and Action Plan, Version II (2015), 16, available at: https://www.isa.org.jm/files/documents/EN/OffDocs/Rev_RegFramework_ActionPlan_14072015.pdf.

[64] See *Proelss* on Art. 60 MN 18–23.

[65] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.8 (2014), 102.

[66] See *Proelss* on Art. 60 MN 31–32.

[67] A similar term (which was well is not neither defined) is used in Art. 261, which requires that the deployment of scientific research installations 'shall not constitute an obstacle to established international shipping routes'.

straights (Art. 41), but remains silent on ships' routing beyond the limits of national jurisdiction. In this regard, Regulation V/10 of the 1974 International Convention for the Safety of Life at Sea[68] provides for the establishment of ships' routing systems which are to be adopted by the IMO.[69] The reference to 'recognized sea lanes' used in Art. 147 (2)(b) hence encompasses at least those lanes that are included in ships' routing systems adopted by the IMO. Since such systems are usually applied to improve navigational safety in converging areas,[70] these lanes can also be considered to be 'essential to international navigation'. Beyond that, Art. 87 (2)(a) may also encompass other sea lanes which have not been awarded a special legal status, but are still 'essential' for factual reasons.

27 By prohibiting the establishment of installations 'in areas of intense fishing activity', the present subparagraph goes beyond Art. 60 (7). The term 'fishing', which is not expressly defined in the Convention, refers to the extraction of 'living resources from ocean areas, including the water column and the soil and subsoil of the seabed'.[71] Subject to Arts. 116 to 120, fishing is a high seas freedom according to Art. 87 (1)(e). The prohibition of establishing installations in those areas used heavily for fishing activities is a substantiation of the general requirement laid down in Art. 147 (1) that activities in the Area shall be carried out with reasonable regard for other activities in the marine environment. However, the Convention does not indicate under what circumstances an area faces 'intense' fishing activity, in contrast to normal activity. Furthermore, the Regulations do not make any reference to fishing.

28 When assessing an application for approval of a plan of work (see *supra*, MN 23 and accompanying footnotes), the Legal and Technical Commission of the Authority has to determine whether, *inter alia*, the proposed plan of work ensures that installations are not established 'where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity.'[72] Therefore, it will be up to the Commission to determine whether these circumstances are given in the individual circumstances of a case or not.

29 **c) Establishment of safety zones (lit. c).** Art. 147 (2)(c) governs the establishment of safety zones around installations used for carrying out activities in the Area. While the corresponding provision in Art. 60 (4) only entitles the coastal State to the establishment of such zones where necessary, safety zones shall mandatorily be established around all installations that fall under the scope of the present article (see *supra*, MN 20). Art. 147 (2)(c) also adds to the wording of Art. 60 (4) the requirement to designate the safety zone with 'appropriate markings'.

30 While Art. 60 (5) stipulates rules for the determination of the breadth of safety zones (which normally shall not exceed a distance of 500m) and also requires the coastal State to give '[d]ue notice of the extent of safety zones', the present subparagraph does not make similar provisions. The same applies for Art. 60 (6) which requires all ships to respect safety zones and to comply with international standards on navigation in the vicinity of, *inter alia*, installations and safety zones. It could therefore be questioned whether Art. 60 (5) and (6) can be applied *mutatis mutandis* to Art. 147 (2)(c). However, this cannot be easily assumed given that both articles are contained in special regimes for certain maritime zones (Art. 60 on the EEZ, Art. 147 on 'activities in the Area' as defined by Art. 1 (1)(3) of the Convention).[73] Nevertheless, Art. 60(5) and (6) can be understood as specifications of the general

[68] International Convention for the Safety of Life at Sea, as amended (01 November 1974, effective 25 May 1980; last amended on 20 May 2011, effective 01 January 2013), 1184 UNTC 3.

[69] *Budislav Vukas*, The Law Of The Sea: Selected Writings (2004), 149; Donald R. Rothwell, *Sea Lanes*, MPEPIL, para. 19–22, available at: http://opil.ouplaw.com.

[70] See IMO, General Provisions on Ships' Routeing, IMO Res. A572(14) of 20 November 1985, Annex, para. 1.1.

[71] Fishing, in: Walker (note 44), 192 (§ 65).

[72] Reg. 23 (4)(c) Sulphides Regulations; Reg. 23 (4)(c) Crusts Regulations; Reg. 21 (4)(c) Nodules Regulations.

[73] Some consider Part XI of the Convention to be a 'self-contained regime', *cf. Marcel Brus*, Third Party Dispute Settlement in an Interdependent World: Developing a Theoretical Framework (1995), 21; while others

obligation to pay due regard to other activities in the maritime environment, as enshrined in Art. 87 (2) and Art. 147 (1) and (3), and hence at least provide guidance as to how safety zones around installations for activities in the Area could be managed. Ultimately, it will be the task of the Authority to specify the meaning and scope of the present subparagraph either in its Regulations or in the process of approving plans of work that incorporate the establishment of installations.

The second sentence of subparagraph c requires that safety zones shall not be established so as to impede either the access to particular maritime zones or navigation around sea lanes. This obligation partially corresponds with Art. 60 (7), which remains silent on the question of access to maritime zones. It can be assumed that the Legal and Technical Committee of the Authority will observe the compliance of contractors with the present provisions, acting under its mandate to ensure that interference with 'recognized sea lanes essential to international navigation' is avoided (see *supra*, MN 28). 31

d) Exclusive use for peaceful purposes (lit. d). Art. 147 (2)(d) requires that installations used for carrying out activities in the Area may only be used for peaceful purposes. This obligation is already established for the use of the Area as a whole by Art. 141, and for the high seas by Art. 88. Since the present Article only covers installations 'used for carrying out activities in the Area' in the sense of Art. 1 (1)(3) of the Convention, the present subparagraph may seem like a mere repetition of what is already stipulated elsewhere. To that end, its added value might be that the provision clarifies that any dual use of installations (falling under the scope of Art. 147) for non-peaceful purposes is prohibited. 32

e) Legal status of installations (lit. e). Art. 147 (2)(e) literally applies the wording of Art. 60 (8) to installations used for carrying out activities in the Area: Such installations neither possess the status of islands (which are defined in Art. 121 (1), see *supra*, MN 18), nor do they have a territorial sea (Art. 3 *et seq.*) or influence the delimitation of any maritime zone. This provision reflects the legal nature of the Area and the superjacent waters as 'areas beyond the limits of national jurisdiction' (see Art. 1(1)) and implements the ban of claims or exercise of sovereignty over the high seas (Art. 89) and the Area (Art. 137). 33

3. Obligation to conduct other activities with reasonable regard for activities in the Area (para. 3)

Art. 147 (3) mirrors the obligation contained in Art. 147 (1) with respect to other activities in the marine environment. Using the same terminology as Art. 147 (1), it requires that such 'other activities' are carried out with due regard for activities in the Area. Art. 147 (3) closely relates to Art. 87 (2), which lays out that the freedom of the high seas shall be exercised by all States, *inter alia*, 'with due regard for the rights under this Convention with respect to activities in the Area'. Despite the slightly different wording, the normative content of both provisions is the same, since they limit the freedom of the high seas insofar as unnecessary or unreasonable interference with legitimate activities in the Area shall be avoided. 34

doubt this qualification but nevertheless stress its character as *lex specialis*, *cf. Alex G. Oude Elferink/Erik Jaap Molenaar*, The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments (2010), 13.

Article 148
Participation of developing States in activities in the Area

The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

Bibliography: *L. M. Alexander*, The 'Disadvantaged' States and the Law of the Sea, Marine Policy 5 (1981), 185–193; *Lucius Caflisch*, What is a Geographically Disadvantaged State?, ODIL 18 (1987), 641–663; *Philippe Cullet*, Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations, EJIL 10 (1999), 549–582; *Hasjim Djalal*, The Developing Countries and the Law of the Sea Conference, Columbia Journal of World Business 15 (1980), 22–29; *Edwin E. Egede*, African States and Participation in Deep Seabed Mining: Problems and Prospects, IJMCL 24 (2009), 683–712; *Jennifer Frakes*, The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?, WILJ 21 (2003), 409–434; *Duncan French*, From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion, IJMCL 26 (2011), 525–568; *Wolfgang Graf Vitzthum*, International Seabed Area, MPEPIL, available at: http://opil.ouplaw.com *Gerhard Hafner*, Land-Locked-States, MPEPIL, available at: http://opil.ouplaw.com; *Gerhard Hafner*, Geographically Disadvantaged States, MPEPIL, available at: http://opil.ouplaw.com; *Mosche Hirsch*, Developing Countries, MPEPIL, available at: http://opil.ouplaw.com; *Allan G. Kirton/Stephen C. Vasciannie*, Deep Seabed Mining under the Law of the Sea Convention and the Implementation Agreement: Developing Country Perspectives, Social and Economic Studies 51 (2002), 63–115; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995); *M. C. W. Pinto*, The Developing Countries and the Exploitation of the Deep Seabed, Columbia Journal of World Business 15 (1980), 30–41; *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459–488; *Scott J. Shackelford*, The Tragedy of the Common Heritage of Mankind, Stanford ELJ 28 (2009), 109–169; *Stephen Vasciannie*, Land-Locked and Geographically Disadvantaged States, Commonwealth Law Bulletin 31 (2005), 59–68; *Rüdiger Wolfrum*, Common Heritage of Mankind, MPEPIL, available at: http://opil.ouplaw.com

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749(XXV) of 12 December 1970; UN DOALOS, Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea (2010), available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/msr_guide%202010_final.pdf

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

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I. Purpose and Function

Art. 148 stresses one of the main aims of Part XI, which is to support developing States in order to enable them to participate in 'the activities in the Area' as defined in Art. 1 (1)(3).[1] Their special situation and needs have to be taken into account 'with due regard'. This general duty is specified for those developing States that have special needs because they are land-locked and geographically disadvantaged. Art. 148 therefore is in line with the notion of the deep seabed as 'common heritage of mankind' (Art. 136). It is also spelled out in further provisions of Part XI: according to Art. 140 (2), the Authority is responsible for the equitable sharing of all benefits derived from the Area[2] and the interests and needs of developing States have to be considered.[3] Moreover Arts. 143 (3)(b) and 144 provide for universal distribution of technology and knowledge as well as affirmative action to the advantage of less developed States.[4] That affirmative action is lawful is stressed explicitly by Art. 152 (2): Although the Authority 'shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area' (Art. 152 (1)), 'special consideration for developing States, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for in this Part shall be permitted'.[5] Those differential rules in favor of developing countries are incorporated in other international multilateral treaties as well, especially international trade and environmental treaties.[6] **1**

As can be seen, many provisions of Part XI provide that support for developing States, and particularly land-locked and geographically disadvantaged States, is not only lawful but necessary and a purpose of the Convention; nevertheless, it is questionable whether it is correct to state that Art. 148 is 'generally hortatory in nature' and does not create any specific obligations beyond those specified in Part XI (see *infra*, MN 12 *et seq.*).[7] **2**

II. Historical Background

First discussions on the participation of developing States in activities in the Area took place within the Sea-Bed Committee (Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction).[8] The UN General Assembly had already agreed on the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction[9] by 1970, which not only called upon States to strengthen the research capabilities of developing States (para. 10), but also stressed the need to take into 'particular consideration the interests and needs of developing countries' in the exploration of the Area and its resources (para. 7).[10] The declaration also **3**

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[1] See *Tanaka* on Art. 1 MN 11.

[2] See *Vöneky/Höfelmeier* on Art. 136 MN 19.

[3] See *Vöneky/Höfelmeier* on Art. 140.

[4] See *Vöneky/Höfelmeier* on Art. 136 MN 19.

[5] See *Siegfried* on Art. 152.

[6] *Mosche Hirsch*, Developing Countries, MPEPIL, paras. 24 et seq., available at: http://opil.ouplaw.com.

[7] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), MN 148.2.

[8] UN DOALOS, Marine Scientific Research: A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea (2010), 1–2, available at: http://www.un.org/depts/los/doalos_publications/publicationstexts/msr_guide%202010_final.pdf.

[9] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749(XXV) of 12 December 1970, affirmative votes of 104 States; none against; 14 abstentions; *cf. Allan G. Kirton/Stephen C. Vasciannie*, Deep Seabed Mining under The Law of the Sea Convention and The Implementation Agreement: Developing Country Perspectives, Social and Economic Studies 51 (2002), 63, 69 *et seq.*

[10] Nordquist/Nandan/Rosenne (note 7), MN 148.2.

entailed a provision that provided that 'the area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.'[11] However, most western States perceived this declaration as being only a political statement not containing binding 'hard' international law.[12]

4 Because those questions remained unsettled, the negotiation of seabed questions was an important part of UNCLOS III (1973–1982).[13] Hence, although the demands of land-locked States used to be a special right of access to the sea,[14] the aim to use the seas economically was decisive during the negotiations. Land-locked States regarded themselves to be disadvantaged by the decrease of the international maritime area and they deduced from the principle of common heritage of mankind preferential rights in the exploration, exploitation, and administration of the Area.[15] At UNCLOS III, they formed the group of 55 'land-locked and geographically disadvantaged States' which included both developed and developing States.[16] This merger is reflected in the express wording of Art. 148. However, Art. 148 can be invoked only by those 'land-locked and geographically disadvantaged States' that are at the same time developing states.

5 Since negotiations during UNCLOS III focused on the legal status of the international seabed and on the future exploitation system including the economic effects of deep seabed mining,[17] developing States wanted to avoid a 'first come, first served' rule and stressed the principle of benefit of mankind.[18] This position was reflected in the final wording of the Convention in several provisions and Art. 148 can be seen as another important element against the fear of some developing States during the negotiations about their access to seabed mining. A final proposal prepared by Working Group 21 that included the main elements of the final wording of Art. 148 was agreed in 1979.[19] This outcome was possible since major western States, like the US, that were against any internationalization of the deep seabed, had to 'bargain' this position in order to achieve other important tasks, such as the transit through international straits.[20] Art. 148 is, as other provisions of the Convention,[21] inspired and in line with the demands of the New International Economic Order (NIEO) that promoted a new model of development in the 1970s, looking more to the needs of the developing countries.[22]

III. Elements

1. Promotion of developing States and developing land-locked and geographically disadvantaged States

6 **a) The principle of Common Heritage of Mankind.** The postulation that activities in the Area shall be carried out for the benefit of mankind as a whole includes two different lines of demands: the first is the participation of all States in the equitable sharing of benefits; the

[11] Para. 5 Declaration of Principles (note 9).
[12] *Wolfgang Graf Vitzthum*, International Seabed Area, MPEPIL, para. 7, available at: http://opil.ouplaw.com.
[13] Nordquist/Nandan/Rosenne (note 7), MN 148.2 *et seq.*
[14] See *Uprety/Maggio* on Art. 125.
[15] *Gerhard Hafner*, Land-Locked-States, MPEPIL, para. 5, available at: http://opil.ouplaw.com.
[16] *Lucius Caflisch*, What is a Geographically Disadvantaged State?, ODIL 18 (1987), 641 *et seq.*; *L. M. Alexander*, The 'Disadvantaged' States and the Law of the Sea, Marine Policy 5 (1981), 185, 190 *et seq.*
[17] *Hasjim Djalal*, The Developing Countries and the Law of the Sea Conference, Columbia Journal of World Business 15 (1980), 22, 27 *et seq.*; *Graf Vitzthum* (note 12), para. 8; *Rüdiger Wolfrum*, Common Heritage of Mankind, MPEPIL, para. 18 *et seq.*, available at: http://opil.ouplaw.com. For the drafting history: Nordquist/Nandan/Rosenne (note 7), MN 148.5 *et seq.*
[18] See *Vöneky/Beck* on Art. 144 MN 5 *et seq.*; *Graf Vitzthum* (note 12), para. 8.
[19] Nordquist/Nandan/Rosenne (note 7), MN 148.9.
[20] *Graf Vitzthum* (note 12), para. 8.
[21] See *Vöneky/Beck* on Art. 144 MN 6.
[22] *M.C.W. Pinto*, The Developing Countries and the Exploitation of the Deep Seabed, Columbia Journal of World Business 15 (1980), 3033; *Kirton/Vasciannie* (note 9), 70 *et seq.*, 83 *et seq.*

second is the equalization of the effective conditions for all States to conduct deep seabed mining.[23] Hence, the ideas of equitable sharing of benefits and the use for the benefit of all mankind are core elements of the principle of common heritage of mankind.[24] Art. 148 stresses the basic objectives for the regime of the Area and provides for the benefit-sharing element of the principle of common heritage of mankind as anchored in Art. 136. Besides, Art. 148 is one of the provisions specifying the fifth preamble paragraph of the Convention, which lays out the aim to 'contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.'[25]

b) Developing States. The main subjects of Art. 148 are 'developing States'. Their effective participation in activities in the Area shall be promoted. In setting the needs and interests of developing States as one important parameter for conducting activities to the benefit of mankind as a whole, the Convention follows a general trend in international law for differential instead of formally equal treatment of States.[26] 7

Since the term 'developing States' is included in different other provisions of the Convention and the 1994 Implementation Agreement (*cf. inter alia* Art. 82 (3)(4), 143 UNCLOS; 1994 Agreement Annex, S. 3, para. 15(d)), but there is no definition which country is a developing State according to the Convention, it is unclear which criteria are relevant so that a State can count as 'developing'. According to the object and purpose of Art. 148, it seems clear that under this provision only those States are developing that do not have the financial and/or technological resources to participate in the activities in the Area without support from other States or private entities at the respective time. Since the aim of Art. 148 is an 'effective participation of developing States', only the actual capabilities of States are decisive and it is not relevant whether States have been developing States in the past or during the time of UNCLOS III.[27] 8

c) Geographically disadvantaged and land-locked States. Art. 148 has a particular focus on those developing States that are land-locked and geographically disadvantaged. The term 'geographically disadvantaged States' was introduced during the UNCLOS III negotiations[28] (see *supra*, MN 4) and referred first of all to so-called 'shelf-locked States', i. e. States that possess only a narrow continental shelf or no shelf at all.[29] A definition is laid down in Art. 70 (2): 9

> 'coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.'[30]

This definition seems to be only decisive – according to the express wording of Art. 70 (2) – for the purpose of Part V on the exclusive economic zone. But, as there is no general definition of geographically disadvantaged States in the Convention, one has to conclude that

[23] See *Vöneky/Höfelmeier* on Art. 140 MN 8.

[24] For a general discussion of this principle, see *Vöneky/Höfelmeier* on Art. 136.

[25] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 151, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[26] See *Philippe Cullet*, Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations, EJIL 10 (1999), 549, 563.

[27] In reference to the ITLOS *Responsibilities and Obligations of Sponsoring States* (note 25), *cf. Duncan French*, From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion, IJMCL 26 (2011), 525, 567.

[28] *Caflisch* (note 16), 641 *et seq.*; *Alexander* (note 16), 187, 193.

[29] *Alexander* (note 16), 187 *et seq.*; *Gerhard Hafner*, Geographically Disadvantaged States, MPEPIL, para. 1, available at: http://opil.ouplaw.com.

[30] *Cf.* for the negotiating history *Caflisch* (note 16), 644 *et seq.*, 654 *et seq.*; *Alexander* (note 16), 190.

the definition of Art. 70 (2) is *prima facie* relevant for other provisions of the Convention where the concept of 'geographically disadvantaged States' is mentioned.[31] This is convincing in regard to Art. 148 as far as the notions of geographically disadvantaged States and developing States overlap: Art. 148 only makes reference to the sub-group of 'land-locked and geographically disadvantaged States' that are – at the same time – developing States ('The effective participation of developing States […], and in particular to the special need of the land-locked and geographically disadvantaged among them.'). This is a necessary requirement since geographically disadvantaged States include not only and developing countries such as Cameroon, Syria, or Jamaica, but also industrialized countries such as the Netherlands or Singapore[32] which do not need the promotion included in Art. 148.[33] However, it is not convincing to argue *per se* that 'it is difficult to see how any State is more or less geographically disadvantaged' than any other State in relation to the Area which lies beyond the national jurisdiction of any State.[34] Hence, for the purpose of Art. 148, developing geographically disadvantaged States can therefore be defined as: developing coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the Area of other States.

10 The term 'land-locked State' is defined in the Convention as a 'State having no sea-coast' (Art. 124 (1)(a)), i. e. a State not bordering the sea.[35] A majority of the 41 land-locked States that exist are parties of the Convention and most of them are least developed countries, as for instance Afghanistan, Laos, or Chad.[36] However, only those land-locked States that also are developing States are covered by the scope of Art. 148 (see *supra*, MN 7).

2. Measures and tests for the promotion: the due regard rule

11 The object of Art. 148 is to promote the effective participation of the different groups of developing States in activities in the Area. This shall be achieved by 'having due regard to their special interests and needs', especially to the needs of land-locked and geographically disadvantaged States. The Convention does not define what 'due regard' means, but uses the term 'due regard' often when stipulating obligations to respect the rights of other States or to consider other legitimate activities or interests.[37] The meaning of the due regard notion depends on the context.[38] In Art. 87 (2), for instance, the notion of 'due regard' requires

> 'all States, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and to refrain from activities that interfere with the exercise by other States of the freedom of the high seas.'[39]

It is in line with this definition to argue that due regard in the context of Art. 148 can be understood as requiring all States and entities – when exercising activities in the Area – to be aware of and consider the interests of said developing States in using the Area and refrain from activities that interfere with the special interests and needs of those developing States.[40]

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[31] For a different view, *Caflisch* (note 16), 656.

[32] *Alexander* (note 16), 188; *Hafner* (note 29), para. 3.

[33] For a differentiation between nominally disadvantaged geographically disadvantaged States and seriously disadvantaged geographically disadvantaged States, *cf. Alexander* (note 16), 188 *et seq*.

[34] Nordquist/Nandan/Rosenne (note 7), MN 148.11(c).

[35] *Alexander* (note 16), 185 *et seq*., 193; *Hafner* (note 15), para. 1.

[36] *Cf.* the list of States *Alexander* (note 16), 186; *Hafner* (note 15), para. 1.

[37] The term 'due regard' appears, in different contexts, apart from Art. 148 in Arts. 27 (4), 39 (3)(a), 56(2), 58 (3), 60 (3), 66 (3)(a), 79 (5), 87 (2), 142 (1), 161 (4), 162 (2)(d), 163 (3), 167 (2), 234 and 267 of the Convention; and in Art. 2 (1) of Annex II as well as Art. 5 (1) and 5 (2) of Annex III. See *Vöneky/Beck* on Art. 147 MN 13–17.

[38] Due regard, in: George K. Walker (ed.), Definitions for the Law of the Sea. Terms Not Defined by the 1982 Convention (2012), 182 (§ 56).

[39] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. III (1995), MN 87.9(i); *Vöneky/Beck* on Art. 147 MN 17.

[40] With regard to the special interests and needs of African States, *cf. Edwin E. Egede*, African States and Participation in Deep Seabed Mining: Problems and Prospects, IJMCL 24 (2009), 683, 683 *et seq*.

Particularly all developed States and entities – while exercising activities in the Area – must be aware of and work towards overcoming the obstacles for developing land-locked and developing geographically disadvantaged States (e. g. remoteness from the Area and difficulty of access to and from it), as the latter is stressed expressly by Art. 148.

3. Symbolic character of the provision?

12 It is questionable whether it is correct to state that Art. 148 is 'generally hortatory in nature' and does not create any specific obligations beyond those specified in Part XI (see *supra*, MN 2).[41] This would mean that Art. 148 has a merely symbolic character, only providing incentives for additional developments on the subject.[42] It can be brought forward in opposition to this view that other provisions of Part XI, as for instance Art. 140 (1), are concerned with the interests and needs of developing States in an even broader and more general manner as part of the aim to serve the 'benefit of mankind as a whole', while Art. 148 aims, quite concretely, at an effective participation of those States.

13 The promotion of the effective participation of developing States, according to Art. 148, must not be misunderstood as granting land-locked and geographically disadvantaged developing States specific preferential rights in the exploitation of the Area. Instead, Art. 148 supports – first of all – participation in the benefits from the Area,[43] since the equal sharing of benefits acquired from exploitation of the region is one of the main elements of the common heritage of mankind principle.[44] Secondly, the provision grants that their 'effective participation' shall be promoted in the framework of other provisions of Part XI ('as specifically provided for in this Part'). The latter means – on the one hand – that Art. 148 has to interpreted as containing obligations for developed States (and even rights for developing States) that must not be in conflict with other provisions of Part XI, i. e. Art. 148 has to be interpreted in coherence with the principle of common heritage of mankind. But it does not mean – on the other hand – that the obligation enshrined in Art. 148 and the corresponding right are completely included in other provisions of Part XI.[45] Therefore, one can conclude that there is a distinct normative content of Art. 148 and there are additional obligations for industrialized States because of Art. 148, as described above (MN 11). This is especially true if other provisions and rights of developing States in Part XI are interpreted narrowly. Hence, Art. 148 can create obligations apart from those laid down in provisions of Part XI in the Convention,[46] even if the reference to special needs of developing and certain developing and disadvantaged States (landlocked and geographically disadvantaged) to overcome disadvantages on account of their remote location[47] seems unclear at the first glance. This result, however, does not lead to the conclusion that equal treatment of developing States and developed States is *per se* unlawful as far as activities in the Area are concerned. To the contrary, if – because of certain circumstances – only equal treatment of developing and

[41] Nordquist/Nandan/Rosenne (note 7), MN 148.2.

[42] *Responsibilities and Obligations of Sponsoring States* (note 25), para. 151 *et seq.*; analysis by *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459, 473 *et seq.*

[43] *Hafner* (note 29), 17.

[44] *Scott J. Shackelford*, The Tragedy of the Common Heritage of Mankind, Stanford ELJ 28 (2009), 109, 111; *Jennifer Frakes*, The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?, WILJ 21 (2003), 409, 411. See *Vöneky/Höfelmeier* on Art. 136 MN 19.

[45] *Responsibilities and Obligations of Sponsoring States* (note 25), para. 156: 'According to this provision, the general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved "as specifically provided for" in Part XI (an expression also found in article 140 of the Convention). This means that there is no general clause for the consideration of such interests and needs beyond what is provided for in specific provisions of Part XI of the Convention.'

[46] For a different view, Nordquist/Nandan/Rosenne (note 7), MN 148.11(b): 'In short, article 148 adds nothing to the rest of the Convention.'

[47] Nordquist/Nandan/Rosenne (note 7), MN 148.11(b).

developed States is in line with the common heritage of mankind principle, equal treatment is lawful as Art. 148 has to be interpreted in line with that principle. Therefore it is correct that the Seabed Disputes Chamber of ITLOS held in its 2011 advisory opinion[48] with regard to the responsibilities and liability of a sponsoring State that, whether developing or developed, the

> 'equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls.'[49]

The convincing rationale behind this statement is that another interpretation would be in conflict with the principle of common heritage of mankind: '(t)he spread of sponsoring States "of convenience" would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.'[50]

14 In the end, it is true that the normative content of Art. 148 and its obligations (and rights) are vague,[51] as there are uncertainties about the precise limits of the notion of a 'developing State' (see *supra*, MN 7) and there are limits with regard to other provisions of Part XI that must not be violated. Hence, Art. 140 is not a loophole for a dynamic or amendatory interpretation of the treaty in favor of developing countries[52];[53] but it is neither a void or obsolete provision, as it includes a due regard obligation for developed States Parties that is not entirely enshrined in the other provisions of Part XI.

Article 149
Archaeological and historical objects

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

Documents: ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex; ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex

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[48] For an analysis *cf. French* (note 27), 525 *et seq.*, esp. 556 *et seq.*

[49] *Responsibilities and Obligations of Sponsoring States* (note 25), para. 159.

[50] *Ibid.*

[51] 'Imprecision', *Stephen Vasciannie*, Land-Locked and Geographically Disadvantaged States, Commonwealth Law Bulletin 31 (2005), 59, 63; '[…] the modalities for exercising theses rights and privileges are couched in very general terms […]", *Alexander* (note 16), 193.

[52] For this view, see however *Responsibilities and Obligations of Sponsoring States* (note 25), Statement by the Republic of Nauru, 5 August 2010, para. 2 *et seq.*, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Nauru.pdf.

[53] *Responsibilities and Obligations of Sponsoring States* (note 25), para. 151 *et seq.*; analysis by *Rayfuse* (note 42), 473 *et seq.*

I. Purpose and Function

The UNCLOS does not provide a comprehensive regime for underwater cultural heritage. Only two provisions are devoted to what are called in the UNCLOS 'archaeological and historical objects', namely Art. 149, included in Part XI on the Area, and Art. 303 on archaeological and historical objects found at sea, included in Part XVI. The former provision is limited to 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', as the Area is defined in Art. 1 (1)(1). It has a particular scope of application and consequently prevails, where the Area is concerned, over Art. 303, which has a general scope of application.[1] 1

The particular regime for the common heritage of mankind, set forth under Part XI for the Area and its mineral resources, does not apply to archaeological and historical objects, which are man-made artifacts and cannot be considered as minerals.[2] However, such objects must be preserved or disposed of 'for the benefit of mankind as a whole'. This seems to be something close to the objective for which the regime of common heritage of mankind was established. 2

The subject matter covered by Arts. 149 and 303 is also covered today by the Convention on the Protection of the Underwater Cultural Heritage (CPUCH), adopted on 2 November 2001 within the framework of the United Nations Organization for Education, Science and Culture (UNESCO).[3] 3

II. Historical Background

In 1973, Turkey submitted a draft article to the Sea-Bed Committee that extended the common heritage of mankind regime to 'archaeological and historical treasures' and gave to 'the State of the country of origin' a sort of right of pre-emption over them: 4

> '1. Archaeological and historical treasures to be discovered during the exploration and exploitation of the area constitute a part of the common heritage of mankind and as such shall enjoy the protection of the International Authority.
>
> The Authority shall bring the discovery of such treasures to notice of member States.
>
> 2. The State of the country of origin shall have the right to acquire the treasure from the International Authority against payment.
>
> In case the State of the country of origin opts not to exercise its right to acquire the treasure, the International Authority shall have the right to sell the treasure to authorized third parties or to keep it in a museum belonging to the International Authority of the United Nations.
>
> 3. The International Authority, in consultation with concerned specialized agencies of the United Nations, shall draw up rules for regulating the discovery, identification, protection, acquisition and disposal of the archaeological and historical treasures discovered in the area.'[4]

A substantively similar proposal was made by Greece, but with the important difference that the Greek draft covered all the objects in question and not only those discovered as a consequence of the exploration and exploitation of the resources of the Area: 5

> '1. The States parties to this Convention recognize that all objects of archaeological or historical value in the area beyond the limits of national jurisdiction are part of the common heritage of mankind.
>
> 2. The Authority shall, in co-operation with the appropriate specialized agencies of the United Nations, take measures for the identification, protection and conservation of the objects of archaeological or historical value found in the area.

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[1] See also *Scovazzi* on Art. 303 MN 2.

[2] For the scope of application of the concept of common heritage of mankind, see *Vöneky/Höfelmeier* on Art. 136.

[3] The CPUCH entered into force on 2 January 2009 and, as of July 2013, there were forty-four State parties.

[4] Sea-Bed Committee, Turkey: Draft Article under Point 23, Archaeological and Historical Treasures on the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/SC.1/L.21 (1973), cited in: GAOR 28th Sess. Suppl. 21, vol. I (A/9021), 18.

3. The State of cultural origin of such objects shall have the preferential right to undertake the salvaging of such objects and to acquire any such object under procedures to be established by the Assembly, including compensation of the Authority.

4. If the State of cultural origin does not avail itself of its preferential right under paragraph 3 above the Authority will see to it that such object is disposed of in accordance with the principle in paragraph 1 above.'[5]

6 In the 1973 text, illustrative of the areas of agreement and disagreement for the negotiators, the statement that objects of archaeological or historical value are part of the common heritage of mankind was not included. States having a particular connection with the objects were granted preferential rights over them, although the content of such rights was left unspecified:

'1. Particular regard being paid to the preferential rights of [the State of country of] [the State of cultural] [the State of historical and archaeological] origin, all objects of an archaeological and historical nature found in the Area shall be preserved [or disposed of by the Authority for the benefit of the international community as a whole].

[2. The recovery and disposal of wrecks and their contents more than [fifty] years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof.]'[6]

7 In the 1975 Informal Single Negotiating Text (ISNT) the provision was drafted in the following way:

'1. All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of by the Authority for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the State of country or origin, or the State of cultural origin, or the State of historical and archaeological origin.

2. The recovery and disposal of wrecks and their contents more than 50 years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof.

3. Any dispute with regard to a preferential right under paragraph 1 or a right of ownership under paragraph 2, shall, on the application of either party, be subject to the procedure for settlement of disputes provided for in this Convention'.[7]

8 In 1975 the United States proposed the deletion of the provision.[8] In the 1976 Revised Single Negotiating Text any reference to regulations to be adopted by the Authority was deleted from the provision, as well as any specific mention of the subject of settlement of disputes. The provision became very similar to the present Art. 149.[9] The only difference was the wording 'for the benefit of the international community as a whole'. In 1980, following a recommendation of the Drafting Committee, it was changed into the present 'for the benefit of mankind as a whole'.

III. Elements

1. 'All objects of an archaeological and historical nature'

9 It is difficult to find another instance where two excellent ideas are included in a treaty provision that is so poorly drafted from a textual and logical point of view, as is the case with Art. 149. The provision, which applies to 'objects of an archaeological and historical nature',

[5] Sea-Bed Committee, Draft Article on Item 23 of the List of Subjects and Issues, Protection of Archaeological and Historical Treasures, Presented by the Delegation of Greece, UN Doc. A/AC.138/SC.I/L.25 (1973).

[6] Sea-Bed Committee, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), 29 (Article 20).

[7] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 140 (Article 19).

[8] First Committee UNCLOS III, United States: Proposed Amendments to the Committee I Single Negotiating Text (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 153, 156 (Article 19).

[9] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 131 (Article 19).

seems to require that the objects in question have both an archaeological and a historical nature. This would appear to exclude from the scope of the provision objects which do not have a millennium-honoured background. To avoid a manifestly unreasonable result, it is better to interpret Art. 149 in a broader sense, as covering cultural objects in general, in conformity with the objective of preserving all kinds of underwater cultural heritage. In this regard, Art. 1 (1)(a) CPUCH more correctly refers to 'all traces of human existence having a cultural, historical or archaeological character'.

2. 'the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin'

Even more confusing is the wording 'the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin'. It seems that, at least in the most complex cases, three different States could intervene as players in the same game, namely the State of origin, the State of cultural origin, and the State of historical and archaeological origin[10]. However, how could objects having by definition an 'archaeological and historical nature' also have a State of cultural origin different from the State of historical and archaeological origin is itself an intriguing puzzle hidden in Art. 149. Less difficult is to deduce in what cases could a 'State of origin' exist and be different from the 'State of cultural origin' or the 'State of historical and archaeological origin'. This could, for example, happen if artifacts made in the former Spanish colony of Peru using silver extracted from the local mines are found in a Spanish galleon sunk during her voyage to Spain. In this case, Spain could be considered the State of cultural origin and Peru the State of origin of the silver artifacts. **10**

A further complication is how to explain the inclusion of the word 'country'. What is the difference between a State and a country, both in general terms and for the purposes of Art. 149? Why is 'country' used only for the case of 'origin' and not for the cases of 'cultural origin' or 'historical and archaeological origin'? Has it any purpose to conclude that, assuming that a country of origin exists, countries of cultural or historical and archaeological origin do not exist? Is the wording 'State or country of origin' simply a correction of the already wrong wording 'State of the country of origin', used in the above reproduced Turkish draft and 1975 ISNT?[11] If this were the case, the correction would have not improved the original. Leaving aside all the conundrums that it implies, a more clearly worded statement of the rule provided for in Art. 149 could be the following: 'All objects of a cultural nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the States of origin'. **11**

3. 'for the benefit of mankind as a whole' and 'preferential rights'

Despite its wording, Art. 149 contains two principal ideas from the point of view of ensuring the appropriate protection of underwater cultural heritage. First, archaeological and historical objects must be preserved or disposed of for 'the benefit of mankind as a whole'. Uses having a public character, such as research or exhibition, are given priority. Uses that take place for private interest, such as trade and personal gain, are given little weight, if any. Second, some categories of States which have a link with the objects are given preferential rights, putting them in a better position than other States. However, Art. 149 does not specify the content of these rights or the manner in which they should be harmonized with the benefit of mankind as a whole. **12**

[10] The objects of an 'archaeological and historical nature', as they are called at the beginning of Art. 149, have a State of 'historical and archaeological origin', as the end of Art. 149 says. The unwarranted inversion of the order of the adjectives could disturb for stylistic reasons, but does not entail any substantive consequence.

[11] See *supra*, MN 4 *et seq.*

13 Some further details are given in the regulations on prospecting and exploration for certain mineral resources in the Area (so-called mining codes), relating to polymetallic nodules[12], to polymetallic sulphides[13] and to cobalt-rich ferromanganese crusts[14], adopted by the International Sea-Bed Authority (Authority) respectively in 2000, 2010 and 2012. They provide for an obligation of notification, if 'objects of an archaeological or historical nature'[15] are found in the Area:

> 'A prospector shall immediately notify the Secretary-General in writing of any finding in the Area of an object of an archaeological or historical nature and its location. The Secretary-General shall transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organization.'[16]
>
> 'The contractor shall immediately notify the Secretary-General in writing of any finding in the exploration area of an object of an archaeological or historical nature and its location. The Secretary-General shall transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organization. Following the finding of any such object of an archaeological or historical nature in the exploration area, the contractor shall take all reasonable measures to avoid disturbing such object.'[17]
>
> 'A prospector shall immediately notify the Secretary-General in writing of any finding in the Area of an object of actual or potential archaeological or historical nature and its location. The Secretary-General shall transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organization.'[18]
>
> 'The contractor shall immediately notify the Secretary-General in writing of any finding in the exploration area of any human remains of an archaeological or historical nature, or any object or site of a similar nature and its location, including the preservation and protection measures taken. The Secretary-General shall transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organization and any other competent international organization. Following the finding of any such human remains, object or site in the exploration area, and in order to avoid disturbing such human remains, object or site, no further prospecting or exploration shall take place, within a reasonable radius, until such time as the Council decides otherwise after taking account of the views of the Director-General of the United Nations Educational, Scientific and Cultural Organization or any other competent international Organization.'[19]
>
> 'The contractor shall immediately notify the Secretary-General in writing of any finding in the exploration area of any human remains of an archaeological or historical nature, or any object or site of a similar nature and its location, including the preservation and protection measures taken. The Secretary-General shall immediately transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organization and any other competent international organization. Following the finding of any such human remains, object or site in the exploration area, and in order to avoid disturbing such human remains, object or site, no further prospecting or exploration shall take place, within a reasonable radius, until such time as the Council decides otherwise after taking account of the views of the Director-General of the United Nations Educational, Scientific and Cultural Organization or any other competent international Organization.'[20]

14 The second and third sets of regulations have a broader scope; insofar as they also cover objects of only a potential archaeological or historical nature, they aim to protect human remains and they give the Council of the Authority the power to take decisions on whether exploration activities can be resumed after their suspension within a certain radius from the

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[12] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex (Polymetallic Nodules Regulations).

[13] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex (Polymetallic Sulphides Regulations).

[14] ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex (Cobalt-Rich Ferromanganese Crusts Regulations).

[15] Here the 'and' between 'archaeological' and 'historical' becomes, more correctly, an 'or'.

[16] Reg. 8 Polymetallic Nodules Regulations.

[17] Reg. 34 Polymetallic Nodules Regulations.

[18] Reg. 8 Polymetallic Sulphides Regulations; Reg. 8 Cobalt-Rich Ferromanganese Crusts Regulations.

[19] Reg. 37 Polymetallic Sulphides Regulations.

[20] Reg. 37 Cobalt-Rich Ferromanganese Crusts Regulations. The only difference between Reg. 37 Polymetallic Sulphides Regulations and Reg. 37 Cobalt-Rich Ferromanganese Crusts Regulations is the adverb 'immediately' that appears twice in the latter regulations.

objects or remains. However, none of the sets of regulations specifies the content of the preferential rights enjoyed by certain States under Art. 149 or the manner in which they should be harmonized with the benefit of mankind as a whole.

4. The Regime of the CPUCH

The two principal ideas contained in Art. 149 have become a source of inspiration for the regime established by the CPUCH. As far as the Area is concerned,[21] the CPUCH provides in general that States Parties are bound to 'preserve underwater cultural heritage for the benefit of humanity'[22]. The preservation *in situ* of underwater cultural heritage is considered as the first option before allowing or engaging in any activities directed at this heritage.[23]. Under the CPUCH, the 'underwater cultural heritage shall not be commercially exploited'.[24] In this regard: **15**

> 'the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods'.[25]

Art. 11 CPUCH, on reporting and notification in the Area, and Art. 12 CPUCH, on the protection of underwater cultural heritage in the Area, grant to States that have a 'verifiable link' with the heritage concerned the right to enter into consultations on how best to protect it: **16**

> '1. States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it.
>
> 2. States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them.
>
> 3. The Director-General shall promptly make available to all States Parties any such information supplied by States Parties.
>
> 4. Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.'[26]

Art. 12 CPUCH reads:

> '1. No authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of this Article.
>
> 2. The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the "Coordinating State". The Director-General shall also invite the International Seabed Authority to participate in such consultations.
>
> 3. All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.
>
> 4. The Coordinating State shall:
>
> (a) implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; and

[21] For the other maritime zones, see *Scovazzi* on Art. 303.
[22] Art. 2 (3) CPUCH.
[23] Art. 2 (5) CPUCH.
[24] Art. 2 (7) CPUCH.
[25] Rule 2 Annex CPUCH. However, Rule 2 points out that 'this cannot be interpreted as preventing the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities'.
[26] Art. 11 CPUCH.

(b) issue all necessary authorizations for such agreed measures, in conformity with this Convention, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.

5. The Coordinating State may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.

7. No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.'

17 The concept of 'verifiable link' is not defined in the CPUCH, and it would be extremely difficult to provide a precise definition for such a flexible concept. However, Art. 11 (4) CPUCH is clear enough in pointing out that, in the Area, the States enjoying preferential rights as States of cultural, historical or archaeological origin are those that are entitled to declare their verifiable link to the heritage concerned. This corresponds to what is already provided by UNCLOS Art. 149.

Section 3
Development of resources of the Area

Article 150
Policies relating to activities in the Area

Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring:

(a) **the development of the resources of the Area;**

(b) **orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;**

(c) **the expansion of opportunities for participation in such activities consistent in particular with articles 144 and 148;**

(d) **participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention;**

(e) **increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;**

(f) **the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;**

(g) **the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;**

(h) **the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area, as provided in article 151;**

(i) **the development of the common heritage for the benefit of mankind as a whole; and**
(j) **conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.**

Bibliography: *René-Jean Dupuy*, L'océan partagé (1979); *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982); *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention. Treaty Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung (1995), 121–134; *Jean-Pierre Lévy*, The International Sea-Bed Area, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. 1 (1991), 587–633; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Bernhard H. Oxman*, The 1994 Agreement Relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15–35; *Bernhard H. Oxman*, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), AJIL 75 (1981), 211–256; *Moragodage Christopher Walter Pinto*, The Common Heritage of Mankind: Then and Now (2012); *Rüdiger Wolfrum*, Common Heritage of Mankind, MPEPIL, available at: http://www.mpepil.com; *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume (1984)

Documents: GA, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970; GA Res. 48/263 of 17 August 1994

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5. '(c) the expansion of opportunities for participation in such activities consistent in particular with articles 144 and 148; (d) participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention; […] (g) the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area […]' 14

I. Purpose and Function

1 With view to the implementation of the common heritage of mankind,[1] Art. 150 lays down general policies relating to activities in the Area. These are to be considered in the exercise of rights and duties arising from other provisions of the Convention.[2] The policies concern activities in the Area as such, in particular regarding the special consideration of developing States, but even more the relationship between seabed and land-based mining and resource policy. Art. 150 represents a compromise between the disparate economic interests of potential seabed mining and consumer (industrial) States and traditional land-based producer (including developing) States, alongside the interests of States that were neither major producers nor consumers.[3] While the chapeau of Art. 150 sets out the general aims of activities in the Area, these are specified in Art. 150 (a)-(j).[4] Art. 150 must be read in light of the Agreement Relating to the Implementation of Part XI of UNCLOS (1994 Agreement)[5]. Although the Agreement does not explicitly refer to Art. 150, the article is nonetheless engaged. This especially pertains to its provisions on resource policy, and has moreover to be kept in mind with regard to those provisions that refer to the transfer of technology and participation in revenues by the Authority, as these items have been fundamentally modified by the Agreement.[6]

II. Historical Background

2 In 1967, the Maltese Ambassador Arvid Pardo, in his famous speech on the future of the seabed and ocean floor beyond national jurisdiction, advocated that these areas should be 'a common heritage of mankind'.[7] He believed they should be used for the benefit of mankind as a whole, with preferential treatment for developing States regarding benefits deriving from activities.[8] Only a few years later, in 1970, the 'Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction'[9] followed Pardo[10] and further elaborated on governing principles. In particular, paragraph 9 of the declaration stated:

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[1] See *Moragodage Christopher Walter Pinto*, The Common Heritage of Mankind. Then and Now (2012), 68; *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 51. Critical with regard to the provisions on resource policy, *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume (1984), 506 *et seq*.

[2] *Berhard H. Oxman*, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), AJIL 75 (1981), 211, 215 (para. 2); see also *Pinto* (note 1), 68.

[3] See for instance Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 254; *Pinto* (note 1), 69 *et seq*.

[4] *Jean-Pierre Lévy*, The International Sea-Bed Area, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. 1 (1991), 587, 620 (para. 131); *Wolfrum* (note 1), 481.

[5] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, Annex to GA Res. 48/263 of 17 August 1994. See on the adoption of the 1994 Agreement e. g. *Bernhard H. Oxman*, The 1994 Agreement Relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15–35; *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention. Treaty Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin *et al.* (eds.), Recht zwischen Umbruch und Bewahrung (1995), 121.

[6] See 1994 Agreement, Annex, S. 6; S. 5; S. 8.

[7] Statement of *Arvid Pardo*, 1 November 1967, UN Doc. A/C.1/PV.1515 and UN Doc. A/C.1/PV.1516, GAOR 22nd Sess. (Doc. A/C.1/PV.1516, MN 13).

[8] *Ibid*.

[9] GA, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970.

[10] See in particular *ibid*., para. 1 (common heritage of mankind), para. 7 (benefit of mankind as a whole and particular consideration of developing States).

> '[…] The régime shall, *inter alia,* provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.'

These considerations, which largely follow from the concept of common heritage of mankind, are reminiscent of provisions that can be found in the later Art. 150: development of the resources of the Area (Art. 150 (a)), their rational management (Art. 150 (b)), expansion of opportunities (Art. 150 (c), (g)) and special consideration of developing States (Art. 150 (c), (d), (g), (h)). Also, the overarching concept of 'common heritage for the benefit of mankind as a whole' is explicitly listed (Art. 150 (i)). Further, the declaration's preamble considered

> '[…] that the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities'.[11]

The first aim mentioned in this paragraph almost verbatim corresponds with the objective termed in the chapeau of Art. 150. Also, the general idea that adverse economic effects resulting from seabed mining should be reduced can be found in Art. 150.[12]

These considerations were taken up in the deliberations of the Sea-Bed Committee on **3**
policies and objectives.[13] Several of the early drafts reflected the content of paragraph 9[14] and in line with the declaration's preamble, early proposals considered minimizing the fluctuation of prices or countering adverse economic effects resulting from seabed mining in general, for instance by control of production or determination of prices.[15]

In the discussions, the issue of resource policy was particularly disputed. A balance had to be **4**
found especially between, on the one hand, the interests of industrialized States, who, as consumers and potential seabed miners, favored the promotion of seabed mining, and on the other hand the interests of land-based producers, including developing States, who sought protection from its apprehended adverse effects.[16] Under the heading 'General principles

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[11] *Ibid.*, Recital 6 of the Preamble.

[12] See Art. 150 (e), (f), (h), (j); *infra*, MN 10 *et seq.*

[13] The declaration had from the outset been of high importance for the work of the Sea-Bed Committee. See the Committee's Agreement on the Organization of Work, which referred to the declaration in tasking Sub-Committee I with preparing 'draft treaty articles embodying the international régime […] for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction', Sea-Bed Committee, Agreement on the Organization of Work (1971), GAOR 26th Sess. Suppl. 21 (A/8421), para. 19.

[14] For instance, nearly verbatim adopted in Art. 2 (1) of the Draft Statute for an International Seabed Authority, Sea-Bed Committee, United Republic of Tanzania: Draft Statute for an International Seabed Authority, UN Doc. A/AC.138/3 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 50; verbatim adopted in Sea-Bed Committee, Canada: The International Sea-bed Régime and Machinery Working Paper, UN Doc. A/AC.138/59 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 205 (Art. 9); Sea-Bed Committee, Chile *et al.*: Working Paper on the Régime of the Sea-bed and Ocean Floor, and the Subsoil Thereof beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93 (Art. 14 (a)), empowered the International Seabed Authority 'to provide for the orderly and safe development and rational management of the area and its resources for the benefit of mankind'; Sea-Bed Committee, Report of Sub-Committee I, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Program of Work, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39, 59 (Art. 10 (A)).

[15] Art. 2 (2) Tanzania Draft Statute (note 14) stated: '[…] the Authority shall pay particular attention to the desirability of minimizing fluctuations of prices of land minerals and raw minerals that may result from the exploitation of the resources of the area'. Art. 5 Chile *et al.* Working Paper (note 14) stated: 'Exploitation of the resources of the area shall be carried out in rational manner so as […] to minimize any fluctuation in the prices of minerals and materials from terrestrial sources that may result from such exploitation and adversely affect the exports of the developing countries'; *ibid.*, Art. 14 (e) empowered the International Seabed Authority to control, reduce or suspend of production and to fix prices in order to avoid 'adverse economic effects for developing countries, exporters of raw materials'. In reference to the text of recital 6 of the declaration's preamble, the elaborations on Art. 9 Canada Working Paper (note 14), 213, lit. l suggest to regulate 'the production, marketing and distribution of raw materials from the seabed'; on the regulation of production see also *ibid.*, lit. g.

[16] See for instance *Pinto* (note 1), 69 *et seq.*; *Wolfrum* (note 1), 486 *et seq.*; Nordquist/Rosenne/Yankov (note 3), 254.

regarding activities in the area', the Informal Single Negotiating Text[17] provided that adverse economic effects on developing States caused by a decrease in export earnings should be prevented or minimized.[18] In the Revised Single Negotiating Text,[19] the protection of land-based producing developing States was further elaborated. Protection was to be realized by commodity and other arrangements or agreements, by production limitation for the Area and a compensatory system. This approach was adopted by the Informal Composite Negotiating Text (ICNT)[20], which provided detailed provisions on production policies. Subsequently however, these were separated from general policies. Whilst production policies were incorporated in the later Art. 151, Art. 150 only maintained a general aim of protection, with reference to Art. 151.[21] However, the article retained other provisions on resource policy.

5 In a late stage of the negotiations, at the instigation of industrialized countries, the development of the common heritage was expressly incorporated in the article, as it was felt that the *development* of seabed mining needed stronger emphasis.[22] In turn,[23] in response to land-based producers' concerns that their traditional customer countries might prospectively favour seabed minerals, a provision was introduced that sought to prohibit preferential treatment of seabed minerals in market access.[24] This is exemplary for the ongoing attempt to consolidate the different interest groups particularly involved in resource policy, namely potential seabed miners, consumers, and land based-producers.

6 Besides resource policy, the transfer of technology to the Authority and developing States in the context of activities in the Area, introduced in Art. 150 by the ICNT,[25] and provided for in Art. 144 and Annex III, Art. 5, was one of the most controversial issues of Part XI.[26]

III. Elements

1. 'Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States […]'

7 According to Art. 150, the key objective[27] to be pursued in conducting activities in the Area is to 'foster healthy development of the world economy and balanced growth of

[17] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 138 (Art. 9).

[18] Notably, the ISNT (*ibid.*) also added to the considerations already contained in the 'Declaration of Principles' that the '[c]onservation and utilization of the resources of the Area for optimum benefit of producers and consumers […]' should be ensured (see on the development and the meaning of the provision on conservation, *Wolfrum* (note 1), 482 *et seq.*). This provision requires the consideration of future generations and as such is expressive of a central aspect of the concept of common heritage of mankind (see *ibid.*, 483).

[19] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 129 (Art. 9).

[20] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 25 (Art. 150).

[21] On the development of the provisions on production control, see *Lévy* (note 4), 626 (paras. 159 et s*eq.*).

[22] UNCLOS III, Report of the Co-ordinators of the Working Group of 21 to the First Committee, UN Doc. A/CONF.62/C.1/L.28 and ADD. 1 (1980), OR XIV, 161, 166 and 173 (Annex, Modifications to the Negotiating Text Proposed by the Working Group (Art. 150 (h)); UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), Doc. A/CONF.62/WP.10/REV.3 (1980), reproduced in Renate Platzöder (ed.), Third United Conference on the Law of the Sea: Documents, vol. II (1982), 179, 245 *et seq.* (Art. 150 (h)).

[23] *Oxman* (note 2), 215 (para. 2 and footnote 19).

[24] See Report of the Co-ordinators (note 22), 164 and 173 (Annex, Art. 150 lit. (i)); Draft Convention on the Law of the Sea (note 22), 245 *et seq.* (Art. 150 (i)).

[25] ICNT (note 20), 25 (Art. 150 (b) and (c)).

[26] See *Vöneky/Beck* on Art. 144 and *Le Gurun* on Annex III, Art. 5.

[27] *Lévy* (note 4), 620; *Wolfrum* (note 1), 480.

international trade'. A further aim is the promotion of international cooperation with a view to the development of *all* States, and in particular developing States. Art. 150 (a) to (j) expand on these very general aims.[28] The objectives are to be implemented as provided in other provisions of Part XI. This reference clarifies that Art. 150 as such neither gives the International Seabed Authority any powers,[29] nor does it provide requirements for activities in the Area.[30] The objectives laid out in Art. 150, however, gain relevance with regard to discretionary norms, vague legal concepts and regulatory lacunae, in that they provide guidance for the implementation and interpretation of relevant provisions of the Convention and for the handling of gaps.[31]

2. '(a) the development of the resources of the Area; […] (i) the development of the common heritage for the benefit of mankind as a whole'

Whereas Art. 150 in its provisions on resource and trade policy restricts rather than promotes seabed mining,[32] Art. 150 (a) and (i), the 'pro-production formulas',[33] unequivocally encourage it.[34] While Art. 150 (a) endorses the development of seabed resources in general,[35] Art. 150 (i), in line with Art. 140, stresses that activities in the Area shall pursue the objective to develop the 'common heritage for the benefit of mankind as a whole', and therewith strengthens the aim of development of resources. **8**

3. '(b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste'

The policy stipulated in Art. 150 (b) follows from the concept of common heritage of mankind, which requires taking not only present but also future generations into consideration.[36] The resources shall therefore be managed rationally, at the hands of the International Seabed Authority, and conducted efficiently; their depletion[37] and waste shall be prevented. **9**

[28] *Lévy* (note 4), 621; *Wolfrum* (note 1), 481.
[29] *Wolfrum* (note 1), 485 *et seq.*, however argues that Art. 150 (h) contains a mandate for action ('Handlungsauftrag') *vis-á-vis* the International Seabed Authority.
[30] *Oxman* (note 2), 215 (para. 2); *Hauser* (note 1), 53 *et seq.*
[31] *Hauser* (note 1), 54.
[32] Likewise *ibid.*, 52 *et seq.* See *infra*, MN 10 *et seq.* on Art. 150 (e), (f), (h) and (j). Note, however, that these provisions have to be read in light of the 1994 Agreement.
[33] *Wolfrum* (note 1), 482.
[34] Likewise *Hauser* (note 1), 52.
[35] The formulation of Art. 150 (a) corresponds to the title of Section 3 'Development of resources of the Area'.
[36] See *René-Jean Dupuy*, L'océan partagé (1979), 151–153; *Lévy* (note 4), 621; *Wolfrum* (note 1), 482 *et seq.*
[37] *Wolfrum* (note 1), 482 *et seq.*

4. '(e) increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals; (f) the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand; […] (h) the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area, as provided in article 151; […] (j) conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.'

10 Art. 150 (e), (f), (h) and (j) are concerned with issues relating to resource and trade policy. They primarily strive to ensure that seabed minerals remain a mere supplement alongside land-based minerals and do not compete with them.[38] However, this shifts in light of the 1994 Agreement.

11 Art. 150 (e) and (f) reflect part of the compromise that had to be made during the negotiations on the regime of the Area.[39] On the one hand, industrialized consumer and potential seabed mining States had an interest in the development of deep seabed resources and enhanced supply, and on the other hand, other producers, in particular developing countries, in apprehension of adverse effects of seabed mining were interested in stable prices and equalized markets.[40] Accordingly, Art. 150 (e) seeks to enhance the availability of seabed minerals to ensure the overall supplies, but arguably only insofar as needed as a supplement to other minerals.[41] Art. 150 (f) aims at the balance of markets and protection of prices, with view to both producers and consumers, and deep seabed as well as terrestrial minerals. When read in conjunction with Art. 150 (b), these norms moreover indicate two objectives of seabed mining in another regard, inherent in the concept of common heritage of mankind, that require balancing: to serve present *and* future generations.[42] However, Art. 150 (e) and (f) have to be read in light of the fundamental changes that the 1994 Agreement introduces to production policy. The Agreement abandons the production control established by Art. 151, i. e. the promotion of commodity agreements and arrangements, as well as production limitation, and instead introduces a new set of principles. These in particular provide that the development of resources shall accord with 'sound commercial principles',[43] that the provisions of the GATT and its successor agreements (the WTO and covered Agreements) shall apply,[44] and that discrimination between seabed and other minerals is prohibited.[45]

12 Also along these lines, in apprehension of a decrease in mineral prices and exports, Art. 150 (h) strives after the protection of land-based developing producer States from adverse effects of seabed mining.[46] The provision refers to Art. 151 which established a

[38] Similar *ibid.*, 505.

[39] Likewise *Lévy* (note 4), 622, who even speaks of an 'ideological clash'.

[40] See *ibid.*, 622. See also *ibid.*, 622 *et seq.* on the issues associated with pursuing an equilibrium of markets.

[41] Having regard to the development of the provision, *Wolfrum* (note 1), 484 *et seq.*, argues that the wording amounts to conditioning the increase in availability of seabed minerals on a lower availability of minerals from other sources.

[42] See *ibid.*, 484 *et seq.*

[43] 1994 Agreement, Annex, S. 6, para. 1(a).

[44] See 1994 Agreement, Annex, S. 6, paras. 1(b) and 2.

[45] 1994 Agreement, Annex, S. 6, para. 1(d). Nordquist/Rosenne/Yankov (note 3), 255 point out that Art. 150 (e) and other provisions of Art. 150 are 'rendered nugatory'.

[46] The Council, upon recommendation of the Economic Planning Commission, shall take according measures, see Arts. 162 (2)(m) and 164 (2)(c) UNCLOS.

restrictive production policy for seabed mining, in particular in order to ensure its supplementary position alongside land-based mining.[47] However, whilst Art. 151 still envisages economic assistance for affected developing States, its provisions that provided for the prevention of adverse effects for land-based producers, i. e. those on commodity arrangements and production limitation, were declared inapplicable by the 1994 Agreement.[48] Art. 150 (h) has to be read in accordance with these modifications and the principles on production policy introduced by the 1994 Agreement.[49]

With regard to access to markets, Art. 150 (j) envisages that import conditions for seabed minerals and commodities shall not be more favourable than the most favourable for land-based minerals and commodities. This provision reflects the land-based producers' fear that they might lose their traditional customers to seabed producers.[50] In effect, it allows discrimination against seabed minerals, but not land-based minerals. However, Art. 150 (j) has to be read in light of the 1994 Agreement, which in its principles for production policy provides that discrimination and preferential access to markets in either direction is prohibited.[51] 13

5. '(c) the expansion of opportunities for participation in such activities consistent in particular with articles 144 and 148; (d) participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention; […] (g) the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area […]'

Art. 150 (c), (d) and (g) express fundamental implications of the concept of the common heritage of mankind in the regime of the Area: *all* States shall have the opportunity to participate in activities in the Area, and mankind, represented by *all* States, shall benefit from seabed mining.[52] This entails special consideration of the needs and interests of developing States.[53] Art. 150 (g) emphasizes that activities in the Area shall promote non-discriminatory participation in the development of seabed resources for all States parties. Art. 150 (c) stresses the particular support of developing States and the Enterprise in this regard. It explicitly refers to Art. 148, which strives after the effective participation of developing States in activities in the Area, and moreover to Art. 144, which is concerned with the transfer of technology, an important factor in this context. Also, Art. 150 (d) states that the transfer of technology to the Enterprise and States shall be pursued in the conduct of activities in the Area. The provision moreover provides that the Authority shall participate in the revenues of seabed mining. 14

It has to be kept in mind that the Convention's original system of transfer of technology to the Enterprise and developing States[54] has been replaced with a much more liberal system. In particular, instead of *compulsory* transfer, the 1994 Agreement, if necessary, relies on the cooperation of contractors and States 'in facilitating the acquisition of […] technology', 'consistent with the effective protection of intellectual property rights'.[55] Equally, the 15

[47] See *Siegfried* on Art. 151. Certainly, the system established by Art. 151 in large part (i. e. with regard to production limitation and commodity agreements and arrangements) not only benefits developing but also all other land-based producers. Similarly *Wolfrum* (note 1), 488.

[48] See 1994 Agreement, Annex, S. 6, para. 7.

[49] See *supra*, MN 11.

[50] See *supra*, note 24.

[51] See 1994 Agreement, Annex, S. 6, para. 1(d).

[52] See Arts. 140 and 148 UNCLOS and *Rüdiger Wolfrum*, Common Heritage of Mankind, MPEPIL, para. 18 *et seq.*, available at: http://www.mpepil.com; *Lévy* (note 4), 621.

[53] See *ibid.*

[54] See Art. 144 and Annex III, Art. 5 UNCLOS.

[55] 1994 Agreement, Annex, S. 5.

complex system of payments from contractors to the Authority as originally provided for by the Convention[56] has been abandoned and replaced by new principles for the establishment of rules, regulations and procedures on the financial terms of contracts.[57]

Article 151
Production policies

1. (a) **Without prejudice to the objectives set forth in article 150 and for the purpose of implementing subparagraph (h) of that article, the Authority, acting through existing forums or such new arrangements or agreements as may be appropriate, in which all interested parties, including both producers and consumers, participate, shall take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the minerals derived from the Area, at prices remunerative to producers and fair to consumers. All States Parties shall cooperate to this end.**

(b) **The Authority shall have the right to participate in any commodity conference dealing with those commodities and in which all interested parties including both producers and consumers participate. The Authority shall have the right to become a party to any arrangement or agreement resulting from such conferences. Participation of the Authority in any organs established under those arrangements or agreements shall be in respect of production in the Area and in accordance with the relevant rules of those organs.**

(c) **The Authority shall carry out its obligations under the arrangements or agreements referred to in this paragraph in a manner which assures a uniform and non-discriminatory implementation in respect of all production in the Area of the minerals concerned. In doing so, the Authority shall act in a manner consistent with the terms of existing contracts and approved plans of work of the Enterprise.**

2. (a) **During the interim period specified in paragraph 3, commercial production shall not be undertaken pursuant to an approved plan of work until the operator has applied for and has been issued a production authorization by the Authority. Such production authorizations may not be applied for or issued more than five years prior to the planned commencement of commercial production under the plan of work unless, having regard to the nature and timing of project development, the rules, regulations and procedures of the Authority prescribe another period.**

(b) **In the application for the production authorization, the operator shall specify the annual quantity of nickel expected to be recovered under the approved plan of work. The application shall include a schedule of expenditures to be made by the operator after he has received the authorization which are reasonably calculated to allow him to begin commercial production on the date planned.**

(c) **For the purposes of subparagraphs (a) and (b), the Authority shall establish appropriate performance requirements in accordance with Annex III, article 17.**

(d) **The Authority shall issue a production authorization for the level of production applied for unless the sum of that level and the levels already authorized exceeds the nickel production ceiling, as calculated pursuant to paragraph 4 in the year of issuance of the authorization, during any year of planned production falling within the interim period.**

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[56] See Annex III, Art. 13 UNCLOS.

[57] See 1994 Agreement, Annex, S. 8, paras. 2, 1. Notably, S. 8, para. 1(b) provides that payments to the Authority shall range in the order of those for land-based mining so as to prevent an 'artificial competitive advantage' or disadvantage for seabed mining.

(e) When issued, the production authorization and approved application shall become a part of the approved plan of work.

(f) If the operator's application for a production authorization is denied pursuant to subparagraph (d), the operator may apply again to the Authority at any time.

3. The interim period shall begin five years prior to 1 January of the year in which the earliest commercial production is planned to commence under an approved plan of work. If the earliest commercial production is delayed beyond the year originally planned, the beginning of the interim period and the production ceiling originally calculated shall be adjusted accordingly. The interim period shall last 25 years or until the end of the Review Conference referred to in article 155 or until the day when such new arrangements or agreements as are referred to in paragraph 1 enter into force, whichever is earliest. The Authority shall resume the power provided in this article for the remainder of the interim period if the said arrangements or agreements should lapse or become ineffective for any reason whatsoever.

4. (a) The production ceiling for any year of the interim period shall be the sum of:

(i) the difference between the trend line values for nickel consumption, as calculated pursuant to subparagraph (b), for the year immediately prior to the year of the earliest commercial production and the year immediately prior to the commencement of the interim period; and

(ii) sixty per cent of the difference between the trend line values for nickel consumption, as calculated pursuant to subparagraph (b), for the year for which the production authorization is being applied for and the year immediately prior to the year of the earliest commercial production.

(b) For the purposes of subparagraph (a):

(i) trend line values used for computing the nickel production ceiling shall be those annual nickel consumption values on a trend line computed during the year in which a production authorization is issued. The trend line shall be derived from a linear regression of the logarithms of actual nickel consumption for the most recent 15-year period for which such data are available, time being the independent variable. This trend line shall be referred to as the original trend line;

(ii) if the annual rate of increase of the original trend line is less than 3 per cent, then the trend line used to determine the quantities referred to in subparagraph (a) shall instead be one passing through the original trend line at the value for the first year of the relevant 15-year period, and increasing at 3 per cent annually; provided however that the production ceiling established for any year of the interim period may not in any case exceed the difference between the original trend line value for that year and the original trend line value for the year immediately prior to the commencement of the interim period.

5. The Authority shall reserve to the Enterprise for its initial production a quantity of 38,000 metric tonnes of nickel from the available production ceiling calculated pursuant to paragraph 4.

6. (a) An operator may in any year produce less than or up to 8 per cent more than the level of annual production of minerals from polymetallic nodules specified in his production authorization, provided that the over-all amount of production shall not exceed that specified in the authorization. Any excess over 8 per cent and up to 20 per cent in any year, or any excess in the first and subsequent years following two consecutive years in which excesses occur, shall be negotiated with the Authority, which may require the operator to obtain a supplementary production authorization to cover additional production.

(b) **Applications for such supplementary production authorizations shall be considered by the Authority only after all pending applications by operators who have not yet received production authorizations have been acted upon and due account has been taken of other likely applicants. The Authority shall be guided by the principle of not exceeding the total production allowed under the production ceiling in any year of the interim period. It shall not authorize the production under any plan of work of a quantity in excess of 46,500 metric tonnes of nickel per year.**

7. **The levels of production of other metals such as copper, cobalt and manganese extracted from the polymetallic nodules that are recovered pursuant to a production authorization should not be higher than those which would have been produced had the operator produced the maximum level of nickel from those nodules pursuant to this article. The Authority shall establish rules, regulations and procedures pursuant to Annex III, article 17, to implement this paragraph.**
8. **Rights and obligations relating to unfair economic practices under relevant multilateral trade agreements shall apply to the exploration for and exploitation of minerals from the Area. In the settlement of disputes arising under this provision, States Parties which are Parties to such multilateral trade agreements shall have recourse to the dispute settlement procedures of such agreements.**
9. **The Authority shall have the power to limit the level of production of minerals from the Area, other than minerals from polymetallic nodules, under such conditions and applying such methods as may be appropriate by adopting regulations in accordance with article 161, paragraph 8.**
10. **Upon the recommendation of the Council on the basis of advice from the Economic Planning Commission, the Assembly shall establish a system of compensation or take other measures of economic adjustment assistance including cooperation with specialized agencies and other international organizations to assist developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area. The Authority on request shall initiate studies on the problems of those States which are likely to be most seriously affected with a view to minimizing their difficulties and assisting them in their economic adjustment.**

Bibliography: *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention. Treaty Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung. Völkerrecht Europarecht Staatsrecht (1995), 121–134; *Jean-Pierre Lévy*, The International Sea-Bed Area, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. 1 (1991), 587–633; *L. Dolliver M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Bernhard H. Oxman*, The 1994 Agreement relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15–35; *Moragodage Christopher Walter Pinto*, The Common Heritage of Mankind: Then and Now (2012); *Rüdiger Wolfrum,* Die Internationalisierung staatsfreier Räume (1984)

Documents: GA Res. 48/263 of 17 August 1994; GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970

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I. Purpose and Function

The production policy established by Art. 151 sought to ensure the stability of markets and to protect developing land-based producers of minerals from adverse effects of seabed mining. In apprehension of a decrease in mineral prices and exports, it was in particular intended that seabed mining would remain a mere supplement to land-based mining instead of competing with it.[1] Art. 151 envisaged that the Authority should participate in market-regulating commodity and other arrangements or agreements (Art. 151 (1))[2] and set up an interim period of up to 25 years in which production should be subject to an authorization and limited by a production ceiling (Art. 151 (2)–(7), see also Art. 151 (9)). The article moreover refers to multilateral trade agreements with regard to unfair economic practices and dispute settlement (Art. 151 (8)) and provides for a system of compensation to assist affected developing countries (Art. 151 (10)). **1**

However, most of the provisions of Art. 151 (Art. 151 (1)–(7) and (9)) were declared inapplicable by the Agreement Relating to the Implementation of Part XI of UNCLOS (1994 Agreement).[3] The production control established by Art. 151 has been abandoned. Instead, the Agreement establishes a fundamentally different set of principles for production policy. In particular, the development of resources shall accord with 'sound commercial principles', discrimination between minerals derived from land-based and seabed mining is prohibited and the provisions of the GATT and its successor agreements (the WTO and covered Agreements) apply.[4] In line with this, Art. 151 (8) remains untouched by the 1994 Agreement. Art. 151 (10) also remains in effect, though it is to be implemented by way of 'economic assistance' as elaborated in the Agreement.[5] **2**

[1] *Jean-Pierre Lévy*, The International Sea-Bed Area, in: Dupuy/Vignes (eds.), A Handbook on the New Law of the Sea, vol. 1 (1991), 587, 624; *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin *et al.* (eds.), Recht zwischen Umbruch und Bewahrung (1995), 121, 125 *et seq.*; *Moragodage Christopher Walter Pinto*, The Common Heritage of Mankind: Then and Now (2012), 81 *et seq.*; Art. 151 (1)(a) and Art. 150 (h) UNCLOS.

[2] See *Wolfrum*, Die Internationalisierung staatsfreier Räume (1984), 488–497, on Art. 151 (1) and these instruments.

[3] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, Annex to GA Res. 48/263 of 17 August 1994. *Ibid.*, Annex, S. 6, para. 7.

[4] 1994 Agreement, Annex, S. 6, paras. 1(a), (d), (b), 2.

[5] 1994 Agreement, Annex, S. 7; Art. 151 (10) UNCLOS.

II. Historical Background

3 The Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction of 1970[6] stressed in its preamble that the

> 'development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities'.[7]

With regard to activities in the Area, the declaration further pointed to the particular consideration of developing States.[8]

4 In the Sea-Bed Committee, production policy initially formed part of the discussions on general policies relating to activities in the Area, as later embodied in Art. 150 UNCLOS. Two objectives were identified. On the one hand, it was sought to foster the development of seabed mining, not only in the interest of potential seabed mining industrialized States and consumer States but also for the *de facto* realization of the concept of common heritage of mankind. On the other hand, protection of potentially adversely affected, in particular developing State, land-based producers was deemed necessary.[9] Certainly, the issue was further complicated by the fact that production policy had to be drafted although it could only be conjectured when production would actually start and which economic order and other conditions would be in place at that point in time.[10] An early draft formulated that activities in the Area should:

> 'be carried out on a safe, orderly and rational manner so as […] to regulate production in the Area so as to minimize the fluctuation in the prices of minerals and raw materials from land and off-shore sources that may result from such exploitation and adversely affect the exports of developing countries, especially those who are producers of wasting and non-renewable materials. The mineral resources of the Area shall be considered as being complementary to resources produced from land and off-shore areas.'[11]

In this context, commodity agreements were mentioned.[12] Beyond that however, no specific scheme to implement these ideas was elaborated until the Revised Single Negotiating Text of 1976 (RSNT).[13] Under 'General principles regarding economic aspects of activities in the area' the RSNT laid out three pillars of protection against adverse economic effects of seabed mining on developing producer States: commodity arrangements or agreements, an interim production limitation for seabed resources and a compensation mechanism for affected land-producer States.[14] The subsequent Informal Composite Negotiating Text of

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[6] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970.

[7] *Ibid.*, recital 6 of the preamble.

[8] *Ibid.*, para. 7.

[9] See *Lévy* (note 1), 617 *et seq.* (paras. 116 *et seq.*); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 265. See with regard to production limitation, in later stages of the negotiations, UNCLOS III, Report of the Chairman of the First Committee on the Negotiations in the First Committee, UN. Doc. A/CONF.62/L.43 (1979), OR XII, 74, 75 (para. 17 (2)); UNCLOS III, Report of the Chairman of the First Committee, UN Doc. A/CONF.62/L.54 (1980), OR XIII, 88, 89 (para. 13).

[10] See *Lévy* (note 1), 617 (para. 115) and 632 (para. 186).

[11] Sea-Bed Committee, Report of Sub-Committee I, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Program of Work, UN Doc. A/AC.138/94/ADD.1 (1973), GAOR 26th Sess. Suppl. 21 (A/9021-II), 39, 59 (Art. 10 (B)).

[12] *Ibid.*, 60 (note 1).

[13] Nordquist/Rosenne/Yankov (note 9), 266.

[14] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 129 (Art. 9 (4)). See also *ibid.*, 139, 142 (Annex I, para. 21 on computation).

1977 (ICNT) adopted this threefold approach and provided detailed provisions on a system of production limitation.[15] In the revised version of the ICNT production policies were eventually detached from general policies,[16] whilst it was stressed that the new Art. 151 on production policies intended to implement Art. 150 (g), which dealt with the protection of developing State producers.[17]

Throughout the negotiations, the issue of production limitation proved to be particularly controversial.[18] Three main interest groups were represented in the negotiating process. Potential seabed miners and consumer States were interested in long-term conditions for investment,[19] and regarded seabed minerals necessary in order to ensure supply.[20] In contrast, land-based miners feared subsidization of seabed mining and over-supply, leading to adverse effects on prices and on the economies of traditional producer States.[21] Finally, States that were not major producers or consumers emphasized that seabed mining should benefit mankind as a whole, calling for a rational development, instead of exceeding production or restrictive limitation.[22] **5**

Following the assumption that production control was the only way to effectively protect land-based producers,[23] a restrictive system of production limitation for a period of up to 25 years was eventually agreed on. However, the final version contained in Art. 151, although adopted, still gave rise to substantial concerns, in particular on the part of industrialized States. They considered the concept of production limitation to be artificial and outdated.[24] Besides general criticism that related to central planning and the discretionary power of the Authority in granting production authorizations, the formula for calculating the production ceiling was criticized.[25] It was – due to the recession in the 1980s – considered to be more restrictive than originally planned. This would result in fewer possible mining operations than expected and therefore in the refusal of production authorizations.[26] On the whole, the principles of market economy were thought to be better-suited.[27] Also, it was acknowledged **6**

[15] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 25 (Art. 150 (1)(g)(B)).

[16] UNCLOS III, Informal Composite Negotiating Text/Revision 1, UN Doc. A/CONF.62/WP.10/REV.1 (1979), reproduced in Renate Platzöder (ed.), Third United Conference on the Law of the Sea: Documents, vol. I (1982), 375, 442 (Arts. 150 and 151).

[17] *Ibid.*, Art. 151, heading.

[18] On the problematic issues see for instance: UNCLOS III, Statement Made by Mr. P. B. Engo, Chairman of the First Committee, at the 39th Meeting on 14 June 1977, UN Doc. A/CONF.62/C.1/L.21 (1977), OR VII, 78, 79 *et seq.*; UNCLOS III, Report to the Chairman of Negotiating Group 1 by Mr. Nandan on Negotiations Relating to Production Policies, Annex I to Report by the Chairman of Negotiating Group 1, UN Doc. A/CONF.62/L.35 (1979), OR XI, 86, 87 *et seq.*; UNCLOS III, Report of the Co-ordinators of the Working Group of 21 to the First Committee, UN Doc. A/CONF.62/C.1/L.27 and ADD.1 (1980), OR XIII, 113, 120, 120 *et seq.* (Production Policies); UNCLOS III, Report on the Negotiations in the First Committee by Paul Bamela Engo (United Republic of Cameroon), Doc. A/CONF.62/C.1/L.29 (1981), reproduced in Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 51, 56–57 (Production Policy).

[19] See UNCLOS III, Production Policy – Report of the Chairman (Ambassador Nandan) to First Committee, para. 7(a) (1979, mimeo.), reproduced in Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea, vol. VIII (1985), 188, with regard to the production ceiling; UNCLOS III, Report by Mr. W. Okoth (Kenya) on Negotiations Relating to Production Policies, UN Doc. WG 21/Informal Paper 2 (1979, mimeo.), reproduced in Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea, vol. VI (1984), 184, 185.

[20] For potential seabed miners, see Production Policy – Report of the Chairman (note 19), para. 7(a), with regard to the production ceiling.

[21] See *ibid.*, para. 7(b), with regard to the production ceiling.

[22] See *ibid.*, 190 *et seq.*, with regard to the production ceiling.

[23] *Lévy* (note 1), 626 *et seq.*

[24] See *L. Dolliver M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189, 199.

[25] Background Paper (1991), reproduced in ISA, Secretary-General's Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, Collected Documents (2002), 15, 16 (para. 4).

[26] *Ibid.* Originally, it had been assumed that all those interested in seabed mining would be able to engage in activities, *Lévy* (note 1), 631.

[27] *Jaenicke* (note 1), 126.

that seabed mining would, even with a lack of a corresponding regulation, merely be a supplement to land-based mining as long as the latter would be able to cover the demand in a more economical way.[28] In the negotiations on a novel system, it was agreed that general principles would be established (rather than specific rules), as it was uncertain which conditions would prevail at the time of the first production.[29] The items of non-subsidization and non-discrimination between seabed and land-based mining gained particular attention in this regard.[30]

7 In line with the above-mentioned findings on production limitation, the 1994 Agreement declared the respective provisions, and those on commodity and other arrangements and agreements inapplicable.[31] Instead, it established principles to govern the production policy, including the prohibition of subsidization and discrimination.[32] Moreover, the Agreement introduced the norms that the development of resources shall accord with 'sound commercial principles' and that the provisions of the GATT and its successor agreements (the WTO and covered Agreements) shall apply.[33] Regarding the compensation system envisaged by Art. 151 (10), concern had been raised that States parties could be burdened with high costs.[34] The principles[35] subsequently included in the 1994 Agreement *inter alia* provide that economic assistance shall be financed only by those funds exceeding the administrative costs of the Authority and received either from contractors (also the Enterprise) or on a voluntary basis.[36] Art. 151 (8) on multilateral trade agreements with regard to unfair economic practices and dispute settlement, which had been proposed and introduced in the article as recently as 1982,[37] was preserved. Thus, while the system of production control was abandoned, implying a significant weakening of the protection of land-based producers, the interests of these producers were at least still taken into account.

III. Elements

1. '2. (a) During the interim period […] commercial production shall not be undertaken […] until the operator […] has been issued a production authorization by the Authority […]. (d) The Authority shall issue a production authorization […] unless the sum of that level and the levels already authorized exceeds the nickel production ceiling […].'

8 Art. 151 provided for an interim period of up to 25 years,[38] to begin five years before the first commercial production (Art. 151 (3)), in which production should be dependent on an authorization (Art. 151 (2)). Prior to the beginning of a commercial production, the respective contractor should apply for such an authorization, which should be obtained in

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[28] *Ibid.*

[29] See Information Note of 10 December 1992, para. 6, reproduced in ISA Secretary-General's Informal Consultations (note 25), 89.

[30] *Ibid.*, para. 45.

[31] See 1994 Agreement, Annex, S. 6, para. 7.

[32] *Ibid.*, S. 6, para. 1.

[33] *Ibid.*, S. 6, paras. 1(a), (b) and 2.

[34] Background Paper (note 25), para. 5. Prior to that, the Preparatory Commission had been appointed to *inter alia* study the institution of a compensation fund, UNCLOS III, Resolution I, Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, UN Doc. A/CONF.62/121 (1982), OR XVII, 139, 145 (para. 5(i)).

[35] As in the case of production limitation, due to the existing uncertainties with regard to the future situation, it was decided to establish general principles, instead of specific rules, see Information Note of 10 December 1992 (note 29), paras. 6, 49 *et seq.*

[36] 1994 Agreement, Annex, S. 7, para. 1(a).

[37] See UNCLOS III, Report of the President to the Conference, Doc. A/CONF.62/L.141 and ADD.1 (1982), OR XVI, 247, 248 (Annex Proposed modification relating to unfair economic practices).

[38] See on the issues that would have arisen after the end of the interim period, *Wolfrum* (note 2), 501 *et seq.*

addition to the previously approved plan of work.[39] Production authorizations should be issued by the Authority unless the levels of production envisaged by the applying operators and those of the productions already authorized would in sum exceed the production ceiling determined for the respective year.[40] In the latter case, a selection among several applicants for production authorizations was to be undertaken according to the criteria set out in Annex III, Art. 7.[41] While the system in Art. 151 was set up with a view to nodules, being the resource that appeared most interesting for seabed mining at the time of drafting,[42] Art. 151 (9) also authorized the Authority to limit the production of minerals from other resources.

The 1994 Agreement abandons the system of production control established by Art. 151 (1)-(7), (9) and Annex III, Art. 7.[43] In lieu thereof, the Agreement provides for certain principles to guide production policy. In particular, the development of resources shall accord with 'sound commercial principles'[44] and the provisions of the GATT and its successor agreements (the WTO and covered Agreements) shall apply.[45] Moreover, any kind of discrimination between seabed and other minerals is prohibited[46] and States parties are proscribed from subsidizing activities in the Area, unless allowed under these instruments.[47] Under the 1994 Agreement, the production policy has thus been fundamentally revised towards a market-oriented approach.[48] The viability of seabed mining and its prospects are now solely determined by costs of production and market conditions.[49] **9**

2. '4. (a) The production ceiling for any year of the interim period shall be the sum of […]'

The annual production ceiling was calculated as the sum of two figures: first, 100 % of the *growth* in nickel consumption[50] in the first five years of the interim period, i. e. five years till the beginning of commercial production,[51] and second, 60 % of the growth in nickel consumption from the latter point in time to the specific envisaged production.[52] However, at the industrial States' instigation[53] it was ensured that seabed mining would not be left with nothing; a 'floor'[54] value, that is a fictive annual increase of at least 3 % in nickel consumption, was laid down in the Convention.[55] It was however confined by a 'safeguard clause'[56], providing that in any event the production ceiling would not exceed the *total growth* since **10**

[39] See Art. 151 (2)(a) UNCLOS. Once issued, the production authorization should become part of the approved plan of work, see Art. 151 (2)(e).

[40] See Art. 151 (2)(d); Annex III, Art. 7 (1).

[41] The selection should be undertaken by the Council, see Art. 162 (2)(q). A selection among several applicants could also have become relevant under a commodity agreement or arrangement (see Art. 151 (1)), see Annex III, Art. 7 (1), (2). For the quantity of nickel allocated to the Enterprise, see Art. 151 (5).

[42] See *Pinto* (note 1), 83.

[43] As well as the connected Art. 162 (2)(q) (see note 41), Art. 165 (2)(n) and Annex III, Art. 6 (5) UNCLOS, 1994 Agreement, Annex, S. 6, para. 7.

[44] 1994 Agreement, Annex, S. 6, para. 1(a).

[45] 1994 Agreement, Annex, S. 6, paras. 1(b) and 2.

[46] 1994 Agreement, Annex, S. 6, para. 1(d).

[47] 1994 Agreement, Annex, S. 6, para. 1(c), see also paras. 1(g) and 3.

[48] See also *Bernhard H. Oxman*, The 1994 Agreement Relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15, 24.

[49] See *Jaenicke* (note 1), 126.

[50] The production ceiling referred to nickel because this metal was thought to determine the viability of nodule mining operations, *Pinto* (note 1), 82; *Lévy* (note 1), 627 (para. 163). Other potentially relevant metals were copper, manganese and cobalt, *Pinto* (note 1), 81. Art. 151 (7) dealt with the other metal's level of production.

[51] See Art. 151 (4)(a)(i) and (3).

[52] See Art. 151 (a)(ii).

[53] *Pinto* (note 1), 83.

[54] *Lévy* (note 1), 630 (para. 175); *Pinto* (note 1), 83.

[55] See Art. 151 (4)(b)(ii).

[56] *Lévy* (note 1), 630.

the start of the interim period and hence seabed mining would not interfere with established land-based production.[57] Notably, a certain quantity of nickel from the production ceiling should be reserved for the Enterprise for initial production (Art. 151 (5)). As part of the system of production control, the 1994 Agreement abandons both the formula of Art. 151 (4) and (5).[58]

3. '10. […] the Assembly shall establish a system of compensation or take other measures of economic adjustment assistance […]'

11 Besides by commodity arrangements or agreements, as well as production limitation, Art. 151 intended to protect adversely affected developing land-based producers by way of a compensation mechanism or other 'economic adjustment assistance'[59]. In fact, this third pillar of protection was the only one that actually benefitted *only developing* land-producer States, as it is envisaged by Art. 150 (h). Contrary to the abandoned *preventative* measures, this means of protection applies after an adverse effect has materialized. It is the only one of the three pillars of protection that was not declared inapplicable by the 1994 Agreement.

12 While Art. 151 (10) tasks the Authority with establishing a system of compensation or similar, the 1994 Agreement elaborates on principles on 'economic assistance' to implement Art. 151 (10).[60] Accordingly, an assistance fund shall be established, composed of means that exceed the administrative costs of the Authority,[61] and that are received either on a voluntary basis or from contractors.[62] From this fund, developing land-based producer countries that have been seriously economically affected by a decrease in price or in export volume of a mineral shall be assisted.[63] The level and time frame of assistance shall be determined for each particular case.[64] It may be provided in cooperation with 'global and regional development institutions'.[65]

Article 152
Exercise of powers and functions by the Authority

1. The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.

2. Nevertheless, special consideration for developing States, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for in this Part shall be permitted.

Bibliography: *Gerhard Hafner*, Geographically Disadvantaged States, MPEPIL, available at: http://www.mpepil.com; *Moshe Hirsch*, Developing Countries, MPEPIL, available at: http://www.mpepil.com; *Yuna Huang*, Rights of Land-locked and Geographically Disadvantaged States in the Exclusive Economic Zone, in: Rainer Lagoni/Peter Ehlers/Marian Paschke (eds.), Recent Developments in the Law of the Sea (2010); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Helmut Tuerk*, Landlocked and Geographically Disadvantaged States, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook on the Law of the Sea (2015); *S.C. Vasciannie*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990)

[57] See Art. 151 (4)(b)(ii).

[58] 1994 Agreement, Annex, S. 6, para. 7.

[59] Art. 151 (10).

[60] Arts. 160 (2)(l), 162 (2)(n), 164 (2)(d) on the competences of the Authority's organs with regard to the establishment of such a system are to be interpreted in accordance with the 1994 Agreement, see *ibid.*, Annex, S. 7, para. 2.

[61] See 1994 Agreement, Annex, S. 7, para. 1(a) and already Arts. 171 (f) and 173 (2)(c) UNCLOS which are to be interpreted in accordance with the 1994 Agreement, *ibid.,* Annex, S. 7, para. 2.

[62] 1994 Agreement, Annex, S. 7, para. 1(a).

[63] 1994 Agreement, Annex, S. 7, para. 1(b).

[64] 1994 Agreement, Annex, S. 7, para. 1(d).

[65] 1994 Agreement, Annex, S. 7, para. 1(c).

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970; GA Res. 48/263 of 17 August 1994

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I. Purpose and Function

Art. 152 (1) lays down a general standard of non-discrimination for the Authority. It aims at the equality of States with regard to activities in the Area and related issues. At the same time, Art. 152 (2) provides for a preferential treatment clause for developing, particularly land-locked and geographically disadvantaged, States. The substance of this provision is connected to the idea that mankind as a whole shall benefit from activities in the Area (→ Art. 140), an element of the concept of common heritage of mankind as envisaged by the Convention (→ Art. 136). **1**

II. Historical Background

In 1967, the Maltese Ambassador Arvid Pardo, in his famous speech on the future of the seabed and ocean floor beyond national jurisdiction, formulated the idea that they should be seen as the common heritage of mankind to be used for the benefit of mankind as a whole and that developing States should be treated preferentially with regard to benefits deriving from respective activities.[1] Pardo referred to the variety of States that had made claims or proclamations regarding their alleged rights to continental shelves, including the prominent Truman Proclamation of 1945.[2] He expressed his concern that these would expand to claims over the seabed and ocean floor far afield (the legal status of which had hitherto been disputed), encouraged by the 1958 Convention on the Continental Shelf which declared the latter to extend 'to […] where the depth of the superjacent waters admits the exploitation of the natural resources'.[3] Pardo feared that this would lead to a struggle for sovereign rights, entailing a 'dramatic escalation of the arms race and sharply increasing world tensions, caused also by the intolerable injustice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations', and lead to the impairment of the traditional freedoms of the high seas and of the marine environment through pollution.[4] All this could only be prevented by establishing an international regime for the seabed and the ocean floor, ensuring that the area will not be nationally appropriated, only be used for peaceful purposes and be administered by a special organization acting as trustee for all States.[5] Only few years later, in 1970, the 'Declaration of Principles **2**

[1] Statement of *Arvid Pardo*, 1 November 1967, UN Doc. A/C.1/PV.1515 and UN Doc. A/C.1/PV.1516, GAOR 22nd Sess., First Committee, 1516th Meeting, MN 13.

[2] US Presidential Proclamation 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945. On the various claims and proclamations in this regard see also *Maggio* on Art. 77, MN 5–8.

[3] Statement of *Pardo* (note 1), UN Doc. A/C.1/PV.1515, MN 56 *et seq.*

[4] *Ibid.*, MN 91 and further on marine pollution MN 73 *et seq.*

[5] Statement of *Pardo* (note 1), UN Doc. A/C.1/PV.1516, MN 3–10.

Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction'[6] followed these ideas. It moreover emphasized that the Area should be used 'by all States, whether coastal or land-locked, without discrimination' and that 'equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal' should be ensured.[7] From the beginning of the discussions in the Seabed Committee, proposals included these ideas.[8] In 1973, the Seabed Committee formulated a general non-discrimination clause.[9] In the following years, the discussions on the Authority embraced the notion of non-discrimination and combined it with the element of preferential treatment for developing States.[10] However this was still laid out in connection with the sharing of benefits, as adopted in the Informal Single Negotiating Text,[11] which read in Art. 23 (2) and (3):

> '2. The Authority shall avoid discrimination in the granting of opportunities for […] activities [in the Area] […]. Special consideration by the Authority under this Convention for the interests and needs of the developing countries, and particularly the land-locked among them, shall not be deemed to be discrimination.
>
> 3. The Authority shall ensure the equitable sharing by States in the benefits derived from activities in the Area, taking into particular consideration the interests and needs of developing countries whether coastal or land-locked.'

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[6] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 17 December 1970.

[7] *Ibid.*, paras. 5 and 9.

[8] On the equitable sharing of benefits under special consideration of developing States, see for instance Sea-Bed Committee, Chile *et al.*: Working Paper on the Régime for the Sea-Bed and Ocean Floor, and the Subsoil thereof beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93, 95 (Arts. 14 (d), 16); Sea-Bed Committee, Clause XIII Texts Illustrating Areas of Agreement and Disagreement Programme of Work, Item 1 "Status, Scope and Basic Provisions of the Régime, Based on the Declaration of Principles, UN Doc. A/AC.138/SC.I/L.18/Add.3 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 81, 96; Sea-Bed Committee, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39, 77 (Art. XXX, para. 2). On the idea that activities should be carried out for the benefit of mankind as a whole, under particular consideration of developing States, see for instance: Sea-Bed Committee, USSR: Provisional Draft Articles of a Treaty on the Uses of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 69 (Art. 8); Sea-Bed Committee, Malta: Draft Ocean Space Treaty, UN Doc. A/AC.138/53 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105, 146 (Art. 71); Sea-Bed Committee, Canada: International Sea-Bed Régime and Machinery Working Paper, UN Doc. A/AC.138/59 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 205, 210 (para. 7); Sea-Bed Committee, Clauses X and XIA Texts Illustrating Areas of Agreement and Disagreement Programme of Work, Item 1 "Status, Scope and Basic Provisions of the Régime, Based on the Declaration of Principles", UN Doc. A/AC.138/SC.I/L.18/Add.3 (1972), GAOR 27th Suppl. 21 (A/8721), 81, 91, 93. On the Authority's role with regard to equality among States, see for instance: Sea-Bed Committee, Chile *et al.*: Working Paper on the Régime for the Sea-Bed and Ocean Floor, and the Subsoil thereof beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93, 95 (Arts. 14 (d), 16); Sea-Bed Committee, Poland: Working Paper Concerning an International Organization to be Established to Deal with the Problems of the Exploration and Exploitation of the Mineral Resources of the International Area of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, the Limits of which are to be Determined, UN Doc. A/AC.138/44 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 76, 78 (Sec. II, Art. 1 (a)); Sea-Bed Committee: Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39, 75 (Art. XXIX).

[9] See Sea-Bed Committee, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1. (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39, 55 (Art. 5). This general clause can now be found in Art. 141 of the Convention.

[10] See for instance First Committee Working Group UNCLOS III, Basic Conditions of Exploration and Exploitation, UN Doc. CP/cab.12 (1975), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VI (1984), 81; UNCLOS III, Draft of Informal Single Negotiating Text/Part I (1975), Art. 22, paras. 3 and 4, reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 110, 120.

[11] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137.

In Art. 23 of the Revised Single Negotiating Text[12] the issue of sharing of benefits was separated and in both remaining paragraphs limitations were inserted: 3

> '1. The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area, except as specifically provided for in this part of the Convention […].
> 2. Special consideration for developing countries specifically provided for in this part of the Convention shall not be deemed to be discrimination.'

Subsequently, as initially proposed by the group of land-locked and geographically disadvantaged States (LLGDS), these categories of countries were explicitly included in paragraph 2.[13] Also, the proposal originally put forward by the Group of 77 to delete the limitation in paragraph 1[14] was adopted.[15] Later, the negative formulation in paragraph 2 concerning discrimination was considered to be misleading[16] and was changed to a positive wording.[17]

III. Elements

1. 'The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area'

Art. 152 (1) contains a general principle of non-discrimination[18] for the Authority. It undertakes to ensure the equality of all States with regard to activities in the Area and related issues.[19] Art. 152 (1) is part of the general non-discrimination approach of the regime of the Area, which can be found on different levels.[20] Art. 141 provides for access to the Area 'by all States […] without discrimination'.[21] The non-discrimination clause of Art. 152 (1) concerns the Authority's measures regarding activities in the Area and related matters. With regard to the equitable sharing of benefits deriving from these activities, a cornerstone of the concept of common heritage of mankind, Art. 140 (2) obliges the Authority to act on 'a non-discriminatory basis'. The principle of non-discrimination as embodied in Art. 152 (1) is specified in Annex III, Art. 6 (3) referring to non-discrimination in the context of the approval of plans of work and the Agreement Relating to the Implementation of Part XI of UNCLOS (1994 Agreement)[22], Annex, S. 1, para. 6 (a)(iii) with regard to contracts with 4

[12] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 132.

[13] See First Committee UNCLOS III, LLGDS: Draft Amendments to the Informal Single Negotiating Text (1976, mimeo.), Art. 23, reproduced in: Platzöder vol. VII (note 10), 306, 306 *et seq.*; First Committee UNCLOS III, LLGDS: Draft Amendments to the Informal Single Negotiating Text (1977, mimeo.), reproduced in: *ibid.*, 396, 397 (Art. 23); First Committee UNCLOS III, LLGDS: Article 23, Paragraph 2 of the RSNT (1977, mimeo.), reproduced in: *ibid.*, 401.

[14] See First Committee UNCLOS III, Group of 77: Functions of the Authority (1976, mimeo.), reproduced in: Platzöder vol. VII (note 10), 302 (Art. 23); UNCLOS III, Group of 77: Functions of the Authority (1977, mimeo.), reproduced in: *ibid.*, 448, 449 (Art. 23).

[15] See UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 25 *et seq.* (Art. 150 (2)).

[16] See UNCLOS III, Report by the Chairman of Negotiating Group 1, UN Doc. A/CONF.62/L.35 (1979), OR XI, 86, 89 on the suggested Art. 150 *ter*, which was substantially taken over in Art. 152 ICNT/Rev.1 (UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 81).

[17] See ICNT/Rev.1 (note 16), 81 (Art. 152).

[18] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 290.

[19] See also *ibid.*, 290.

[20] See *ibid.*, 290 *et seq.* on provisions related to Art. 152 (1).

[21] Also Art. 151 (1)(c) on production policies, which is inapplicable according to Annex, S. 6, para. 7 of the 1994 Agreement, obliged the Authority to non-discrimination.

[22] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, Annex to GA Res. 48/263 of 17 August 1994.

pioneer investors.[23] Also, in the context of the adoption of rules, regulations and procedures on the financial terms of contracts, Annex III, Art. 13 (1)(d) and (14) and the 1994 Agreement, Annex, S. 8, para. 1 (e) in different regards make reference to non-discrimination, as does Annex III, Art. 17 (1)(c)(i) concerning the rules, regulations and procedures on financial matters.

2. 'Nevertheless, special consideration for developing States […] shall be permitted'

5 The preferential treatment of developing States in Art. 152 (2) allows for an exemption to the non-discrimination obligation.[24] It is in line with the concept of 'benefit of mankind as a whole' as contained in the regime of the Area. The particular consideration of the 'interests and needs of developing States' with regard to activities in the Area in general is mandated in Art. 140 (1). It is also in line with Art. 148, which envisages the developing States' effective participation. There are, however, no universal criteria to determine which States belong to the category of developing States.[25] Conclusions on which States are considered to be developing States in the context of the Area may be drawn from the composition of the Council of the Authority, in particular convening exclusively developing States in 'Group D'.[26]

3. 'including particular consideration for the land-locked and geographically disadvantaged among them'

6 In the group of the developing States, land-locked and geographically disadvantaged States enjoy particular consideration. As defined in Art. 124 (1)(a), in terms of the Convention a land-locked State is 'a State which has no sea-coast'.[27] In the group of land-locked States, 32 States are currently considered to be developing States,[28] and the International Seabed Authority lists 20 States Members in this group.[29] The Convention however contains no general definition of 'geographically disadvantaged State' and it is debatable whether the definition provided with regard to the Exclusive Economic Zone in Art. 70 (2) is transferable, as it explicitly says 'for the purpose of this part'.[30] Due to the problems of definition, the

[23] The 1994 Agreement, Annex, S. 1, para. 15 (c) refers to the 'principle of non-discrimination among contractors' in the context of the approval of plans of work for exploitation in case the respective provisions have not been elaborated in time. Annex III, Art. 6 (5) and Art. 7 (2) and (5) of the Convention also contained references to non-discrimination, linked to the production policies set out in Art. 151. These provisions are however inapplicable according to the 1994 Agreement, Annex, S. 6, para. 7.

[24] Nordquist/Nandan/Rosenne (note 18), 291; see *ibid*., 291 *et seq*. on provisions related to Art. 152 (2).

[25] See *Moshe Hirsch*, Developing Countries, MPEPIL, para. 3 *et seq*., available at: http://www.mpepil.com.

[26] See 1994 Agreement, Annex, S. 3, para. 15 (according to *ibid*., S. 3, para. 16, the original Art. 161 (1) shall not apply); ISA, Indicative List of States Members of the International Seabed Authority which Would Fulfil the Criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 of Section 3 of the Annex to the Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 1982, ISA Doc. ISBA/22/A/CRP.2 (2016), 14 *et seq*.; see also a table on the composition of the Council from 1996 to 2016, available at: https://www.isa.org.jm/sites/default/files/Council96-2016.pdf.

[27] The term 'land-locked States' includes States which border an *enclosed* sea, as opposed to States bordering the open ocean. *Yuna Huang*, Rights of Land-locked and Geographically Disadvantaged States in the Exclusive Economic Zone, in: Rainer Lagoni/Peter Ehlers/Marian Paschke (eds.), Recent Developments in the Law of the Sea (2010), 87, 89 *et seq*. See also generally *Uprety/Maggio* on Art. 124.

[28] See the list of land-locked developing countries by the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, available at: http://unohrlls.org/about-lldcs/country-profiles/.

[29] ISA, Indicative List of States Members of the International Seabed Authority which Would Fulfil the Criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 of Section 3 of the Annex to the Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 1982 (note 26), 15.

[30] See e. g. *S. C. Vasciannie*, Land-Locked and Geographically Disadvantaged States in the International Law of the Sea (1990), 13–15; *Helmut Tuerk*, Landlocked and Geographically Disadvantaged States, in: Donald R.

number of developing geographically disadvantaged States is not clearly established.[31] The Authority, however, considers 16 States Members to be part of this group.[32]

Art. 148 particularly emphasizes the consideration of the needs of land-locked and geographically disadvantaged States with regard to activities in the Area and provides the underlying reason: 'to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it'. 7

4. 'specifically provided for in this Part'

Alongside the privileged position of developing States generally established in the system of exploration and exploitation of the Area,[33] the preferential treatment of developing States by the Authority is specified in several provisions of Part XI, as well as Annexes III and IV of the Convention and the 1994 Agreement.[34] In general terms, with regard to policies relating to activities in the Area, Art. 150 states that activities in the Area shall promote 'international cooperation for the over-all development of all countries, especially developing States' and in the following enounces specific goals to be pursued, *inter alia* regarding developing States. According to Art. 160 (2)(k), the Assembly, the 'supreme' organ of the Authority,[35] is supposed to take account of general issues arising from activities in the Area, particularly for developing States, and those problems that occur due to a State's location, in particular for land-locked and geographically disadvantaged States. 8

Besides these general considerations, several provisions are concerned with specific issues. Art. 160 (2)(f)(i) and Art. 162 (2)(o)(i) intend the Authority's organs to particularly consider the developing States' interests and needs with regard to the 'equitable sharing of […] benefits'. Art. 143 (3)(b) envisages the support of developing States regarding marine scientific research in the Area. Art. 144, Annex III, Art. 17 (1)(b)(xi) and the 1994 Agreement, Annex, S. 5 aim at the transfer of technology and scientific knowledge to developing States in respect of activities in the Area, particularly promoted by the Authority.[36] According to Art. 12 (3)(b)(ii) of Annex IV UNCLOS, the Enterprise, the (not yet independently and as originally envisaged operating[37]) operative organ of the Authority,[38] shall take into account preference to be accorded to 'developing States, including the land-locked and geographically disadvantaged among them' in the procurement of goods and services. Moreover, according to Annex III, Art. 9 (2), in considering joint ventures for activities in reserved areas, it shall give developing States the opportunity to participate effectively. In reviewing the market conditions regarding the minerals, Art. 164 (2)(b) obliges the Economic Planning Commission, a (not yet operational) subsidiary body of the Authority's Council,[39] to pay regard to the interests of in particular developing importing and exporting States. According to Art. 151 (10) Convention 9

Rothwell *et al.* (eds.), The Oxford Handbook on the Law of the Sea (2015), 325, 331. See *Harrison/Morgera* on Art. 70 MN 3–4.

[31] *Gerhard Hafner*, Geographically Disadvantaged States, MPEPIL, paras. 1-3, 17, available at: http://www.mpepil.com.

[32] ISA, Indicative List of States Members of the International Seabed Authority which Would Fulfil the Criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 of Section 3 of the Annex to the Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 1982 (note 26), 15.

[33] See only the remarks *supra*, as well as in particular the concept of reserved areas (see thereto *Siegfried* on Art. 153 MN 6).

[34] See the list by Nordquist/Nandan/Rosenne (note 18), 291 *et seq.* on provisions related to Art. 152 (2).

[35] See Art. 158 (1); Art. 160.

[36] Annex III, Art. 5 (3)(e) which pursued the compulsory transfer of technology to developing States is no longer applicable according to the 1994 Agreement, Annex, S. 5, para. 2. Instead, the 1994 Agreement, Annex, S. 5, para. 1 provides a much more liberal system.

[37] See 1994 Agreement, Annex, S. 2.

[38] See Art. 158 (2).

[39] See Art. 163 (1)(a) and Art. 158 (1). The Economic Planning Commission is not yet operational. Per the 1994 Agreement, its functions are in the interim performed by the Legal and Technical Commission, see 1994 Agreement, Annex, S. 1, para. 4.

and S. 7 Annex of the 1994 Agreement, the Authority shall provide economic assistance to developing States that are as 'land-based producer States' seriously adversely affected by the reduction of mineral prices or decreased exports caused by activities in the Area. With regard to the adoption of rules, regulations and procedures on the financial terms of contracts by the Authority and the negotiation of those terms, Annex III, Art. 13 (1)(d) aims at the promotion of joint arrangements with the Enterprise and developing States, of the transfer of technology thereto and of the training of personnel.

Article 153
System of exploration and exploitation

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.

2. Activities in the Area shall be carried out as prescribed in paragraph 3:

(a) **by the Enterprise, and**

(b) **in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.**

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 and approved by the Council after review by the Legal and Technical Commission. In the case of activities in the Area carried out as authorized by the Authority by the entities specified in paragraph 2(b), the plan of work shall, in accordance with Annex III, article 3, be in the form of a contract. Such contracts may provide for joint arrangements in accordance with Annex III, article 11.

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.

5. The Authority shall have the right to take at any time any measures provided for under this Part to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract. The Authority shall have the right to inspect all installations in the Area used in connection with activities in the Area.

6. A contract under paragraph 3 shall provide for security of tenure. Accordingly, the contract shall not be revised, suspended or terminated except in accordance with Annex III, articles 18 and 19.

Bibliography: *Edward D. Brown*, Seabed-Energy and Minerals: The international Legal Regime, vol. II (2001); *Gregory A. French*, Der Tiefseebergbau. Eine interdisziplinäre Untersuchung der völkerrechtlichen Problematik (1990); *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982); *Satya N. Nandan*, Administering the Mineral Resources of the Deep Seabed, BIICL Law of the Sea Symposium (March 2005), available at: http://www.biicl.org/files/1392_nandan_opening.doc; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Bernhard H. Oxman*, The 1994 Agreement relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15–35; *Peter B. Payoyo*, Cries of the Sea. World Inequality, Sustainable Development and the Common Heritage of Humanity (1997); *Moragodage C. Pinto*, The Common Heritage of Mankind. Then and Now (2012); *Helmut Tuerk,* Reflections on the Contemporary Law of the Sea (2012); *Francisco O. Vicuña*, The Régime for the Exploration and Exploitation of Sea-bed Mineral Resources, in: René Jean Dupuy/Daniel Vignes (eds.), A

Handbook on the New Law of the Sea, vol. I (1991), 635–687; *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume (1984); *Rüdiger Wolfrum*, Rechtsstatus und Nutzung des Tiefseebodens (des Gebiets), in: Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 333–354

Documents: ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013); ISA, Statement of the President of the Council of the International Seabed Authority on the Work of the Council During the Nineteenth Session, Doc. ISBA/19/C/18 (2013)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011 ITLOS Reports (2011), 10

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I. Purpose and Function

Art. 153 draws up the key rules of the system of exploration and exploitation for the Area, as specified in several other provisions, and therewith 'lies at the heart of the regime for deep seabed mining'[1]. It sets forth the basic elements of the so-called 'parallel system',[2] featuring the coexistence of the Authority and States (and other entities) with regard to activities in the **1**

[1] Myron H. Nordquist/Nandan/Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 297.

[2] *Moragodage C. Pinto*, The Common Heritage of Mankind. Then and Now (2012), 77 *et seq.*; Nordquist/Nandan/Rosenne (note 1), 310; see also *Francisco O. Vicuña*, The Régime for the Exploration and Exploitation of Sea-bed Mineral Resources, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 635, 644 *et seq.*, 647 *et seq.* who in particular emphasizes the plurality of actors; see also *Gregory A. French*, Der Tiefseebergbau. Eine interdisziplinäre Untersuchung der völkerrechtlichen Problematik (1990), 219 *et seq.* who refers to Art. 153 (2); *Bernhard H. Oxman*, The 1994 Agreement Relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15, 25, who makes reference to Annex III, Art. 8.

Area. By its particular design, Art. 153 provides access to the Area to both, while establishing the predominant role of the Authority as the guardian of seabed resources on behalf of mankind as a whole.

2 Art. 153 is structured in six paragraphs. Art. 153 (1) establishes the Authority's central role with regard to activities in the Area, i. e. its administration, control and conduct of activities. Art. 153 (2) sets out who may carry out activities: the Enterprise, States parties, their enterprises and private entities. Art. 153 (3) requires an approved plan of work for the conduct of activities in the Area. Art. 153 (4) and (5) lay out the control by the Authority and establish its enforcement jurisdiction. Finally, Art. 153 (6) declares contracts to enjoy security of tenure.

II. Historical Background

3 Throughout the negotiations on the regime of the Area, the questions of who should conduct activities in the Area and what role an international organization should play were highly controversial.[3] Two extremes collided. On the one hand industrialized States believed that activities in the Area should be governed by a system comparable to that of national mining, i. e. basically freedom of access, and an Authority with only sparse powers.[4] On the other hand, developing States favored a model that allowed for a strong and central role of an international body. A wide range of proposals were put forward. Besides the first extreme, which called for freedom of access and a weak Authority, other proposals also envisaged conduct of activities by States and private persons, though with various degrees of influence by an Authority (such as supervision and coordination,[5] regulation,[6] or registration or conclusion of contract[7]). Further proposals favored a system of conduct by both States (or private actors) and an Authority with different powers.[8] Others provided for conduct by an Authority, at its discretion through service contracts or in association with persons.[9] The provisions in both the Informal Single Negotiating Text of 1975, generally providing for conduct by an Authority, at its discretion in association with States or persons,[10] and the Revised Single Negotiating Text of 1976, which envisaged conduct by both an Authority and States (or persons) under control of the former,[11] scarcely reflected consensus between the

[3] Indeed, Art. 153 was one of the most disputed provisions of the Convention, *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume (1984), 416.

[4] See for instance proposals by the United States: Sea-Bed Committee, USA: Draft United Nations Convention on the International Sea-Bed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130, 134 (Art. 10 *et seq.*); UNCLOS III, USA: Draft Appendix to the Law of the Sea Treaty Concerning Mineral Resource Development in the International Sea-Bed Area, UN Doc. A/CONF.62/C.1/L.6 (1974), OR III, 169, 170 (Art. IV).

[5] Sea-Bed Committee, USSR: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67, 71–73 (Arts. 13, 16, 22).

[6] Sea-Bed Committee, Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39, 57 (Art. 9 (A)).

[7] First Committee UNCLOS III, Japan: Working Paper on Conditions of Exploration and Exploitation, UN Doc. A/CONF.62/C.1/L.9 (1974), OR III, 175 (Arts. I, II).

[8] See 'Regulation' and 'General Supervision and Control': Sea-Bed Committee, Tanzania: Arts. 8 and 13 Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51, 53, 54; 'if it considers it appropriate, and subject to such terms and conditions as it may determine, the Authority may decide to grant licenses': Areas of Agreement and Disagreement (note 6), 58 (Art. 9 (C)).

[9] See for instance Sea-Bed Committee, Chile *et al.*: Working Paper on the Régime for the Sea-Bed and Ocean Floor, and the Subsoil thereof beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93, 95 (Art. 15); UNCLOS III, G77: UN Doc. C.1/CRP.4 (1984, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. V (1984), 489 (Art. 9).

[10] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 140 (Art. 22).

[11] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 131 (Art. 22).

negotiating States.[12] However, in 1976 US Secretary of State KISSINGER put forward a proposal, seen as a significant step in the unification of the opposing views.[13] As a compromise, it suggested a parallel system, ensuring access to the Area on the one hand for States and private actors and on the other hand for the international community, while establishing a financing mechanism for an operational Enterprise, the transfer of technology and periodic review.[14] One year later, the first version of Art. 151 (1) and (2) Informal Composite Negotiating Text[15] read:

> '1. Activities in the Area shall be carried out by the Authority on behalf of mankind as a whole in accordance with the provisions of this article as well as other relevant provisions of this Part of the present Convention and its annexes, and the rules, regulations and procedures of the Authority […].
> 2. Activities in the Area shall be carried out on the Authority's behalf […]:
> (i) by the Enterprise, and
> (ii) in association with the Authority by State Parties or State Entities, or persons natural or juridical […].'

It moreover contained the requirement of a plan of work, provided control by the Authority and its right to take measures to secure compliance, and stipulated the contract's security of tenure. The wording of the article was subsequently adjusted so as to find a balance between the different views, at the same time providing for the participation of States and persons and ensuring the predominant role of the Authority.[16] In particular, paragraph 1 was extended to not only include the conduct by the Authority but also its control and organization of the activities in the Area. In paragraph 2, the provision that activities should be 'carried out on the Authority's behalf' was deleted. The following Art. 153 in the Informal Composite Negotiating Text Revision 1[17] substantively already corresponded to the final version contained in UNCLOS. 4

III. Elements

1. 'Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole […].'

Art. 153 (1) establishes the central role of the Authority in the system of exploration and exploitation in the Area. The Authority is the administrative and controlling entity with regard to these activities and may equally conduct them. Its controlling powers are laid out in Art. 153 (4) and (5) and further substantiated throughout the provisions on the Area. The intergovernmental organization acts on behalf of mankind as a whole, as provided in Art. 137 (2). In its operation, however, it is bound to the relevant provisions of the Convention and its own norms. Its powers and functions are limited to those provided for by the Convention.[18] 5

2. 'Activities in the Area shall be carried out […]: (a) by the Enterprise'

The conduct of activities in the Area was envisaged to be the main purpose of the Authority's 'operative arm',[19] the Enterprise.[20] Its activity alongside States and private actors 6

[12] *Wolfrum* (note 3), 421–423; Nordquist/Nandan/Rosenne (note 1), 302–304.
[13] See Nordquist/Nandan/Rosenne (note 1), 305; *Peter B. Payoyo*, Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity (1997), 399.
[14] US Department of State Bulletin 75 (1976), 398; Yearbook of the United Nations 30 (1976), 87. See on Kissinger's proposal *Payoyo* (note 13), 399 *et seq*.
[15] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 26.
[16] UNCLOS III, Explanatory Memorandum by the Chairman Concerning Document NG1/10/Rev.1, reproduced in: UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13, 19.
[17] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 81 (Art. 153).
[18] Art. 157 (2).
[19] *Vicuña* (note 2), 649.
[20] See Art. 158 (2), 170 (1). On the Enterprise in general, see Art. 170 and Annex IV, as modified by the 1994 Agreement.

has in particular been planned to be put into practice by means of the so-called 'site banking'[21] system. According to Annex III, Arts. 8 and 9, each proposed mining site is divided into two equally valuable parts, one part being available for the activities of the applying contractor and the other one becoming a 'reserved area' for activities by the Enterprise or developing States and respective persons.[22] This system endeavors to ensure the participation of these entities in activities in the Area, in the spirit of the common heritage of mankind.[23] Although the Enterprise has lost a considerable part of its original preferential position *vis-à-vis* States and private ventures by means of the Agreement Relating to the Implementation of Part XI of UNCLOS (1994 Agreement),[24] the basic system of reserved areas has been maintained. However, an alternative means of participation has been introduced by the Regulations for sulphides and crusts, enabling the applicant to offer an equity interest in a joint venture instead of contributing a reserved area.[25] In any case, as of 2016, the Enterprise does not operate as an independent entity and it has not begun to conduct activities. In the interim, the secretariat of the Authority performs certain functions of the Enterprise.[26]

3. '(b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States'

7 Activities may also be carried out by States, as well as State enterprises and natural or juridical persons, but only if they are nationals of or effectively controlled by a State party and if a State party sponsors them.[27] These prerequisites aim at guaranteeing the State party's potential to actually control the respective entity.[28] The element of sponsorship is tied to the

[21] E. g. *Edward D. Brown*, Seabed-Energy and Minerals: The International Legal Regime, vol. II (2001), 256; *Helmut Tuerk*, Reflections on the Contemporary Law of the Sea (2012), 37.

[22] See however Annex III, Art. 9 and the 1994 Agreement, Annex, S. 2, para. 5, for the possibility of activities of the contractor in the reserved area.

[23] See also *Wolfrum* (note 3), 437. Under this system, the Enterprise and developing countries can obtain already prospected 'prime' mining areas and thus get access despite limited expertise or funding, *Pinto* (note 2), 81.

[24] See 1994 Agreement, Annex, S. 2 and S. 5, para. 2.

[25] See Regulations 16 and 19 of the ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex (Crusts Regulations) and ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex (Sulphides Regulations). This is due to the specific nature of these minerals, being localized and three-dimensional, see *Satya N. Nandan*, Administering the Mineral Resources of the Deep Seabed, BIICL Law of the Sea Symposium (March 2005), 18 *et seq.*, available at: http://www.biicl.org/files/1392_nandan_opening.doc. Other modifications of the system have been introduced by the 1994 Agreement, see Annex, S. 1, para. 10 and S. 2, para. 5; see also: Regulation 17 ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex (Nodules Regulations); Regulation 18 Crusts Regulations (note 25); Regulation 18 Sulphides Regulations (note 25).

[26] For the interim phase, see 1994 Agreement, Annex, S. 2, para. 1. See also *ibid*., S. 2, para. 2 on the establishment of the Enterprise. In 2013, the Council assumed that it was 'premature for the Enterprise to function independently', ISA, Statement of the President of the Council of the International Seabed Authority on the Work of the Council During the Nineteenth Session, Doc. ISBA/19/C/18 (2013), para. 16 (a). For recent developments on the issue, see ISA, Issues relating to the operation of the Enterprise, in particular the legal, technical and financial implications for the Authority and for States parties. Note by the secretariat, ISA Doc. ISBA/22/LTC/9 (2016); Periodic Review of the International Seabed Authority Pursuant to UNCLOS Article 154. Interim Report. Comments by the Review Committee, ISA Doc. ISBA/22/A/CRP.3(2) (2016).

[27] Notably, the requirement of sponsorship also applies to State enterprises, explicitly ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10, para. 74. On the question which State(s) shall be the sponsoring State(s), see Annex III, Art. 4 (3) and Regulation 11 (1) and (2) of the Crusts Regulations, Sulphides Regulations and Nodules Regulations (note 25).

[28] See *Wolfrum* (note 3), 426 *et seq*. On the responsibility and liability of States parties, see *Vöneky/Höfelmeier* on Art. 139.

State's obligation to ensure compliance with the provisions relevant to activities in the Area.[29] This contributes to making sure that the entity, although not party to the Convention, complies with its provisions, being subject to the national law of the sponsoring State party.[30] By ensuring compliance, the sponsoring State serves the common interest of all States in the implementation of the common heritage of mankind.[31]

The formulation 'in association with the Authority' does not imply that the enumerated entities would have to cooperate with the former in the *conduct* of activities as such, but rather points out that the operations are subject to the Authority's organization and control.[32] It should be noted that in contrast to Art. 141, stipulating the (peaceful) use of the Area for *all* States, according to Art. 153 (2)(b) only States *parties* may conduct the special use of activities.[33] The purpose of this restriction may lie in the assumption that the exclusion of non-State parties was the only way to realize a regulated utilization of the resources of the Area, and therewith the overarching goal of the system of exploration and exploitation of the common heritage of mankind.[34] In contrast, the benefits deriving from these activities shall also accrue to non-State parties.[35] At present,[36] 25 entities, among them private actors as well as States and State enterprises, have entered into contracts for exploration with the Authority. **8**

4. 'Activities in the Area shall be carried out in accordance with a formal written plan of work drawn up in accordance with Annex III and approved by the Council after review by the Legal and Technical Commission.'

Exploration and exploitation are conditional upon an approved plan of work and are to be conducted in accordance with it. All entities referred to in Art. 153 (2) can apply.[37] The decision on the approval is undertaken by the Council, upon review and recommendation by the Legal and Technical Commission.[38] In a preliminary assessment of the application, besides the conditions of nationality or control and sponsorship[39], respectively, the financial and technical capabilities of the applicant and, if the case, behavior under previous contracts are examined.[40] Further, it is ascertained whether the applicant has committed to comply with the provisions of Part XI of the Convention, the rules, regulations and procedures of the Authority, its decisions and the contract, as well as to being controlled by the Authority.[41] The plan of work shall provide for this control, in accordance with Art. 153 (4).[42] Notably, **9**

[29] See *infra*, MN 13 *et seq*.

[30] *Responsibilities and Obligations of Sponsoring States* (note 27), para. 75, para. 108. See on the sponsorship in general *ibid.*, paras. 74 *et seq*.

[31] *Ibid.*, para. 76.

[32] *Wolfrum* (note 3), 427 *et seq*.; see *Vicuña* (note 2), 652 *et seq*.

[33] By reference in Art. 141 to other provisions of Part XI, Art. 153 is *lex specialis* to Art. 141, *Wolfrum* (note 3), 424. On the consequences for non-State parties, see *ibid.*, 424–426.

[34] See *Rüdiger Wolfrum*, Rechtsstatus und Nutzung des Tiefseebodens (des Gebiets), in: Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 287, 341, MN 167; critically however, *Wolfrum* (note 3), 424–426.

[35] This can be derived from Art. 140, see Nordquist/Nandan/Rosenne (note 1), 142 *et seq*.; *Vöneky/Höfelmeier* on Art. 140 MN 6 and 8: 'arguably'; *Wolfrum* (note 34), 339.

[36] As of July 2016.

[37] Annex III, Art. 3 (1).

[38] On the procedure, see Art. 165 (2)(b) UNCLOS, 1994 Agreement, Annex, S. 3, paras. 11 (a) and 12; the procedures envisaged by Art. 162 (2)(j) are no longer applicable according to the 1994 Agreement, Annex, S. 3, para. 11 (b).

[39] See on the certificate of sponsorship, Regulation 11 of the Crusts Regulations (note 25), Sulphides Regulations (note 25) and Nodules Regulations (note 25).

[40] See Annex III, Art. 4 (1)(2) and Art. 6 (2)(b) and Regulation 13 and 14 of the Crusts Regulations (note 25) and Sulphides Regulations (note 25); Regulations 12 and 13 Nodules Regulations (note 25). The assessment of performance under previous contracts allows for sanctions and could prove to be of importance, see *Wolfrum* (note 3), 434.

[41] See Annex III, Art. 4 (1)(6) and Art. 6 (2)(a) and Regulation 15 Crusts Regulations (note 25) and Sulphides Regulations (note 25); Regulation 14 Nodules Regulations (note 25).

[42] Annex III, Art. 3 (4)(b).

according to the 1994 Agreement, an application must also include a study on potential environmental impacts and a description of planned oceanographic and environmental baseline studies.[43] The plan of work is then checked with view to its compliance with the provisions of the Convention and those of the Authority. Particular consideration is given to the 'uniform and non-discrimination requirements'. If the application meets these conditions and unless one of the limited number of listed reasons for refusal applies, it is to be approved.[44] The Regulations of the Authority contain detailed provisions on application and approval of plans of work for exploration.[45]

10 An approved plan of work grants the contractor the exclusive right to conduct the respective activity.[46] As per the 1994 Agreement, a plan of work for exploration is approved for 15 years, and may be followed by either an application for exploitation or an extension of the exploration.[47] The first exploration contracts concluded by the Authority expire in 2016. Applications for an extension of these contracts have been approved by the Council.[48]

5. 'In the case of activities in the Area carried out as authorized by the Authority by the entities specified in paragraph 2(b), the plan of work shall, in accordance with Annex III, article 3, be in the form of a contract.'

11 As provided by Art. 153 (3) and Art. 3 (5) Annex III, the approved plans of work for States and private actors are issued as contracts. According to the 1994 Agreement, however, disposing of the different treatment of the Enterprise, an approved plan of work for the latter is also to be in contractual form.[49] The contract as such is characterized by equality of contractor and Authority; its revision is subject to consent of the parties.[50] The

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[43] 1994 Agreement, Annex, S. 1, para. 7; see also Regulation 20 (1)(a) and (b) Crusts Regulations (note 25) and Sulphides Regulations (note 25), Regulation 18 (a) and (b) Nodules Regulations (note 25).

[44] Annex III, Art. 6 (3) and (4). The 1994 Agreement, Annex, S. 1, para. 6, sets up special provisions with regard to pioneer investors.

[45] See Part III and Annex II Crusts Regulations (note 25); Part III and Annex 2 Sulphides Regulations (note 25); Part III and Annex II Nodules Regulations (note 25). It has to be noted that some contractors merely underwent the simplified procedure of the 1994 Agreement, Annex, S. 1, para. 6 (a)(ii), as they were registered pioneer investors (see Resolution II of the Final Act of UNCLOS III). See, with view to the requirement of sponsorship, *Responsibilities and Obligations of Sponsoring States* (note 27), para. 81; and ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Public Sitting, 14 September 2010, ITLOS Doc. ITLOS/PV.2010/1/Rev.2, 6, 14 *et seq.* (Michael W. Lodge, Legal Counsel of the International Seabed Authority). See also 1994 Agreement, Annex, S. 1, para. 6 (a)(iii), (i) for other entities.

[46] Annex III, Art. 3 (4)(c) UNCLOS; see also Annex III, Art. 16, first sentence, UNCLOS.

[47] 1994 Agreement, Annex, S. 1, para. 9.

[48] See ISA, Décision du Conseil de l'Autorité internationale des fonds marins concernant une demande de l'Organisation mixte Interoceanmetal tendant à proroger un contrat d'exploration des nodules polymétalliques conclu entre cette dernière et l'Autorité, ISA Doc. ISBA/22/C/21 (2016); *id*., Decision of the Council of the International Seabed Authority relating to an application by Yuzhmorgeologiya for extension of a contract for exploration for polymetallic nodules between Yuzhmorgeologiya and the Authority, ISA Doc. ISBA/22/C/22 (2016); *id*., Decision of the Council of the International Seabed Authority relating to an application by the Government of the Republic of Korea for extension of a contract for exploration for polymetallic nodules between the Government of the Republic of Korea and the Authority, ISA Doc. ISBA/22/C/23 (2016); *id*., Decision of the Council of the International Seabed Authority realting to an application by the China Mineral Resources Research and Development Association for extensionof a contractor exploration for polymetallic nodules between the China Ocean Mineral Resources Research and Development Association and the Authority, ISA Doc. ISBA/22/C/24 (2016); *id*., Decision of the Council of the International Seabed Authority relating to an application by Deep Ocean Resources Development Co. Ltd. for extension of a contract for exploration for polymetallic nodules between Deep Ocean Resources Development Co. Ltd. and the Authority, ISA Doc. ISBA/22/C/25 (2016); *id*., Decision of the Council of the International Seabed Authority relating to an application by the Institut français de recherche pour l'exploitation de la mer for extension of a contract for exploration for polymetallic nodules between the Institut français de recherche pour l'exploitation de la mer and the Authority, ISA Doc. ISBA/22/C/26 (2016).

[49] See 1994 Agreement, Annex, S. 2, para. 4.

[50] Annex III, Art. 19 UNCLOS.

Regulations of the Authority contain detailed provisions on contracts and moreover supply a contract form and standard clauses.[51]

6. 'The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions […]'

While the contract as such is characterized by equality of contractor and Authority, at the same time the latter is in control of the activities in the Area on behalf of mankind as a whole.[52] It is in charge of securing compliance with the relevant provisions of the Convention, its own norms and approved plans of work. The Authority considers itself to exercise control in four ways. First, in a regulatory capacity by way of rules, regulations and procedures, secondly through contracts,[53] thirdly by annual reports of contractors[54] and the periodic review of the plan of work's implementation[55] and finally through the sponsoring States.[56] Control is primarily exercised by the Council,[57] under support of the Legal and Technical Commission.[58] In its capacity of supervision, the Authority may monitor activities[59] and inspect installations (→Art. 153 (5), second sentence) and vessels[60]. 12

7. 'States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.'

States parties have to assist the Authority in its control of activities in the Area by undertaking to ensure compliance with the relevant provisions of the Convention, the norms of the Authority and the approved plans of work. Art 153 (4) explicitly refers to Art. 139, which provides for the States' responsibility to ensure and regulates liability: 13

> '1. States Parties shall have the responsibility to ensure that activities in the Area […] shall be carried out in conformity with this Part […].
>
> 2. […] [D]amage caused by the failure of a State Party […] to carry out its responsibilities under this Part shall entail liability […]. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.
>
> 3. […]'

and also is closely linked to Annex III, Art. 4 (4):

> 'The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to

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[51] See Part IV, Annex III and IV Crusts Regulations (note 25); Part IV, Annex 3 and 4 Sulphides Regulations (note 25); Part IV, Annex III and IV Nodules Regulations (note 25).

[52] See Art. 153 (1).

[53] See also Annex III, Art. 3 (4) and Art. 4 (6)(b).

[54] See Regulation 34 (2) and Annex IV, S. 10 Crusts Regulations (note 25); Regulation 32 (2) and Annex IV, S. 10 Nodules Regulations (note 25); Regulation 34 (2) and Annex 4, S. 10 Sulphides Regulations (note 25).

[55] See Regulation 30 Crusts Regulations and Sulphides Regulations (note 25); Regulation 28 Nodules Regulations (note 25).

[56] *Responsibilities and Obligations of Sponsoring States*, Public Sitting (note 45), statement by Michael W. Lodge, 16–18. See *infra*, MN 13 *et seq.*

[57] See Art. 162 (2)(l).

[58] See Art. 165 (2), (3) and the Commission's recommendations, available at: https://www.isa.org.jm/mining-code/Recommendations.

[59] See Art. 165 (2)(h); Regulations 33 (6) and 34 Crusts Regulations and Sulphides Regulations (note 25); Regulations 31 (6) and 32 Nodules Regulations (note 25).

[60] See also Art. 165 (2)(m); Art. 162 (2)(z). For details on the inspection of vessels and installations, see S. 14 of the standard clauses, Nodules Regulations (note 25), Annex IV; S. 14 of the standard clauses, Sulphides Regulations (note 25), Annex 4; S. 14 of the standard clauses, Crusts Regulations (note 25), Annex IV.

comply with its obligations if that State Party 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.'

14 From reading these norms in conjunction[61] follows the obligation of the sponsoring State[62] to take 'all necessary and appropriate measures',[63] i. e. to adopt 'laws and regulations and take[] administrative measures which are, within the framework of its legal system, reasonably appropriate',[64] to ensure the contractor's compliance with the norms relevant to activities in the Area.[65] According to the International Tribunal for the Law of the Sea, in doing so, the State 'must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole'.[66] Thus, whilst the obligation to assist the Authority in Art. 153 (4), second sentence is a 'direct obligation',[67] it is to be fulfilled by ensuring compliance, the latter being an obligation of due diligence.[68] A failure to meet this obligation may entail the State's liability.[69]

15 The mechanism embodied in Art. 153 (4), second sentence, and the other provisions mentioned contributes to ensuring that the actors who conduct activities in the Area, even if not parties to the Convention itself, comply with all norms relevant to the regime of the Area.[70] The sponsoring State acts in a 'common-interest role' in that it serves the common interest of all States with regard to the implementation of the common heritage of mankind by contributing to ensuring compliance with Part XI.[71]

8. 'The Authority shall have the right to take at any time any measures provided for under this Part to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract.'

16 As elaborated, the Authority exercises control in different ways.[72] It is also vested with enforcement power.[73] However, the execution of monetary penalties or, in grave cases, suspension or termination of the contract imposed on a violating contractor, as provided for in Annex III, Art. 18 (1) and (2) and the standard contract clauses[74], is limited. On the one hand, contracts generally enjoy security of tenure[75] and on the other an execution is not

[61] On these provisions and their interaction with regard to the obligations of sponsoring States, see *Responsibilities and Obligations of Sponsoring States* (note 27), paras. 99 *et seq.*

[62] As explicitly stated in Annex III, Art. 4 (4), the obligation refers to the sponsoring State. This also applies to Art. 139 and Art. 153 (4), *Responsibilities and Obligations of Sponsoring States* (note 27), para. 101.

[63] Art. 139 (2), second sentence.

[64] Annex III, Art. 4 (4).

[65] See, also for details on the measures to be taken by sponsoring States, *Responsibilities and Obligations of Sponsoring States* (note 27), 77 *et seq.*, paras. 213–222, 227–241. See also the elaborations of the Authority, in particular with view to the corresponding Czech and German regulations: ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Public Sitting, 14 September 2010, Doc. ITLOS/PV.2010/1/Rev.2, 23–29 (Gwenaëlle Le Gurun, Legal Officer of the International Seabed Authority).

[66] *Responsibilities and Obligations of Sponsoring States* (note 27), 78; see also *ibid.*, para. 230. The mere conclusion of a contract is not sufficient, *ibid.*, 77, paras. 223–226.

[67] *Ibid.*, 74 *et seq.*, paras. 121–124.

[68] *Ibid.*, 74; paras. 110–120, 124. See on other direct obligations of the sponsoring State and their link to its due diligence obligation, *ibid.*, 75, paras. 125–150, and on the link of the obligation to assist under Art. 153 (4) to the obligation concerning an environmental impact assessment, see *ibid.*, 75, para. 142.

[69] On the sponsoring State's liability, see *ibid.*, 76 *et seq.*, paras. 164 *et seq.*

[70] See *ibid.*, paras. 108, 103, 100.

[71] *Ibid.*, para. 76, see also para. 226.

[72] See *supra*, MN 12.

[73] Nordquist/Nandan/Rosenne (note 1), 312.

[74] See S. 2.1, 21 of the standard clauses, Crusts Regulations (note 25), Annex IV; S. 2.1, 21 of the standard clauses, Sulphides Regulations (note 25), Annex 4; S. 2.1, 21 of the standard clauses, Nodules Regulations (note 25), Annex IV.

[75] See *infra*, MN 17.

valid until the contractor has had the chance to exhaust his or her judicial remedies,[76] with the important exception of environmental emergency orders.[77] In cases of non-compliance the Authority may institute proceedings before the Seabed Disputes Chamber.[78]

9. 'A contract […] shall provide for security of tenure. Accordingly, the contract shall not be revised, suspended or terminated except in accordance with Annex III, articles 18 and 19.'

Generally, contracts enjoy security of tenure. Particularly in light of the considerable capital involved, this security is essential for the contractor who has to rely on steady conditions.[79] Narrow possibilities to suspend or terminate a contract exist, in particular in case of serious, ongoing and intentional violations of the 'the fundamental terms'[80] of the contract, Part XI and related instruments of the Authority by the contractor.[81] The revision of a contract is subject to consent of Authority and contractor.[82] It is worth noting that the contractor is only bound to the rules, regulations and procedures of the Authority that were in force at the time of conclusion of the contract.[83] The Authority can thus not unilaterally impose provisions, e. g. of the Regulations, that it has revised after the conclusion of the contract. This is particularly relevant with regard to the non-transferability of improved environmental standards.[84] 17

Article 154
Periodic Review

Every five years from the entry into force of this Convention, the Assembly shall undertake a general and systematic review of the manner in which the international regime of the Area established in this Convention has operated in practice. In the light of this review the Assembly may take, or recommend that other organs take, measures in accordance with the provisions and procedures of this Part and the Annexes relating thereto which will lead to the improvement of the operation of the regime.

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Peter B. Payoyo*, Cries of the sea. World inequality, Sustainable Development and the Common Heritage of Humanity (1997); *Francisco O. Vicuña*, The Régime for the Exploration and Exploitation of Sea-bed Mineral Resources, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. II (1991), 635–687

Documents: ISA, Decision of the Assembly Regarding the First Periodic Review of the International Regime of the Area pursuant to Article 154 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/9/Rev. 1 (2015); ISA, Periodic Review of the International Regime of the Area pursuant to Article 154 of the United Nations Convention on the Law of the Sea. Note by the Secretary-General, ISA Doc. ISBA/21/A/4 (2015); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA

[76] See Part XI, S. 5.

[77] See Annex III, Art. 18 (3); Arts. 162 (2)(w) and 165 (2)(k) UNCLOS; S. 2.1, 21 of the standard clauses (note 74); S. 6.3 of the standard clauses (note 74); Regulation 35 (6) Crusts Regulations (note 25); Regulation 35 (6) Sulphides Regulations (note 25); Regulation 33 (6) Nodules Regulations (note 25).

[78] See Arts. 162 (2)(u) and 165 (2)(i) UNCLOS.

[79] This is also pointed out by *Le Gurun* on Annex III, Art. 3 MN 27. See also Annex III, Art. 16, second sentence UNCLOS; S. 2.1 of the standard clauses (note 74).

[80] Annex III, Art. 18 (1)(a) UNCLOS; S. 21.1 (a) of the standard clauses (note 74).

[81] See Annex III, Art. 18 UNCLOS; S. 21 of the standard clauses (note 74).

[82] Annex III, Art. 19 UNCLOS; S. 24 of the standard clauses (note 74).

[83] This can be deduced from Annex III, Art. 17 (2)(b)(iii), third sentence. *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 207.

[84] Likewise *ibid.*, 207 *et seq.* However, see the standard clauses (note 74), which mention the possibility to consensually revise the contract so as to 'facilitate the application of any rules, regulations and procedures adopted by the Authority subsequent to the entry into force of th[e] contract', S. 24.2 of the standard clauses (note 74).

Doc. ISBA/19/C/17 (2013), Annex; ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/20/A/2 (2014); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/6/A/9 (2000); ISA, Statement of the President on the Work of the Assembly at the Resumed Sixth Session, ISA Doc. ISBA/6/A/19 (2000); US Department of State Bulletin 75 (1976), 398

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I. Purpose and Function

1 Art. 154 provides for the periodic review of the operation of the regime established for the Area. It obliges the Assembly of the Authority (→ Art. 159) to periodically assess the practical operation of the regime in view of changing circumstances and newly gained experiences and allows for taking measures for improvement. As the regime of the Area was unprecedented and no experience existed at the time of its creation, such review was deemed necessary[1]. Art. 154 is to be distinguished from Art. 155,[2] which provided for a formal review conference to review the provisions governing the regime of the Area, potentially entailing amendments of the system as such.

II. Historical Background

2 The idea of a review of the manner in which the regime of the Area established by the Convention operates in practice was sparsely discussed in the early years of the negotiations.[3] In 1976, however, US Secretary of State Kissinger suggested a compromise on the system of exploration and exploitation (in particular featuring the so-called 'parallel system' under which both an authority and States would conduct activities) which included the proposal of a review of that system.[4] The issue of review was closely connected to the question of whether the regime should be of a permanent or temporary nature. Developing States conditioned the acceptance of a parallel system upon its provisional character[5] and it was understood that a

[1] See *infra*, MN 2.

[2] For a brief comparison of the two provisions, see *Francisco O. Vicuña*, The Régime for the Exploration and Exploitation of Sea-bed Mineral Resources, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 635, 645 *et seq*.

[3] A Tanzanian proposal of 1971 envisaged the regular review of a statute for a seabed authority by the Contracting parties, Sea-Bed Committee, Tanzania: Draft Statute for an interantional [sic] Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51, 64 (Art. 44). A provision on 'General Review' in the ISNT/Part I (UNCLOS III, Informal Single Negotiating Text, Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 148 (Art. 66)) was removed in the RSNT/Part I (UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125) because it was settled that the draft of the First Committee, previously thought to be become an independent instrument, would become part of a Convention and hence final clauses were not necessary.

[4] See US Department of State Bulletin 75 (1976), 398; Yearbook of the United Nations 30 (1976), 87. See on Kissinger's proposal, *Peter B. Payoyo*, Cries of the Sea. World Inequality, Sustainable Development and the Common Heritage of Humanity (1997), 399 *et seq*.

[5] See for instance First Committee UNCLOS III, Mexico: Informal Working Paper (1977, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 359.

regime on seabed mining elaborated at a point in time where no experience existed would have to be tested at a later date.[6] The establishment of a regular review of the unprecedented regime and its operation thus seemed consequential. The corresponding Mexican proposal of 1977 contained two provisions on review: one regarding the periodical review of the operation of the regime by the Authority and one concerning a review conference to assess the relevant provisions, potentially entailing modifications of the system as such (the later Art. 155). The former provision read:

> 'Every five years from the provisional or definitive entry into force of the Convention, whichever takes place first, the Assembly shall undertake a general and systematic review of the manner in which the international régime of the Area established in the Convention has operated in practice. In the light of the said review, the Assembly may adopt, or recommend other organs to adopt, measures which, without involving amendment of part I of the Convention or of the annexes thereto, will lead to the improvement of the aforementioned régime and to its better adaption to changing circumstances.'[7]

This proposal already substantially corresponded to the later Art. 154 UNCLOS.[8]

III. Elements

1. 'Every five years from the entry into force of this Convention'

The obligation to review the operation of the regime established for the Area is triggered by the coming into force of the Convention, i. e. the 16 November 1994. From then on, every five years the Assembly has to undertake a review on how the regime of the Area functions in practice. In line with this, the Regulations of the Authority also provide for their regular review.[9] The first review under Art. 154 was due in 2000. However, following the evaluation of the Secretary General of the Authority,[10] the Assembly decided not to take any measures, considering the short experience it had at the time had in operating the regime.[11] In 2015, upon suggestion of the Secretary General, who had referred to the significant developments since the year 2000,[12] the Assembly decided to conduct its first periodic review under Art. 154 in 2017.[13] As of 2016, the review process has been initiated. **3**

2. 'the Assembly shall undertake a general and systematic review'

The review is to be undertaken by the Assembly of the Authority, the 'supreme' organ which consists of all States Parties and is entitled to establish general policies (→ Art. 160). As **4**

[6] See *ibid.*, 363 (Commentary).

[7] *Ibid.*, 362 (Art. 64).

[8] However, the subsequent text of the Informal Composite Negotiating Text, as well as the later Art. 154, in particular contained no reference to an amendment of the Convention and envisaged 'the improvement of the operation of the régime', UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 26 (Art. 152).

[9] See Part X ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), Annex; Part X ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/C/17 (2013), Annex; Part X ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), Annex.

[10] See ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/6/A/9 (2000), paras. 55–63.

[11] ISA, Statement of the President on the Work of the Assembly at the Resumed Sixth Session, ISA Doc. ISBA/6/A/19 (2000), para. 8.

[12] See ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/20/A/2 (2014), paras. 90–93 and ISA, Periodic Review of the International Regime of the Area pursuant to Article 154 of the United Nations Convention on the Law of the Sea. Note by the Secretary-General, ISA Doc. ISBA/21/A/4 (2015).

[13] ISA, Decision of the Assembly Regarding the First Periodic Review of the International Regime of the Area pursuant to Article 154 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/9/Rev.1 (2015).

decided by the Assembly, the process is overseen by the Authority's Review Committee.[14] In 2016, following a tender process, Seascape Consultants Limited conducted a review, producing an interim report, which serves as a basis for the further review process.[15] Taking note of comments by the (subsidiary) organs of the Authority and the Review Committee, the Assembly considered the interim report at its 22nd session.[16] After the further involvement of different actors,[17] it is envisaged that a final report will be considered by the Assembly at its 23rd session in 2017.[18] The review shall consider the practical operation of the Authority's (subsidiary) organs and assess whether the functions of the Authority, as envisaged by the 1994 Agreement, Annex, S. 1, para. 5, have been effectively performed.[19]

3. 'In the light of this review the Assembly may take, or recommend that other organs take, measures […] which will lead to the improvement of the operation of the regime'

5 Upon review of the operation of the regime of the Area, the Assembly may take or recommend measures to improve the former.

Article 155
The Review Conference

1. Fifteen years from 1 January of the year in which the earliest commercial production commences under an approved plan of work, the Assembly shall convene a conference for the review of those provisions of this Part and the relevant Annexes which govern the system of exploration and exploitation of the resources of the Area. The Review Conference shall consider in detail, in the light of the experience acquired during that period:

(a) **whether the provisions of this Part which govern the system of exploration and exploitation of the resources of the Area have achieved their aims in all respects, including whether they have benefited mankind as a whole;**
(b) **whether, during the 15-year period, reserved areas have been exploited in an effective and balanced manner in comparison with non-reserved areas;**
(c) **whether the development and use of the Area and its resources have been undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade;**
(d) **whether monopolization of activities in the Area has been prevented;**
(e) **whether the policies set forth in articles 150 and 151 have been fulfilled; and**
(f) **whether the system has resulted in the equitable sharing of benefits derived from activities in the Area, taking into particular consideration the interests and needs of the developing States.**

2. The Review Conference shall ensure the maintenance of the principle of the common heritage of mankind, the international regime designed to ensure equitable exploitation of the resources of the Area for the benefit of all countries, especially the developing States, and

[14] *Ibid.*, 1, para. 2, also on the composition of the Review Committee.

[15] See *David Johnson et al.*, Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154. Interim report (2016), ISA Doc. ISBA/22/A/CRP.3 (1).

[16] ISA, Decision of the Assembly Regarding the Interim Report of the First Periodic Review of the International Regime of the Area Pursuant to Article 154 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/22/A/11 (2016).

[17] See *ibid.*, paras. 1 *et seq.*

[18] See *ibid.*, para. 4; ISA, Decision of the Assembly Regarding the First Periodic Review of the International Regime of the Area pursuant to Article 154 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/9/Rev.1 (2015), para. 5.

[19] See, also for more specific requirements, ISA, Decision of the Assembly Regarding the First Periodic Review (note 17), Annex, 3, para. 4.

an Authority to organize, conduct and control activities in the Area. It shall also ensure the maintenance of the principles laid down in this Part with regard to the exclusion of claims or exercise of sovereignty over any part of the Area, the rights of States and their general conduct in relation to the Area, and their participation in activities in the Area in conformity with this Convention, the prevention of monopolization of activities in the Area, the use of the Area exclusively for peaceful purposes, economic aspects of activities in the Area, marine scientific research, transfer of technology, protection of the marine environment, protection of human life, rights of coastal States, the legal status of the waters superjacent to the Area and that of the air space above those waters and accommodation between activities in the Area and other activities in the marine environment.

3. The decision-making procedure applicable at the Review Conference shall be the same as that applicable at the Third United Nations Conference on the Law of the Sea. The Conference shall make every effort to reach agreement on any amendments by way of consensus and there should be no voting on such matters until all efforts at achieving consensus have been exhausted.

4. If, five years after its commencement, the Review Conference has not reached agreement on the system of exploration and exploitation of the resources of the Area, it may decide during the ensuing 12 months, by a three-fourths majority of the States Parties, to adopt and submit to the States Parties for ratification or accession such amendments changing or modifying the system as it determines necessary and appropriate. Such amendments shall enter into force for all States Parties 12 months after the deposit of instruments of ratification or accession by three fourths of the States Parties.

5. Amendments adopted by the Review Conference pursuant to this article shall not affect rights acquired under existing contracts.

Bibliography: *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention. Treaty Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin (ed.), Recht zwischen Umbruch und Bewahrung (1995), 121–134; *L. Dolliver. M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189–203; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Bernhard H. Oxman*, The 1994 Agreement relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15–35; *Peter B. Payoyo*, Cries of the Sea. World Inequality, Sustainable Development and the Common Heritage of Humanity (1997); *Francisco O. Vicuña*, The Régime for the Exploration and Exploitation of Sea-Bed Mineral Resources, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 635–687

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3. 'If, five years after its commencement, the Review Conference has not reached agreement on the system of exploration and exploitation of the resources of the Area, it may decide during the ensuing 12 months, by a three-fourths majority of the States Parties, to adopt and submit to the States Parties for ratification or accession such appropriate. Such amendments shall enter into force for all States Parties 12 months after the deposit rights acquired under existing contracts.' 5
4. 'Amendments adopted by the Review Conference pursuant to this article shall not affect rights acquired under existing contracts.' 6

I. Purpose and Function

1 Art. 155 provided for a formal review conference, which should be convened 15 years from the first commercial seabed mining under the regime set up in UNCLOS, in order to assess the provisions of the Convention and its Annexes that constitute the system of exploration and exploitation of the Area with a view to specific criteria, and would possibly entail amendments to the regime. Whereas consent on the text of Art. 155 was reached in 1982, the provision remained – particularly due to its voting procedure – highly controversial. Together with other provisions of Part XI of the Convention, such as Art. 151, it led to some States refusing to become party to UNCLOS, and thus eventually triggered the decision to negotiate on the 1994 Implementation Agreement.[1] The latter not merely implements, but substantially modifies the regime of the Area provided for in Part XI of the Convention and also declares most of the provisions of Art. 155 (paras. 1, 3 and 4) inapplicable.[2] Whilst review by the Authority of the issues enumerated in Art. 155 (1) is possible anytime[3] and certain elements of the norm are preserved, the original review conference and its peculiar decision-making procedure have been abolished. Art. 155 is to be distinguished from Art. 154, which provides for a review by the Authority of the operation of the regime.[4]

II. Historical Background

2 The idea of a review conference was not an issue in the early years of the negotiations on the regime governing the Area, and was thus addressed in neither the Informal Single Negotiating Text[5] nor the Revised Single Negotiating Text[6]. Subsequently, however, it proved to be highly controversial, in particular between potential mining and other States that respectively aimed at control of the review process.[7] When US Secretary of State KISSINGER proposed a 'parallel system' of exploration and exploitation (a system under which both an Authority and States would conduct activities) in 1976, he also included the idea of review.[8] This issue was linked to the call for the provisional nature of the new and unexperienced regime, which was thought to need testing.[9] A Mexican proposal by

[1] *Bernhard H. Oxman*, The 1994 Agreement Relating to the Implementation of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15, 15 *et seq*., 23 *et seq*., 29 *et seq*.; *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin (ed.), Recht zwischen Umbruch und Bewahrung (1995), 121, 121 *et seq*., 125 *et seq*., 128.

[2] See 1994 Agreement, Annex, S. 4.

[3] The 1994 Agreement expressly states that the Assembly, upon recommendation of the Council, can proceed notwithstanding Art. 314 (2), *ibid.*, Annex, S. 4. In any event, the Assembly has the competence to undertake a review on the grounds of its residual powers as stipulated in Art. 160, though subsequent decisions would have to be taken in accordance with the 1994 Agreement's procedures, Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 334, FN 19.

[4] For a brief comparison of the two provisions, see *Francisco O. Vicuña*, The Régime for the Exploration and Exploitation of Sea-Bed Mineral Resources, in: René Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. I (1991), 635, 645 *et seq*.

[5] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137.

[6] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125.

[7] See *Vicuña* (note 4), 647.

[8] See US Department of State Bulletin 75 (1976), 398; Yearbook of the United Nations 30 (1976), 87. See on Kissinger's proposal, *Peter B. Payoyo*, Cries of the Sea. World Inequality, Sustainable Development and the Common Heritage of Humanity (1997), 399 *et seq*.

[9] See First Committee UNCLOS III, Mexico: Informal Working Paper (mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea, vol. VII (1985), 359, 363.

Ambassador CASTAÑEDA of 1977[10] formed the basis for a draft by the Norwegian minister EVENSEN.[11] It contained two provisions on review: one regarding the periodical review of the operation of the regime by the Authority (the later Art. 154) and one concerning a review conference. The latter provided for a conference to assess the regime of the Area as established in particular by the Convention's provisions on exploration and exploitation with view to specific criteria. Particular focus should be on the question whether 'an economic balance has been maintained between the areas reserved for the Authority and the contract areas […]'. In case of ensuing amendments, the common heritage of mankind, the control and organization by the Authority and other basic principles should in any event be preserved. Besides an elaboration on the amending procedure, the proposal furthermore provided for the sanctity of rights under existing contracts. Despite some modifications, the Informal Composite Negotiating Text contained a provision that was more or less in line with EVENSEN's proposal. However, it introduced a way to deal with the feared failure of the review conference: activities in the Area should then be conducted by the Enterprise and through joint ventures with States and entities, under effective control of the Authority.[12] This marked the beginning of controversial discussion on the issue. Drafts providing that the Authority might then deny the closure of new contracts in order to pressure the actors involved to find an agreement[13] generated the fear of an end of seabed mining on the part of some developed States.[14] Subsequent drafts that granted the conference the right to submit amendments to the States parties which would enter into force upon ratification or equivalent by a majority[15] were criticized for binding all States without their individual consent.[16] Finally, a proposal of several industrialized countries to generally apply the procedure of UNCLOS III and to attach great weight to reaching a consensus on amendments[17] was accepted, as reflected in the final text of Art. 155 (3). The proposal's further element that in case of failure amendments ratified by a majority would not be binding for other parties was however not adopted. Instead, the foregoing suggestion to bind all States parties without their individual approval was incorporated in the final Art. 155 (4). Indeed, although adopted, the final version of Art. 155 was still subject to considerable criticism. Eventually, the 1994 Agreement abolished the review conference established by Art. 155 including its peculiar decision-making procedure, while preserving the possibility of a review by the Authority under the regular procedures of the Convention, and maintaining the principles of Art. 155 (2) and the rights under existing contracts as provided by Art. 155 (5).

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[10] *Ibid.*, 363 (Art. 65).

[11] First Committee UNCLOS III, Provisional Nature of the System and Review of the System (1977, mimeo.), reproduced in: Platzöder (note 9), 378 (Art. 65).

[12] See UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 26 *et seq.* (Art. 153); UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/ADD.1 (1977), OR VIII, 65, 67.

[13] See for instance UNCLOS III, Suggested Compromise Formula, UN Doc. NG1/5 (1978 mimeo), reproduced in: Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, vol. IX (1986), 84, 85 (Art. 153 (6)); UNCLOS III, Suggested Compromise Formula, UN Doc. NG1/6 (1978 mimeo), reproduced in: *ibid.*, 85, 90 (Art. 153 (6)); UNCLOS III, Report Made to the Plenary by the Chairman of Negotiating Group 1 on the Work of the Group, UN Doc. NG1/8 (1978 mimeo), reproduced in: *ibid.*, 109, 112; UNCLOS III, Informal Composite Negotiating Text/REV. 1, UN Doc. A/CONF.62/WP.10/Rev.1 (1979), 83, OR VIII, 83 (Art. 155 (6)).

[14] See UNCLOS III, Report of the Coordinators of the Working Group of 21 to the First Committee, UN Doc. A/CONF.62/C.1/L.27 and ADD.1 (1980), OR XIII, 113, 114 (para. 8).

[15] See for instance *ibid.*, 116, 137 (Art. 155 (5)).

[16] See UNCLOS III, Report of the Chairman of the First Committee, UN Doc. A/CONF.62/L.62 (1980), OR XIV, 135, 136 (para. 15).

[17] UNCLOS III, Australia *et al.*: Amendments, UN Doc. A/CONF.62/L.104 and ADD.1 (1982), OR XVI, 219 (Art. 155 (3) and (4)).

III. Elements

1. 1994 Implementation Agreement, Annex, S. 4

3 The 1994 Agreement significantly modifies Art. 155:

> 'The provisions relating to the Review Conference in article 155, paragraphs 1, 3 and 4, of the Convention shall not apply. Notwithstanding the provisions of article 314, paragraph 2, of the Convention, the Assembly, on the recommendation of the Council, may undertake at any time a review of the matters referred to in article 155, paragraph 1, of the Convention. Amendments relating to this Agreement and Part XI shall be subject to the procedures contained in articles 314, 315 and 316 of the Convention, provided that the principles, regime and other terms referred to in article 155, paragraph 2, of the Convention shall be maintained and the rights referred to in paragraph 5 of that article shall not be affected.'

It declares paras. 1, 3 and 4 inapplicable and thus abolishes the review conference. Instead, it entitles the Assembly to review, upon recommendation of the Council, the matters enumerated in Art. 155 (1) at any time. However, amendments of the relevant provisions have to follow the procedures established by the Convention.[18] In contrast, Art. 154 obliges the Assembly to undertake a general and systematic review of the practical operation of the entire regime of the Area in time intervals of five years.

2. 'The Review Conference shall ensure the maintenance of the principle of the common heritage of mankind, the international regime designed to ensure equitable exploitation of the resources of the Area for the benefit of all countries, especially the developing States, and an Authority to organize, conduct and control activities in the Area. It shall also ensure the maintenance of the principles laid down in this Part with regard to […].'

4 As opposed to the most part of Art. 155, Art. 155 (2) was not declared inapplicable by the 1994 Agreement. Instead, the Agreement emphasizes that even in case of amendments, the terms of Art. 155 (2) shall be maintained. Art. 155 (2) refers to the basic principles of the regime of the Area: the common heritage of mankind and its essential elements, as well as others, as enumerated. The provision aims at ensuring that these are preserved as a basis for the regime.

3. 'If, five years after its commencement, the Review Conference has not reached agreement on the system of exploration and exploitation of the resources of the Area, it may decide during the ensuing 12 months, by a three-fourths majority of the States Parties, to adopt and submit to the States Parties for ratification or accession such amendments changing or modifying the system as it determines necessary and appropriate. Such amendments shall enter into force for all States Parties 12 months after the deposit of instruments of ratification or accession by three fourths of the States Parties.'

5 The possibility of adopting amendments by a three-fourths majority with binding effect on all States was heavily opposed by potential mining States. They feared that developing States would impose an unwanted regime (in particular by providing for restriction of access).[19] The 1994 Agreement declares this provision to be inapplicable. Instead, amendments are to be adopted in accordance with the Convention's regular provisions on amendments relating

[18] See *infra*, MN 5.
[19] *Jaenicke* (note 1), 128.

to activities in the Area, Arts. 314, 315 and 316.[20] These, however, require consensus in Council.[21] The mining States' option to veto an amendment is thereby ensured, as opposed to the procedure envisaged under the review conference.[22]

4. 'Amendments adopted by the Review Conference pursuant to this article shall not affect rights acquired under existing contracts.'

In line with Art. 153 (6), which provides for the general security of tenure,[23] amendments adopted after review do not affect the stability of existing contracts. This provision continues to apply under the 1994 Agreement.[24] 6

Section 4
The Authority

Subsection A
General provisions

Article 156
Establishment of the Authority

1. There is hereby established the International Seabed Authority, which shall function in accordance with this Part.

2. All States Parties are *ipso facto* members of the Authority.

3. Observers at the Third United Nations Conference on the Law of the Sea who have signed the Final Act and who are not referred to in article 305, paragraph 1(c), (d), (e) or (f), shall have the right to participate in the Authority as observers, in accordance with its rules, regulations and procedures.

4. The seat of the Authority shall be in Jamaica.

5. The Authority may establish such regional centres or offices as it deems necessary for the exercise of its functions.

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[20] 1994 Agreement, Annex, S. 4.

[21] Arts. 314, 161 (8)(d); followed by an approval of the Assembly with a two-thirds majority, Arts. 314, 159 (8) and ratification, respectively accession by three-fourths of the States Parties, Art. 316 (5). In addition, according to the 1994 Agreement decisions of the Assembly are to be based on the recommendations of the Council, 1994 Agreement, Annex, S. 3, para. 4.

[22] *Jaenicke* (note 1), 128.

[23] See *Siegfried* on Art. 153 MN 17.

[24] 1994 Agreement, Annex, S. 4.

Nations Convention on the Law of the Sea, AJIL 89 (1995), 814–824; *L. D. M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189–203; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. V (1989); *Shigeru Oda*, The International Law of Ocean Development (1972); *Ebere Osieke*, The Legal Validity of Ultra Vires Decisions of International Organizations, AJIL 77 (1983), 239–256; *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135–337; *W. Michael Reisman/Dirk Pulkowski*, Nullity in International Law, MPEPIL, available at: http://www.mpepil.com; *Philippe Sands/Pierre Klein*, Bowett's Law of International Institutions (6th edn. 2009); *Kirsten Schmalenbach*, International Organizations or Institutions, General Aspects, MPEPIL, available at: http://www.mpepil.com; *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984); *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173–241; *Michael C. Wood*, International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47–98

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015); ISA, Rules of Procedure of the Assembly of the International Seabed Authority (1995); ISA, Rules of Procedure of the Council of the International Seabed Authority (1996); ISA, Rules of Procedure of the Legal and Technical Commission (2000)

Cases: ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, ICJ Reports (1972), 46; ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962), 151; ICJ, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, ICJ Reports (1960), 150; ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 66

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I. Purpose and Function

1 Art. 156 (1) constitutes the legal basis for the establishment of the 'International Seabed Authority' as an international organization[1] and indicates the constitutive instruments which determine and delimit its functioning. It should be noted that Art. 1 (1)(2) clarifies that the term 'Authority', which is consistently used throughout UNCLOS with the sole exception of Art. 156 (1), refers to the 'International Seabed Authority' (→ Art. 1 (1)(2)). The Authority is one of three autonomous international institutions set up by UNCLOS, the other two being the International Tribunal for the Law of the Sea (ITLOS) established by (→ Art. 1 (1) Annex VI) and the Commission on the Limits of the Continental Shelf (CLCS) established by (→ Art. 1 Annex II). Notably, these institutions are entirely independent from each other. Art. 156 (2) sets out the conditions for the membership in the Authority. In short, it provides that 'States Parties' to UNCLOS automatically become members of the Authority, which also includes certain non-State entities.[2] Nevertheless, the

[1] See also Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 340 (MN 156.1).

[2] See *infra*, MN 11.

Authority is an overwhelmingly intergovernmental institution. Pursuant to Art. 156 (3), national liberation movements which are not listed in the catalogue of Art. 305 (1)(c)-(f), but which have participated as observers at UNCLOS III, have the right to become observers at the Authority. Art. 156 (4) stipulates that the seat of the Authority shall be in Jamaica. Today, the headquarters of the Authority are located in Kingston, Jamaica. In addition, Art. 156 (5) provides the Authority with the (future) opportunity to establish regional centres or offices in order to facilitate the exercise of its global functions.[3] Importantly, Art. 157 is to be interpreted and applied in accordance with the 1994 Implementation Agreement.[4]

II. Historical Background

The call for a use of the deep seabed and its resources for the benefit of mankind (→ Art. 140)[5] and the corresponding need for a trustee who would implement this principle on the behalf of mankind (→ Art. 137)[6] was accompanied by the idea of an international institution bestowed with this task from the outset. Already in 1970, the General Assembly of the United Nations proposed that '[an] international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established [.]'[7] The exact nature and competence of this machinery, namely an international organization with jurisdiction of its own, was later concretized.[8] Given the general agreement on the establishment of the Authority as an international organization, the question of its legal basis in Art. 156 (1) was more of a formality.[9] 2

The membership structure envisaged in Art. 156 (2), on the other hand, has a more delicate background. In the light of such a progressive notion as the 'common heritage of mankind', it is questionable whether the traditional principle of State representation is truly sufficient for the international machinery tasked with its implementation.[10] Nevertheless, despite calls for an institutional framework more representative of 'humankind' which may have included representatives of peoples as well as possibly non-governmental institutions and individuals from certain economic, social or academic backgrounds,[11] it was decided that the membership structure of the Authority would – in most respects[12] – follow the classic model of an intergovernmental organization.[13] 3

The question of the seat of the Authority was rather contentious. It first materialized after the Second Session of the Conference in 1974, in which a Group of 77 proposal mentioned Jamaica as the seat of the organization.[14] Two other States, Malta and Fiji, also offered to 4

[3] See also Nordquist/Nandan/Rosenne (note 1), 350 (MN 156.13(e)).

[4] S. 1 (17) Annex to the 1994 Implementation Agreement.

[5] For details on the 'common heritage of mankind'-principle, see *Vöneky/Höfelmeier* on Art. 140 MN 2 *et seq.*

[6] For details on the true nature of this 'trusteeship', see *Vöneky/Höfelmeier* on Art. 137 MN 3 *et seq.*

[7] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970.

[8] See *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 359 *et seq.*

[9] For details on the drafting history, see Nordquist/Nandan/Rosenne (note 1), 340 *et seq.* (paras. 156.2 *et seq.*).

[10] *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135, 217 *et seq.*

[11] See, for example, *Elisabeth Mann Borgese*, The Ocean Regime – Draft Statute, in: Shigeru Oda (ed.), The International Law of Ocean Development (1972), 280, 285 *et seq.* (Arts. VII-VIII).

[12] On the membership of entities other than States, see *infra* MN 11 *et seq.*

[13] See *Paolillo* (note 10), 217 *et seq.*, who also gives examples of international organizations whose institutional mechanism comprises entities other than State governments.

[14] UNCLOS III, Group of 77: Draft Articles on International Machinery (1974, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 76 (Art. XXII (4)).

serve as the seat of the Authority.[15] Thus, three small island States each representing a different part of the world (Pacific Ocean, Mediterranean Sea, Caribbean Sea) competed for the status as host State.[16] After lengthy negotiations, a vote on the issue finally took place at the Tenth Session of UNCLOS III in 1981. Malta prevailed in the first round of voting but was beaten by Jamaica in the second round after Fiji had withdrawn.[17] Notably, a proposal that the Authority should have a right to change its seat was unsuccessful.[18] However, a provision on the Authority's right to establish regional centres or offices was included in the final text.

III. Elements

1. 'There is hereby established the International Seabed Authority […]'

5 Art. 156 (1) establishes the Authority and thus forms its legal basis.[19] As such, Art. 156 (1) forms the core of the 'constitution' of the Authority as an international organization[20] whose object is, according to the International Court of Justice (ICJ), 'to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals'[21]. Nonetheless, the first half sentence of Art. 156 (1) has little meaning of its own. It does not specify the nature of the 'International Seabed Authority'. The existence of the Authority as an international organization is implied by other provisions of Part XI, particularly (→ Art. 157 (1)). In particular, the Authority is attributed with international legal personality and legal capacity by (→ Art. 176).[22] The first half sentence of Art. 156 (1) is not, however, entirely declaratory. It determines the official title of the newly established organization, namely 'International Seabed Authority'. Arguably, it also makes clear where (Part XI of UNCLOS) and when (entry into force of UNCLOS on 16 November 1994) the Authority was established.

6 The organic structure of the Authority is not addressed directly by Art. 156 (1). Instead, multiple provisions scattered throughout UNCLOS, its Annexes and the 1994 Implementation Agreement determine the structure of the Authority. As is usual practice in international organizations, the Authority is internally organized by legislative, executive and administrative organs which carry out its various functions. The principal organs of the Authority are the Assembly, the Council and the Secretariat (→ Art. 158 (1)). A further organ, the Enterprise, exists in order to specifically carry out the functions of the Authority referred to in Art. 170 (1) but is still dormant (→ Art. 158 (2)). The Council has two important subsidiary organs, namely the still dormant Economic Planning Commission (→ Art. 163 (1)(a)) and the Legal and Technical Commission (→ Art. 163 (1)(b)). The main subsidiary organ of the Secretariat is the Secretary-General (→ Art. 166 (1)). An entirely new subsidiary organ of the Assembly, the Finance Committee, was established not by UNCLOS but by the later 1994 Implementation Agreement.[23] Finally, the Authority may, through its organs, establish further subsidiary organs (→ Art. 158 (3)). As this

[15] Nordquist/Nandan/Rosenne (note 1), 345 (MN 156.8).

[16] See also *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 224.

[17] Nordquist/Nandan/Rosenne (note 1), 347 (MN 156.11).

[18] UNCLOS III, Draft of the ISNT/Part I (1975, mimeo.), reproduced in: Platzöder (note 14), 110, 119 (Art. 20 (2)): 'The seat of the Authority may be moved to another place by a decision of the Assembly by a majority of two-thirds of its members.'

[19] On the concept, see *Kirsten Schmalenbach*, International Organizations or Institutions, General Aspects, MPEPIL, para. 5, available at: http://www.mpepil.com.

[20] For a detailed description of the legal framework of the Authority, see *infra*, MN 7 *et seq*.

[21] ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 66, 75 (para. 19).

[22] See *Ferrara* on 176 MN 4 *et seq*.

[23] S. 9 (1), (9) Annex to the 1994 Implementation Agreement. For details on the relationship of the Finance Committee and the Council, see *van Doorn* on 162 MN 15 *et seq*.

multitude of organs shows, the Authority is a complex international organization. This complexity results from the Authority's unique nature and functions (→ Art. 157 (1)).

2. '[…] which shall function in accordance with this Part.'

Art. 156 (1) prescribes that the Authority 'shall function in accordance with [Part XI]' and thereby determines the 'internal law' (or 'constitution') of the Authority. This legal framework has two pillars: The first is made of conventional law (or 'primary law'). It comprises UNCLOS[24] (particularly → Part XI) and its Annexes (particularly → Annexes III and IV), which are integral parts of UNCLOS and which are included in the reference to insofar as they are related to Part XI (→ Art. 318). Moreover, the first pillar also includes the 1994 Implementation Agreement. To that end, Art. 2 (1) 1994 Implementation Agreement states: 7

> 'The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail.'[25]

The second pillar is formed by 'rules, regulations and procedures' which, created by the Authority itself on the basis of – and in accordance with – UNCLOS, are derivative law (or 'secondary law').[26] In the words of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (which, so far, has not entered into force): The internal law of an international organization consists 'in particular [of] the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization'.[27] Thus, as is the case for international organizations generally,[28] the internal legal order of the Authority consists of a hierarchy of norms in which the express text of UNCLOS, its Annexes and the 1994 Agreement have the highest value. Within this framework, provisions which define and delimit the purposes, functions and powers of the Authority and its organs are scattered throughout UNCLOS, the Annexes and the 1994 Implementation Agreement.[29] The same is true of provisions which govern the organizational structure and procedure of the Authority and its organs. Overall, the architecture of the legal framework of the Authority, in particular the Annexes, is so detailed and dense that, according to Paolillo, the Authority is deprived of almost any meaningful discretion in the exercise of its seemingly ample powers.[30]

As a general principle of public international law, international organizations must perform their functions in accordance with their 'constitution', i. e. with the rules contained in – and derived from – the instrument by which they are established.[31] As this is also true of the Authority, the wording of Art. 156 (1) which prescribes that the Authority '[…] shall function in accordance with [Part XI]' is declaratory. The obligation of the Authority and its organs to observe the rules contained in their constitutive instrument is a recurring theme repeated by various other provisions to such an extent that Paolillo has described it as 8

[24] For a reference directly to UNCLOS as a whole, see Art. 157 (2).

[25] See also S. 1 (17) Annex to the 1994 Implementation Agreement which states that '[t]he relevant provisions of Part XI, section 4, of [UNCLOS] shall be interpreted and applied in accordance with [the 1994 Implementation Agreement]'. This is in line with the official position of the Authority, see ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015), 4 (para. 11).

[26] *Philippe Sands/Pierre Klein*, Bowett's Law of International Institutions (6th edn. 2009), 460 (paras. 14–032); *Markus Benzing*, International Organizations or Institutions – Secondary Law, MPEPIL, paras. 1 *et seq*., available at: http://www.mpepil.com.

[27] Art. 2 (1)(j) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, ILM 25, 543.

[28] *Pierre Klein*, International Organizations or Institutions – Internal Law and Rules, MPEPIL, para. 9, available at: http://www.mpepil.com.

[29] For an analysis, see *Schatz* on 157 MN 3 *et seq*.

[30] See *Paolillo* (note 10), 271. See also *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987), 296.

[31] *Klein* (note 28), para. 9; *Sands/Klein* (note 26), 460 (para. 14–032).

'almost obsessional'.[32] Examples are: For the Authority, Arts. 144[33], 145[34], 153 (1)[35] and 157 (1)[36]; for the Assembly, Art. 160 (1)[37]; for the Council, Art. 162 (1)[38]; for the Enterprise, Art. 170 (2)[39]. In the case of the Legal and Technical Commission, a similar rule is mentioned in its Rules of Procedure.[40] There is no such express provision for the Secretariat and some other organs, but the general rule mentioned in Art. 156 (1) and elsewhere applies to all organs and subsidiary organs of the Authority.

9 Difficult questions arise with respect to the legal consequences of breaches of the internal law of the Authority by an act of the Authority or one of its organs. Unfortunately, there exists no provision which expressly determines the legal consequences of such a violation. Violations of internal law commonly require an application of the doctrine of *ultra vires*. As previously noted, Part XI, the Annexes and the 1994 Implementation Agreement contain a multitude of provisions which define and delimit the substantive and functional scope of the powers assigned to the Authority (→ Art. 157 (2)) and its organs (→ Art. 158 (4)). Any acts which exceed the limits of these powers, including any implied powers[41], are substantively *ultra vires* the Authority. An (internal) substantive *ultra vires* act also occurs when an organ exceeds its competences in contravention of the internal division of powers of the Authority.[42] The constitutive instruments of the Authority also set out a vast amount of procedural rules for the Authority, many of which relate to decision-making and deal with such issues as the composition, procedure and voting of its organs.[43] Frequently, these primary rules are concretized or supplemented by secondary law enacted by the Authority itself.[44] Any breach of such provisions would constitute a procedural irregularity (or procedural *ultra vires* act). It is unclear whether the Authority will profit much from the cautious approach adopted by the ICJ regarding *ultra vires* acts according to which, when an international organization 'takes action which warrants the assertion that it was appropriate for the fulfilment of one of [its] stated purposes […], the presumption is that such action is not *ultra vires*'.[45] On the one hand, the rather broad main purposes of the Authority are, arguably, to administer the Area and its resources and to do so on behalf and for the benefit of mankind (→ Art. 157 (1)).[46] On the other hand, the individual powers of the Authority and its organs are in most cases defined in great detail[47] and leave little room for presumptions. The ICJ apparently employs

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[32] *Paolillo* (note 10), 270.

[33] Art. 144: 'the **Authority** shall take measures in accordance with this Convention'.

[34] Art. 145: '[n]ecessary measures shall be taken in accordance with this Convention'.

[35] Art. 153 (1): '[a]ctivities in the Area shall be organized, carried out and controlled by the **Authority** […] 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'.

[36] Art. 157 (1): '[t]he **Authority** is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area'.

[37] Art. 160 (1): '[t]he **Assembly** shall have the power to establish general policies in conformity with the relevant provisions of this Convention'.

[38] Art. 162 (1): '[t]he **Council** shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority'.

[39] Art. 170 (2): '[t]he **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'.

[40] ISA, Rules of Procedure of the Legal and Technical Commission (2000), reprinted in: ISA, Basic Texts (2nd edn. 2012), para. 3 of the Introductory Note: '[t]he **Legal and Technical Commission** […] shall function in accordance with the provisions of the Convention and the [1994 Agreement]'.

[41] For a detailed treatment of the issue of the implicit powers of the Authority, see *Schatz* on 157 MN 6 *et seq*.

[42] See generally, ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962), 151, 168.

[43] See, for example, Arts. 159, 161.

[44] See, for example: ISA, Rules of Procedure of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in: ISA, Basic Texts (2nd ed. 2012), 4–31; ISA, Rules of Procedure of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in: ISA, Basic Texts (2nd ed. 2012), 32–54.

[45] *Certain Expenses of the United Nations* (note 42), 168.

[46] See further *Schatz* on 157 MN 3 *et seq*.

[47] See *supra*, MN 7.

a similar presumption with regard to organs which act on the basis of the functions assigned to them.[48] To this end, 'each organ must, in the first place at least, determine its own jurisdiction.'[49] In that context, a very controversial and unclear issue is the division of powers (→ Art. 158 (4))[50] between the Assembly and the Council, including the definition of general and specific policies (→ Arts. 160 (1), 162 (1)).[51]

The question then is whether *ultra vires* acts of the Authority are in principle legally effective unless they are invalidated by a competent review body,[52] or if they must, at least if they are sufficiently severe, be considered an absolute nullity (meaning that they are void *ab initio*).[53] Arguably, acts of the Authority which have been adopted with procedural defects are legally effective with the possible exception of acts which suffer from a severe irregularity.[54] The latter may be the case if the adoption of the act 'prejudice[s] in any fundamental way the requirements of just procedure'[55] or constitutes a 'gross abuse of procedural requirements leading to a miscarriage of justice'.[56] Normally, violations of primary rules, i. e. Part XI, the Annexes or the 1994 Implementation Agreement, will more likely result in nullity of the act than violations of secondary rules such as the rules, regulations and procedures of the Authority.[57] Equally, if an organ of an organization exceeds its competences in contravention of the internal division of powers of the organization but within the scope of the powers of the organization as such, rendering the act merely 'irregular as a matter of that internal structure' (→ Art. 158 (4))[58], the act will be legally effective.[59] In the context of the Authority, the existence of the dispute settlement system established by Arts. 186–191 and their express limitations of the jurisdiction of the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS) raises additional doubts with respect to the concept of absolute nullity. In particular, Art. 189 seems to contemplate the possibility of unlawful but legally effective acts of the Authority which would have to be 'declare[d] invalid' by the SDC[60] and at the same time prevents the SDC from doing so.[61] The only avenue of judicial review of the legality of legislation adopted by the Authority is by way of advisory opinions requested by the Council or Assembly pursuant to Art. 191.[62]

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[48] See *W. Michael Reisman/Dirk Pulkowski*, Nullity in International Law, MPEPIL, para. 22, available at: http://www.mpepil.com.

[49] *Certain Expenses of the United Nations* (note 42), 168.

[50] See further *Schatz* on Art. 158 MN 13.

[51] See further *Schatz* on Art. 160 MN 5.

[52] See, for this general view, *Ebere Osieke*, The Legal Validity of Ultra Vires Decisions of International Organizations, The American Journal of International Law 77 (1983), 239, 244.

[53] This view is based on the argument that, in the absence of judicial procedures for the annulment of unlawful acts of an international organization, such acts must either be fully valid or an absolute nullity. See, for example, *Certain Expenses of the United Nations* (note 42), Separate Opinion of Judge Morelli, 216, 222; *Chittharanjan F. Amerasinghe*, Principles of the Institutional Law of International Organizations (1996), 184.

[54] *Reisman/Pulkowski* (note 48), para. 21. In a case which concerned the improper constitution of an international body, the ICJ did not pronounce itself upon the question of validity: ICJ, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, ICJ Reports (1960), 150, 171. It should, however, be noted that the original request for an advisory opinion did not ask the ICJ to do so. See also ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, ICJ Reports (1972), 46, 69 *et seq.* (para. 45).

[55] *Appeal Relating to the Jurisdiction of the ICAO* (note 54), 69 (para. 45). The ICJ ultimately left the question open in that case. Judge Dillard, however, was more explicit. See *ibid.*, Separate Opinion of Judge Dillard, ICJ Reports (1972), 92, 100.

[56] *Appeal Relating to the Jurisdiction of the ICAO Council* (note 54), Separate Opinion of Judge Dillard, 100. See also *Reisman/Pulkowski* (note 48), para. 21. See also *Osieke* (note 52), 245 *et seq.*

[57] *Benzing* (note 26), para. 45.

[58] See further *Schatz* on Art. 158 MN 13.

[59] *Certain Expenses of the United Nations* (note 4258), 168.

[60] Any reference to an annulment procedure before the SDC was deleted from the wording of the relevant provisions. See *Paolillo* (note 10), 284. For details on the drafting history, see also *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 81 *et seq.*

[61] *Ibid.*, 289.

[62] See also *Paolillo* (note 10), 273 *et seq.*

Art. 189 does not prevent the SDC to pronounce on the conformity of rules, regulations and procedures of the Authority with its internal law in advisory opinions.[63] However, as advisory opinions are also not binding,[64] they can only either **clarify** that an act is an absolute nullity or that it is in breach of the internal law of the Authority, in which case it would still be for the respective organ to act accordingly. The only internal review procedure of the Authority expressly established by Part XI is a periodical review of 'rules, regulations and procedures' by the Legal and Technical Commission, which can recommend such amendments to the Council as it deems necessary or desirable (→ Art. 165 (2)(g)).[65]

3. 'All States Parties are *ipso facto* members of the Authority.'

11 Pursuant to Art. 156 (2) all 'States Parties' automatically become members of the Authority. The term 'States Parties' covers 'States which have consented to be bound by [UNCLOS] and for which [UNCLOS] is in force' pursuant to Art. 305 (1)(a), as well as certain entities listed in Art. 305 (1)(b)-(f) (→ Art. 1 (2)).[66] These entities include Associated States, non-self-governing territories and certain international organizations (→ Art. 305 (1)(b)-(f)). Even though national liberation movements are not included in this list, they can obtain the status of 'observers' in the Authority in accordance with Art. 156 (3).[67] Non-State entities such as natural and juridical persons or State enterprises which, pursuant to (→ Art. 153 (2)(b)), take part in the exploitation of resources of the Area are not eligible to become members of the Authority. In very general terms, Art. 156 (2) can be considered a manifestation of the principle of sovereign equality enshrined in (→ Art. 157 (3)). As of July 2016, the Authority had 168 members, including 167 States and the European Union.

12 The membership of the abovementioned entities barely affects the intergovernmental nature of the Authority.[68] Firstly, Namibia has become an independent State.[69] Secondly, the entities described by Art. 305 (1)(c)-(d) possess many characteristics of States and may even be aspirants to statehood.[70] In practice, the only two such entities which are members of the Authority are the Cook Islands and Niue.[71] Thirdly, while the nature of entities under Art. 305 (1)(e) is not entirely clear, they too share many aspects with States and no such entity has become a State Party to UNCLOS so far.[72] Finally, international organizations which can become States Parties must, in accordance with (→ Art. 1 Annex IX)[73], themselves be intergovernmental in nature and the majority of their members must be States Parties to UNCLOS.[74] So far, the EU is the only member organization of the Authority and (at the time of writing) all of its member States are States Parties to UNCLOS.[75]

13 As far as international organizations are concerned, the principle of single representation applies, meaning that the participation of such an entity may not lead to an increase in representation for its member States (→ Art. 4 (4) Annex IX). This is of particular importance in the context of the Assembly. As members of the Authority are also members of the Assembly (→ Art. 159 (1)), they are all entitled to one vote (→ Art. 159 (6)).[76] Consequently, both the international organization and its members would have one vote. Situations in

[63] See also *Burke* on Art. 189 MN 10.
[64] See also *Paolillo* (note 10), 274.
[65] See *van Doorn* on Art. 165 MN 18.
[66] See *Tanaka* on Art. 1 MN 18.
[67] See *infra*, MN 15.
[68] See also *Paolillo* (note 10), 219.
[69] See *Franckx/Benatar* on Art. 305 MN 23 *et seq.*
[70] See *Franckx/Benatar* on Art. 305 MN 25 *et seq.*
[71] See *Franckx/Benatar* on Art. 305 MN 30.
[72] See *Franckx/Benatar* on Art. 305 MN 31.
[73] On the definition of 'international organization' in the context of UNCLOS, see *Franckx* on Annex IX Art. 1 MN 9 *et seq.*
[74] See *Franckx/Benatar* on Art. 305 MN 34 *et seq.*
[75] See *Franckx/Benatar* on Art. 305 MN 34; see also *Franckx* on Annex IX Art. 4 MN 12.
[76] See *Schatz* on Art. 159 MN 10.

which some members of such an international organization are States Parties to UNCLOS and others are not give rise to a dilemma: Either those member States which are States Parties to UNCLOS receive increased representation or the others receive none at all.[77] This issue has been addressed in Rule 60 of the Rules of Procedure of the Assembly which, however, is merely declaratory of Art. 4 (4) Annex IX and does not solve the problem.[78] A similar problem concerns the calculation of the quorum in the Assembly (→ Art. 159 (5)).[79] As far as the EU is concerned, these issues do not (currently) pose major difficulties given the fact that all EU member States are also States Parties to UNCLOS.[80] Doubts have also been expressed with regard to participation in other organs of the Authority, especially the Council. The complex structure and unequal representation in the Council would, according to that view, require similarly complex rules to achieve compliance with Art. 4 (4) Annex IX.[81] Currently, no such rules exist. In any case, irrespective of how this is achieved in practice, the participation of international organizations in the Authority may not entail and increase of (voting) rights of members of such an entity in any organ of the Authority.[82]

Theoretical problems also arise with regard to those members of the Authority which are not **14**
at the same time States Parties to the 1994 Implementation Agreement.[83] As the 1994 Implementation Agreement modifies Part XI,[84] strictly speaking, there would be not only two separate categories of members of the Authority but also a schizophrenic Authority functioning on the basis of two different constituent instruments at the same time, constituting a dual regime.[85] It would be impossible for the Authority to work on that basis. Non-members to the 1994 Implementation Agreement would even be obliged, vis-à-vis each other, to uphold the original regime established by the unmodified Convention.[86] JAENICKE has argued that the rules of the international law of treaties are not absolute and allow for the necessary flexibility to resolve such treaty conflicts 'in conformity with the interests and intentions of the parties'.[87] Another proposed approach involves declarations of the respective States Parties of UNCLOS that they consider Part XI in its amended form as applicable.[88] Others have interpreted this behaviour as 'tacit acceptance' of the new regime.[89] A practical approach whereby all members, regardless of whether they are formally States Parties to the 1994 Implementation Agreement or not, participate in the reformed Authority has been implemented to tackle this 'incongruity'.[90] Thus, the question of how this treaty conflict can be resolved is purely academic.[91]

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[77] Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. V (1989), 458 *et seq.*; *Paolillo*, however, considers the rule enshrined in Art. 4 (4) Annex IX 'sufficient' with regard to the Assembly: see *Paolillo* (note 10), 221.

[78] Rule 60 Rules of Procedure of the Assembly.

[79] See further *Schatz* on Art. 159 MN 9.

[80] See also *Franckx* on Annex IX Art. 4 MN 12.

[81] See *Paolillo* (note 10), 221.

[82] In agreement with *Franckx* on Annex IX Art. 4 MN 11.

[83] See generally ISA Report of the Secretary-General (note 25), 4 *et seq.* (paras. 10 *et seq.*). In particular, this concerns such States Parties to UNCLOS who have not made use of the simplified procedure under Art. 5 1994 Implementation Agreement.

[84] See *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt (1995), 121, 122 *et seq.*; *L. Dolliver M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189, 192 *et seq.*

[85] See *Wood* (note 16), 182 *et seq.*; *Jaenicke* (note 84), 131 *et seq.*; *Annick de Marffy-Mantuano*, The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea, AJIL 89 (1995), 814, 824; *Nelson* (note 84), 193 *et seq.*

[86] *Jaenicke* (note 84), 131 *et seq.*

[87] *Ibid.*

[88] This approach is, however, problematic in light of Art. 309: see *Jaenicke* (note 84), 133.

[89] See, for example, *Moritaka Hayashi*, The 1994 Agreement for the Universalization of the Law of the Sea Convention, ODIL 27 (1996), 31, 38.

[90] ISA Report of the Secretary-General (note 25), 4 (para. 11); *Wood* (note 16), 182 *et seq.*

[91] See also *Jaenicke* (note 84), 133 *et seq.*

4. 'Observers […]'

15 Art. 156 (3) grants national liberation movements which were observers at UNCLOS III a right to participate in the Authority as 'observers' if they have signed the Final Act of UNCLOS III in accordance with Resolution IV, Annex I of the Final Act. The Appendix to the Final Act contains a list of these national liberation movements (African National Congress (South Africa), African National Council (Zimbabwe), African Party for the Independence of Guinea and Cape Verde Islands (PAIGC), Palestine Liberation Organization, Pan Africanist Congress of Azania (South Africa), Patriotic Front (Zimbabwe), Seychelles People's United Party (SPUP), South West Africa People's Organization (SWAPO)). With the exception of Namibia, Art. 156 (3) constitutes a compromise on participation in UNCLOS of such entities not listed in Art. 305 (1)(c)-(f).[92] In the absence of detailed rules within UNCLOS, the exact scope of this right is further concretized by 'rules, regulations and procedures' of the Authority, in particular the rules of procedure of its organs.[93] The obligation of the Secretary-General of the Authority to transmit reports, notifications, texts of amendments and invitations to meetings of States Parties to the observers is an exception in this regard (→ Art. 319 (3)).[94]

16 Today, Art. 156 (3) has no perceptible function. Firstly, Namibia was expressly allowed to become a State Party to UNCLOS (→ Art. 305 (1)(b)).[95] Secondly, South Africa, Zimbabwe, the Seychelles, Guinea, Cabo Verde and the State of Palestine have become States Parties to UNCLOS and thus, through Art. 156 (2), full members of the Authority. There are, however, provisions in the rules of procedure of the organs of the Authority which allow for observer status of recent regional national liberation movements if certain conditions are fulfilled.[96]

5. 'The seat of the Authority shall be in Jamaica.'

17 As stated by Art. 156 (4), the seat of the Authority is in Jamaica. As Art. 156 (4) does not determine the location of the seat within Jamaica, there was room for some competition between the Jamaican capital Kingston and the city of Montego Bay where UNCLOS was signed in 1982.[97] The Authority has implemented Art. 156 (4) by concluding a 'Headquarters Agreement'[98] with Jamaica on 26 August 1999 which determines Kingston as the seat of the Authority.[99] There has been some debate as to whether the open wording of Art. 156 (4) leaves the determination of the location of the premises of the Authority within Kingston to the Authority or to the Jamaican government, each in consultation with the other.[100] Nonetheless, on 17 December 2003, an additional 'Supplementary Headquarters Agreement' was concluded on the use of the Authority's permanent headquarters in Kingston (the Jamaica Conference Centre).[101] The capacity to conclude such agreements with States and to

[92] Nordquist/Nandan/Rosenne (note 1), 349 (MN 156.13(c)).

[93] See, in particular, Rule 82 (1)(c), (2) Rules of Procedure of the Assembly; Rule 75 Rules of Procedure of the Council.

[94] For details, see *Tams* on Art. 319 MN 11.

[95] For details, see *Franckx/Benatar* on Art. 305 MN 5, 23 *et seq.*

[96] Rule 82 (1)(b), (2) Rules of Procedures of the Assembly; Rule 75 Rules of Procedures of the Council. The right is dependent on recognition by the organization of African Unity or by the League of Arab States.

[97] *Wood* (note 16), 224.

[98] For details, see also *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, vol. 2: Seabed Mining (2001), 342. On 'headquarters agreements' generally, see *Jochen Herbst*, International Organizations or Institutions – Headquarters, MPEPIL, available at: http://www.mpepil.com.

[99] Agreement between the International Seabed Authority and the Government of Jamaica regarding the Headquarters of the International Seabed Authority, 26 August 1999, UNTS 2488, 299 (Headquarters Agreement). For a short overview of the negotiations, see *Michael C. Wood*, International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47, 82 *et seq.*

[100] *Wood* (note 16), 225; *Wood* (note 99), 82. The issue has been addressed in Art. 2 Headquarters Agreement.

[101] Supplementary Agreement between the International Seabed Authority and the Government of Jamaica regarding the headquarters of the International Seabed Authority and the use of the Jamaica Conference Centre

contract with private entities follows from (→ Art. 176).[102] The headquarters agreements set out detailed rules regarding such typical issues as authority and jurisdiction over the headquarters, privileges, immunities and inviolability, customs exemptions, communication freedoms, public services, protection by local authorities, residence and free access of personnel, and establishment of missions. As is usual practice, the Headquarters Agreement also contains a dispute settlement provision including an arbitration clause.[103] Notably, there are separate provisions on the status and functioning of the Enterprise.[104] These provisions may be supplemented by a special agreement concluded between the Enterprise and the government of Jamaica[105] as envisaged by (→ Art. 13 (1) Annex IV).

6. '[…] regional centres or offices […]'

Art. 156 (5) expressly enables the Authority to establish regional centres or offices if it considers such subsidiaries 'necessary for the exercise of its functions.' As demonstrated by this wording, Art. 156 (5) merely spells out what would in any case have been an 'implied power' (→ Art. 157 (2)) of the Authority in light of its global mandate.[106] However, no express power is completely redundant in the light of (→ Art. 157 (2)). Moreover, the fact that this power has been included in Art. 156 (5) regardless of its possible legal redundancy highlights the Authority's potential and purpose as a global actor within the confines of its mandate. So far, no regional centres or offices have been established. This is not surprising given that cost effectiveness is an important principle of the Authority.[107] However, the establishment of regional subsidiaries may be an option, or even imperative, once the exploitation of resources in the Area is initiated and supervision and enforcement can no longer be carried out effectively by a centralized Authority with a single headquarters in Jamaica. **18**

Article 157
Nature and fundamental principles of the Authority

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.

2. The powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.

3. The Authority is based on the principle of the sovereign equality of all its members.

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

Bibliography: *Niels M Blokker*, International Organizations or Institutions, Implied Powers, MPEPIL, available at: http://www.mpepil.com; *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, vol. 2: Sea-bed Mining (2001); *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskon-

complex, 17 December 2003, ISA Doc. ISBA/10/A/2 (2004) (Supplementary Headquarters Agreement). See *Wood* (note 99), 83.

[102] See *Ferrara* on Art. 176 MN 4 *et seq.*

[103] Arts. 4 (6) and 48 (2) Headquarters Agreement. See also the reference to this clause in Art. 16 Supplementary Headquarters Agreement.

[104] Arts. 17–25 Headquarters Agreement.

[105] Art. 47 Headquarters Agreement.

[106] For details on the application of the 'implied powers' doctrine in the context of the Authority, see *Schatz* on Art. 157 MN 6 *et seq.* See also *Klein* (note 28), para. 6.

[107] Sec. 1 (2) Annex to the 1994 Implementation Agreement.

vention (1982); *Juliane Kokott*, States, Sovereign Equality, MPEPIL, available at: http://www.mpepil.com; *Robert Kolb*, Article 2, in: Bruno Simma/Daniel-Erasmus Khan/Georg Nolte/Andreas Paulus (eds.), The Charter of the United Nations: A Commentary, vol. I (3rd edn. 2012); *Markus Kotzur*, Good Faith (Bona fide), MPEPIL, available at: http://www.mpepil.com; *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Bernard H. Oxman*, The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979), AJIL 74 (1980), 1–47; *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135–337; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173–241

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) of 24 October 1970; ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015)

Cases: ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, ICJ Reports (1948), 57; ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, 73; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *v.* Nigeria; Equatorial Guinea intervening), Preliminary Objections, Judgment of 11 June 1998, ICJ Reports (1998), 275; ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 66; ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174

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I. Purpose and Function

1 Art. 157 deals with the basic nature of the International Seabed Authority and some fundamental principles which govern its functioning.[1] Art. 157 (1) points out one of the main functions of the Authority, namely that it is the international organization through which the States Parties to UNCLOS 'organize and control activities in the Area, particularly with a view to administering the resources of the Area.' In that regard, Art. 157 (2), which is repeated in the 1994 Implementation Agreement[2], prescribes how the scope of these functions of the Authority, including its 'implied powers', is to be determined. Art. 157 (3) highlights that the Authority, as an intergovernmental organization, is based on the principle of sovereign equality of its members. Finally, Art. 157 (4) lays down a general obligation of good faith (*bona fide*) of all members of the Authority to fulfil their obligations arising out of their membership in order to ensure to all of them the rights and benefits

[1] See also Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 353 (MN 157.1).

[2] S. 1 (1) Annex to the 1994 Implementation Agreement.

resulting from membership. Importantly, Art. 157 is to be interpreted and applied in accordance with the 1994 Implementation Agreement.[3]

II. Historical Background

Already in 1970 there was a broad consensus in the international community that a regime for the Area should be established, and with it an 'appropriate international machinery' to give effect to that regime which should, *inter alia*, 'provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether landlocked or coastal.'[4] During the drafting of UNCLOS, the nature of that 'international machinery', i. e. the content of Art. 157 (1), was not at the centre of discussions.[5] Instead, attention focused on the question of the scope of the powers and functions of the Authority.[6] Particularly the question of the implied powers of the Authority was highly contentious. Developed States, cautious not to create an institution with too much power and autonomy, favored an express and exhaustive enumeration of all powers and functions of the Authority.[7] In contrast, the Group of 77, which was in favor of a strong Authority with significant flexibility, was of the view that such an enumeration could never be entirely exhaustive and would necessarily leave room for implied powers.[8] The strange wording of Art. 157 (2) is the result of an attempt to reach a compromise on the issue.[9] The inclusion of the rather general rules contained in Art. 157 (3)-(4) proved uncontroversial,[10] particularly in light of the fact that the wording of both provisions was strongly guided by Art. 2 (1)-(2) UN-Charter, respectively.[11] 2

III. Elements

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.'

Despite the fact that a clear and detailed definition of the purposes of an international organization is an essential element of its internal law in that it helps in determining its competences, Part XI does not contain a special provision which defines the purposes of the Authority.[12] Instead, provisions which spell out aspects of the Authority's purposes are scattered throughout Part XI. In general terms, the two main purposes of the Authority are (1) to organize, control and administer the Area and its resources and (2) to do so on behalf and for the benefit of humankind.[13] 3

[3] S. 1 (17) Annex to the 1994 Implementation Agreement.

[4] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970, para. 9.

[5] Nordquist/Nandan/Rosenne (note 1), 353 *et seq.* (MN 157.3 *et seq.*).

[6] *Ibid.*

[7] *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135, 272.

[8] *Ibid.*

[9] *Ibid.*; *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987), 281.

[10] Nordquist/Nandan/Rosenne (note 1), 355 *et seq.* (MN 157.5 *et seq.*).

[11] *Ibid.*, 361 (MN. 157.13(d) *et seq.*).

[12] See also *Paolillo* (note 7), 182.

[13] While the terminology employed to circumscribe these main purposes may differ, their content is generally not in dispute. See *Mahmoudi* (note 9), 267 *et seq.*; *Paolillo* (note 7), 182; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 189 *et seq.*

4 Art. 157 (1) states, in very broad terms, the main functions of the Authority with regard to the Area and its resources. Accordingly, the Authority is 'the organization through which States Parties shall […] organize and control activities in the Area, particularly with a view to administering the resources of the Area.' An identical statement can be found in the 1994 Implementation Agreement.[14] Art. 157 (1) does not mention the *conduct* of activities in the Area as envisaged by Art. 153 (1)[15] as a function of the Authority. The term 'activities in the Area' refers to 'all activities of exploration for, and exploitation of, the resources of the Area' (→ Art. 1 (1)(3)). Any 'activities in the Area' are governed by Part XI (→ Art. 134 (2)). This reference includes the Annexes, particularly Annexes III and IV, insofar as they are related to Part XI (→ Art. 318), and the 1994 Implementation Agreement.[16] Art. 157 (1) also states that States Parties shall organize and control the activities in the Area 'in accordance with [Part XI]'. The 1994 Implementation Agreement completes the reference by adding that this function is discharged 'in accordance with the regime for the Area established in Part XI and this Agreement'.[17] This statement is a reference to the general principle that the Authority must act in accordance with its internal law.[18] Art. 157 (1) also emphasizes a particular purpose of the Authority, namely its task of 'administering the resources of the Area'. For the purposes of Part XI, the term 'resources' refers to 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules' (→ Art. 133 (a)). The Authority is the sole entity which is entitled to access the 'resources of the Area' and to decide on 'activities in the Area'. Thus, the functions described in Art. 157 (1) are exclusive. At this point, it should be added that the functions of the Enterprise of the Authority go beyond 'activities in the Area' and include 'the transporting, processing and marketing of minerals recovered from the Area' (→ Art. 170 (1)).[19] A number of policies relating to activities in the Area which are intended to guide the Authority in the fulfilment of its purposes are prescribed in Art. 150.[20]

5 In exercising the functions ascribed to it by Art. 157 (1), the Authority acts on behalf of mankind as a whole in the exercise of its rights to the resources of the Area (→ Art. 137 (2)).[21] The Authority not only acts on behalf of mankind as a whole but also does so 'for [its] benefit' (→ Art. 140 (1)).[22] In that regard, the Authority must also ensure the 'equitable sharing of financial and other economic benefits derived from activities in the Area' (→ Art. 140 (2)). In some respects the two main purposes of the Authority are merged in Art. 153 which states, *inter alia*, that '[a]ctivities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole […]' (→ Art. 153 (1)). It should also be noted that the Authority has been assigned a number of functions which are essentially unrelated to the main purposes of the Authority and which are not included in Part XI.[23]

2. 'The powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.'

6 Art. 157 (2) reiterates the principle of attributed powers (or principle of speciality), according to which international organizations possess only those powers and functions

[14] S. 1 (1) Annex to the 1994 Implementation Agreement.
[15] For details, see *Siegfried* on Art. 153 MN 5 *et seq*.
[16] S. 1 (17) Annex to the 1994 Implementation Agreement.
[17] S. 1 (1) Annex to the 1994 Implementation Agreement.
[18] See further *Schatz* on Art. 156 MN 7 *et seq*.
[19] See also *Wood* (note 13), 191.
[20] See *Siegfried* on Art. 150 MN 7. That provision has been criticized for being dirigiste and harmful to the conduct of activities in the Area. See, with further references, *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 51 *et seq*.
[21] See *Vöneky/Höfelmeier* on Art. 137 MN 12 *et seq*.
[22] See *Vöneky/Höfelmeier* on Art. 140 MN 6 *et seq*.
[23] See *infra*, MN 8.

which are conferred upon them.[24] As a general rule, these powers and functions may either be expressly or implicitly provided for in the constitutive instruments[25] of the organization.[26] However, the first sentence of Art. 157 (2) restricts, in an apparently unprecedented manner,[27] the powers of the Authority to those expressly conferred upon it by UNCLOS and thereby seems to aim to eradicate the concept of implied powers. No other provision of Part XI demonstrates with such clarity the wish to impose strict legal limitations on the powers of the Authority.[28]

However, the second sentence of Art. 157 (2) contradicts (or qualifies)[29] the first in that it 7
expressly accepts 'incidental powers' of the Authority (1) if they are 'consistent with [UNCLOS]' and (2) if they are 'implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area'.[30] The term 'incidental powers' refers to those powers of the Authority which are necessary in order to effectively perform those powers and functions which, in accordance with the first sentence of Art. 157 (2), are expressly attributed to it, i. e. implied powers.[31] In any case, the purpose (and effect) of the second sentence of Art. 157 (2) is the reintroduction of the concept of implied powers into the legal framework of the Authority,[32] be it despite or in harmony with the first sentence. However, it is not entirely clear whether Art. 157 (2) as a whole imposes a limitation on the exercise of implied powers by the Authority,[33] or whether it is entirely redundant.[34] Indeed, Art. 157 (2) is an example of a particularly badly drafted provision which can only be understood by reference to its drafting history.[35] The requirements of consistency with UNCLOS, of incidentalness, of implicitness and of necessity are already included in the general concept of implied powers.[36] Nonetheless, Art. 157 (2) acknowledges the implied powers of the Authority only in 'the exercise of those powers and functions with respect to activities in the Area', i. e. with respect to the purposes mentioned in Art. 157 (1). Thus, Art. 157 (2) could be considered as limiting the Authority's implied powers at least with respect to other purposes than those directly related to 'activities in the Area'.[37] Importantly, Art. 157 (2) is addressed to the Authority generally and therefore also to all its (subsidiary) organs with the sole exception of the Enterprise, which **expressly** enjoys implied powers pursuant to Art. 12 (6) Annex IV.[38] If the Authority should overstep its limited powers and functions as circumscribed by Art. 157 (2), be it express or implied, any such act would have to be considered *ultra vires* the Authority.[39]

Unlike other provisions such as Art. 156 (1), Art. 157 (2) does not refer to Part XI as the 8
main legal source when it comes to determining the express powers of the Authority. Instead, Art. 157 (2) refers to 'the Convention', i. e. to UNCLOS in its entirety. The same wording is

[24] ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 66, 78 *et seq.* (para. 25). See also *Niels M. Blokker*, International Organizations or Institutions, Implied Powers, MPEPIL, para. 1, available at: http://www.mpepil.com.

[25] For a description of the 'constitution' of the Authority, see *Schatz* on Art. 156 MN 7 *et seq.*

[26] See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174, 179 *et seq.*

[27] *Paolillo* (note 7), 272.

[28] See also *ibid.*, 271.

[29] *Mahmoudi* (note 9), 281: 'contradiction'.

[30] See also *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, vol. 2: Sea-bed Mining (2001), 293.

[31] Nordquist/Nandan/Rosenne (note 1), 361 (MN 157.13(b)); *Paolillo* (note 7), 273; *Mahmoudi* (note 9), 281.

[32] See also *Wood* (note 13), 190.

[33] See *Bernard H. Oxman*, The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979), AJIL 74 (1980), 1, 15; *Wood* (note 13), 190 *et seq.*

[34] See *Paolillo* (note 7), 273. This would also be the consequence of the view of Nordquist/Nandan/Rosenne (note 1), 360 *et seq.* (MN 157.13(b)).

[35] See *supra*, MN 2.

[36] *Paolillo* (note 7), 272.

[37] For a discussion of the main purposes of the Authority, see *supra* MN 3 *et seq.*

[38] Curiously, Mahmoudi restricts the scope of Art. 157 (2) to the Assembly: see *Mahmoudi* (note 9), 280 *et seq.*

[39] See further *Schatz* on Art. 156 MN 9 *et seq.*

repeated by the 1994 Implementation Agreement.[40] Examples of provisions dealing with powers of the Authority which are found outside Part XI and the Annexes are, *inter alia*, Art. 82 (4) on the distribution of payments or contributions derived from the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles, Art. 273 on technology transfer, and Art. 209 (1) on the establishment of international rules, regulations and procedures to prevent, reduce and control pollution of the marine environment from activities in the Area.[41]

3. 'The Authority is based on the principle of the sovereign equality of all its members.'

9 In stating that the Authority is based on the 'principle of sovereign equality of all of its members', Art. 157 (3) borrows its wording from Art. 2 (1) of the UN-Charter. According to the Friendly Relations Declaration, States, under this principle, 'have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.'[42] Yet, despite the fact that the concept is often considered as demanding equality of the chances of all States, it does not in practice guarantee political, social and economic equality.[43] In particular, States may within the enjoyment of their sovereign equality as subjects of international law conclude founding agreements of international organizations which, in the allocation of power within the newly established institution, deviate from the concept of full equality.[44] This is also true of the principle of sovereign equality as envisaged by Art. 157 (3), which does not 'trump' other considerations in their entirety in order to achieve absolute equality of all members of the Authority in all matters.[45] Instead, it allows, in certain provisions contained in Part XI, the Annexes and the 1994 Implementation Agreement, for differentiated treatment of States Parties based on their capacity to carry out activities in the Area. In that regard, the principle must be generally understood as aiming for equality before the law rather than equality of rights.[46]

10 Manifestations of the principle of sovereign equality can be found in the fact that all States Parties to UNCLOS are *ipso facto* (equal) members of the Authority (→ Art. 156 (2)),[47] and particularly in the organic structure and decision-making of the Authority such as the composition (→ Art. 159 (1)) of – and full equality of voting rights (→ Art. 159 (6)) in – the Assembly. This is, however, not true of the Council as a body in which not all members can be represented at all times and certain members *de facto* enjoy permanent representation (→ Art. 161 (1)).[48] Certain safeguards have been established in the functioning of the Council to counterbalance this inequality. First, the Assembly as an organ of equal representation enjoys (at least *pro forma*) a certain degree of influence on the Council by electing its members (→ Art. 161 (1)).[49] Second, membership rotation in the Council is proposed by Art. 161 (4). Finally, members not represented in the Council may attend and participate, without voting rights, in meetings where a matter which directly affects them is under consideration (→ Art. 161 (9)).[50]

11 With regard to the functioning of the Authority, the principle of sovereign equality finds a more specific expression in the 'principle of non-discrimination' in the Authority's exercise

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[40] S. 1 (1) Annex to the 1994 Implementation Agreement.

[41] See also ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2(2015), 1 (para. 3).

[42] GA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) of 24 October 1970, Annex.

[43] See also *Juliane Kokott*, States, Sovereign Equality, MPEPIL, para. 2, available at http://www.mpepil.com.

[44] *Ibid.*, para. 70.

[45] *Paolillo* (note 7), 222.

[46] *Ibid.*; *Kokott* (note 43), para. 23.

[47] Nordquist/Nandan/Rosenne (note 1), 361 (MN 157.13(d)).

[48] See *van Doorn* on Art. 161 MN 10 *et seq.*; *Paolillo* (note 7), 223 *et seq.*

[49] In practice, this influence may be rather small. See *van Doorn* on Art. 161 MN 10.

[50] See also *Paolillo* (note 7), 223.

of 'its powers and functions, including the granting of opportunities for activities in the Area' enshrined in Art. 152 (1)[51] and other provisions of Part XI, such as Art. 140 (2) and Art. 141. In conformity with the relative notion of sovereign equality described above, there are also exceptions to this principle of non-discrimination, such as the permissibility (if specifically provided for in Part XI) of special consideration for developing States, including in particular the land-locked and geographically disadvantaged among them (Art. 152 (2)). Such special consideration has been granted, for example, in Arts. 148, 143 (3)(b), 144 and Annex III Art. 9 (2).[52]

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

12 Art. 157 (4) lays down a general obligation of the members of the Authority to fulfil in good faith (*bona fide*) the obligations assumed by them in accordance with Part XI. In that regard, Art. 157 (4) strongly resembles Art. 2 (2) of the UN-Charter and Art. 26 of the 1969 Vienna Convention on the Law of Treaties[53]. As the International Court of Justice (ICJ) has stated, the principle of good faith is a 'well established principle of international law'.[54] It is part of – and aims to give effect to – the general principle of *pacta sunt servanda*.[55] Thus, Art. 157 (4) also reflects the principle of *pacta sunt servanda*.[56] Art. 157 (4) is closely related to Art. 157 (3) in that the former imposes a condition of respect for – and compliance with – the obligations arising out of Part XI onto the guarantee of sovereign equality granted by the latter.[57] As is generally the case for the principle of good faith, Art. 157 (4) therefore aims to constrain State sovereignty. The provision is also closely related to Art. 300 which, *inter alia*, prescribes that 'States Parties shall fulfil in good faith the obligations assumed under [UNCLOS] and shall exercise the rights, jurisdiction and freedoms recognized in [UNCLOS] in a manner which would not constitute an abuse of right.'[58]

13 The question of the addressee of Art. 157 (4) is a delicate one. A literal reading of both Art. 300 ('States Parties') and Art. 157 (4) ('members of the Authority') would suggest that both provisions address States Parties as envisaged by Art. 305 only, and thus neither provision is applicable to the conduct of **the Authority and its organs** as such.[59] Due to the fact that all States Parties are *ipso facto* members of the Authority (→ Art. 156 (2)) the addressees of the two provisions are, in that respect, *de facto* identical. Nonetheless, it is also clear that the Authority is not unrestrained in its actions vis-á-vis the States Parties and in the interpretation of its internal law, nor are, as Art. 158 (4) shows,[60] its organs in their relationship with each other. Interestingly, the good faith obligation under Art. 2 (2) UN-Charter, which has served as a model for Art. 157 (4), is usually interpreted as a 'principle from which duties flow for all the organs of the Organization' despite the fact that it expressly only addresses States Parties.[61] Indeed, the ICJ has held, albeit with respect to the World Health Organization, that the 'very fact of Egypt's membership of the Organization entails

[51] For details on the principle of non-discrimination, see *Siegfried* on Art. 152 MN 4; see also *Paolillo* (note 7), 222.

[52] For a detailed discussion, see *Siegfried* on Art. 152 MN 5 *et seq*.

[53] Art. 26 Vienna Convention on the Law of Treaties (1969 VCLT).

[54] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *v.* Nigeria; Equatorial Guinea intervening), Preliminary Objections, Judgment of 11 June 1998, ICJ Reports (1998), 275, 296 (para. 38).

[55] *Markus Kotzur*, Good Faith (Bona fide), MPEPIL, para. 19, available at: http://www.mpepil.com. See also *O'Brien* on Art. 300 MN 5.

[56] See also Nordquist/Nandan/Rosenne (note 1), 361 (para. 157.13(e)).

[57] Some early drafts during negotiations even included both rules into the same paragraph under the heading 'Sovereign equality'. See Nordquist/Nandan/Rosenne (note 1), 355 (MN 157.5).

[58] *Ibid*.

[59] *Ibid*., 353 (MN 157.1).

[60] See *Schatz* on Art. 158 MN 13.

[61] *Robert Kolb*, Article 2, in: Bruno Simma/Daniel-Erasmus Khan/Georg Nolte/Andreas Paulus (eds.), The Charter of the United Nations: A Commentary, vol. I (3rd edn. 2012), 169 (Art. 2 (2), para. 4).

certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization.'[62] A similar result would also be in line with the object and purpose of Art. 157 (4).[63] It would also be particularly persuasive for those organs which are made up of States Parties, such as the Assembly (→ Art. 159 (1)) and the Council (→ Art. 161 (1)).

14 A further complex issue is the relationship of Art. 157 (4) with Art. 300. Both provisions have a similar purpose, but there are a number of important differences. First, Art. 157 (4) only refers to 'obligations' and not, as Art. 300 does, to 'rights, jurisdiction and freedoms'. Thus, it does not **expressly** include the concept of 'abuse of rights' into its scope.[64] Considering the possibility of an *e contrario* argument based on the express inclusion of the concept in Art. 300 and its omission in Art. 157 (4), it is uncertain whether it is covered by Art. 157 (4) at all. On the other hand, many 'rights and benefits resulting from membership'[65] are not protected by **explicit** obligations assumed under Part XI. Therefore, an interpretation which takes into account the declared purpose of Art. 157 (4) would necessarily have to be broad enough to include the concept of abuse of rights **implicitly** as an aspect of good faith.[66] But even if this should not be the case, the exercise of rights by the member States of the Authority would, due to the resulting absence of a *lex specialis*, be subject to the prohibition of abuse of rights under Art. 300[67] and general international law. Second, Art. 157 (4) is restricted to obligations assumed by the States Parties in accordance with Part XI. This includes the Annexes, in particular Annexes III and IV, insofar as they are related to Part XI (→ Art. 318), and the 1994 Implementation Agreement.[68] The good faith obligation envisaged by Art. 157 (4) is limited in its application to obligations contained in the regime established by Part XI (and any obligations related thereto) and, importantly, does not of its own give rise to additional obligations.[69] Third, the good faith obligation under Art. 157 (4) has been given a special purpose. It must be discharged 'in order to ensure to all of them the rights and benefits resulting from membership'. This can be understood as a special emphasis on the community aspect of the principle of the common heritage of mankind which forms part of the *raison d'être* of the Authority. The obligations of members States pursuant to Part XI are not an end in themselves but oriented towards the fulfilment of the more general purposes of the Authority. It may be concluded that, as far as the conduct of States Parties falls within the scope of Art. 157 (4), that provision should be considered *lex specialis* to Art. 300. Consequently, there is *a fortiori* no room for an application of Art. 300, as O'Brien apparently contemplates,[70] to the conduct of the Authority and its organs as far as it falls within the scope of Art. 157 (4) which specifically deals with obligations arising out of Part XI.

15 Examples of important 'obligations assumed […] in accordance with [Part XI]' which are to be fulfilled in accordance with Art. 157 (4) can be found in Art. 139 regarding the responsibility and liability of States for activities in the Area, in Art. 144 (2) on the transfer of technology and scientific knowledge to developing States, and in Art. 171 (a) on the contribution of funds to the Authority's budget by its members.[71] Examples of rights and benefits resulting from membership in the Authority which Art. 157 (4) aims to ensure are: the right to carry out marine scientific research in the Area (→ Art. 143 (3)), the right to membership and equality of voting

[62] ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, 73, 93.

[63] For a similar reading of Art. 300, see *O'Brien* on Art. 300 MN 8.

[64] On the concept of abuse of rights as envisaged by Art. 300, see *O'Brien* on 300 MN 11 *et seq.*

[65] See *infra*, MN 15.

[66] ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, ICJ Reports (1948), 57, 63.

[67] See *O'Brien* on 300 MN 11 *et seq.*

[68] Art. 2 (1) 1994 Implementation Agreement.

[69] See generally *Land and Maritime Boundary Case* (note 54), 297 (para. 39). See also, with regard to Art. 300, *O'Brien* on Art. 300 MN 9 *et seq.*

[70] See *O'Brien* on Art. 300 MN 8.

[71] For more examples, see Nordquist/Nandan/Rosenne (note 1), 361 (MN 157.13(e)). See also *Paolillo* (note 7), 206.

rights in the Assembly (→ Art. 159 (1), (6)), the right of the Assembly to elect the members of the Council (→ Art. 161 (1), the right of the Council to elect the members of the Legal and Technical Commission on the right of the States Parties to nominate candidates (→ Art. 163 (2)), the privileges and immunities of representatives of the States Parties in connection to the work of the Authority (→ Art. 182) and the rights of certain organs of the Authority and of the States Parties to make use of the dispute settlement mechanism of Part XI (→ Art. 187).

Article 158
Organs of the Authority

1. There are hereby established, as the principal organs of the Authority, an Assembly, a Council and a Secretariat.

2. There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1.

3. Such subsidiary organs as may be found necessary may be established in accordance with this Part.

4. Each principal organ of the Authority and the Enterprise shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.

Bibliography: *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982); *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt (1995), 121–134; *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987); *L. Dolliver M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189–203; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135–337; *Kirsten Schmalenbach*, International Organizations or Institutions, General Aspects, MPEPIL, available at: http://www.mpepil.com; *Hans Jürgen Wildberg*, Die internationale Meeresbodenbehörde (ISA): Ihre rohstoffwirtschaftliche Aufgabe, entwicklungspolitische Bedeutung und der Entwurf durch die Dritte Seerechtskonferenz (1978); *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984); *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173–241

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970; ISA, Rules of Procedure of the Assembly of the International Seabed Authority (1995); ISA, Statement of the President of the Council of the International Seabed Authority on the Work of the Council during the Nineteenth Session, ISBA Doc. ISBA/19/C/18 (2013)

Cases: ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962), 151

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which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.' 13

I. Purpose and Function

1 In order to exercise their functions as purely juridical entities, international organizations need organs which possess the capacity to generate a will of their own and which can act on their behalf.[1] Whereas Art. 156 (1) establishes the International Seabed Authority as such, Art. 158 constitutes the main legal basis for the establishment of the organs of the Authority. In doing so, Art. 158 creates three distinct types of organs. First, Art. 158 (1) establishes three 'principal organs' of the Authority which are typical features in international organizations generally. These are the 'Assembly' (a plenary organ), the 'Council' (an executive organ) and the 'Secretariat' (an administrative organ). Notably, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which acts as a judicial entity for the settlement of disputes and the delivery of advisory opinions concerning Part XI (→ Arts. 186 *et seq.*), is not an organ of the Authority. Second, Art. 158 (2) establishes the 'Enterprise' which is a functional (and operational) organ structurally independent from the principal organs. As such, the Enterprise is 'the organ through which the Authority shall carry out the functions referred to in [Art. 170 (1)].' Third, Art. 158 (3) provides a legal basis for the establishment of 'subsidiary organs' of the Authority. With the exception of the Enterprise, Art. 158 does not elaborate on the functions and functioning of these organs. Instead, these issues are dealt with elsewhere in Part XI. Structurally, the Authority is therefore a classic international organization with the sole exception of the Enterprise.[2] As Paolillo has noted, this internal structure 'may not be the most appropriate institutional scheme for the performance of commercial and industrial activities'.[3] Art. 158 (4) implements the principle of separation of powers within the organic structure of the Authority.[4] It repeats the self-evident general rule that the principal organs and the Enterprise are individually responsible for discharging their functions and powers. In order to safeguard this division of powers, Art. 158 (4) also repeats the general principle that each organ must respect the powers and functions conferred upon another organ.[5]

2 Importantly, Art. 158 is to be interpreted and applied in accordance with the 1994 Implementation Agreement.[6] This is particularly so with regard to Art. 158 (2) concerning the Enterprise.[7] The 1994 Implementation Agreement sets out basic principles on the establishment and functioning of the organs and subsidiary organs of the Authority which

> 'shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.'[8]

In addition, the organs and subsidiary organs of the Authority shall be 'cost-effective'.[9] Partly for this reason, the Economic Planning Commission and the Enterprise are kept in a 'dormant' stage until a practical need for them arises.[10]

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[1] *Kirsten Schmalenbach*, International Organizations or Institutions, General Aspects, MPEPIL, para. 7, available at: http://www.mpepil.com.

[2] *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 190.

[3] *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135, 213.

[4] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 370 (para. 158(10)(c)).

[5] *Paolillo* (note 3), 242 *et seq.*

[6] S. 1 (17) Annex to the 1994 Implementation Agreement.

[7] S. 2 (6) Annex to the 1994 Implementation Agreement.

[8] S. 1 (3) and 2 (1) Annex to the 1994 Implementation Agreement.

[9] S. 1 (2) Annex to the 1994 Implementation Agreement. See also *L. Dolliver M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189, 196.

[10] S. 1 (4) and 2 (1) Annex to the 1994 Implementation Agreement.

II. Historical Background

After the General Assembly of the United Nations had, in 1970, proposed the creation of '[an] international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established […]'[11] and after the idea of an international organization to carry out this function had materialized, the question of the organic structure of the prospective organization arose.[12] During the following negotiations, the issue of the general structure of the Authority was rather uncontroversial. This is particularly so because the three principal organs of the Authority are typical features of international organizations.[13] Some early proposals also foresaw a principal judicial organ, the 'Tribunal'.[14] The idea of an operative organ which would directly undertake activities in the Area was first brought up in 1971 by a proposal of a group of Latin American States.[15] Interestingly, this proposal and other early negotiating texts perceived the future operative organ as one of the principal organs of the Authority.[16] That issue was rather contentious.[17] Whereas the concept of the Enterprise as an operative organ of the Authority gained widespread support after its endorsement by the Group of 77 and, in 1979, by the United States, it did not become one of the principal organs of the Authority.[18] Neither, however, did it become a subsidiary organ of the Council, as had been proposed by some Western industrialized States, which also sought to weaken the position of the Enterprise in light of its status as a competitor to private companies.[19] The issue of subsidiary organs was, unsurprisingly, not contentious, as discussions focused rather on the question of the powers and functions of the organization and its main organs as such and not details regarding the second level of the Authority's organic structure. The special emphasis on the principle of division of powers between the organs of the Authority as envisaged by Art. 158 (4) is a result of the efforts of industrialized States to contain the power of the Assembly which, due to the expected majority situation, would be under a strong influence of developing States.[20] 3

III. Elements

1. 'There are hereby established, as the principal organs of the Authority, an Assembly, a Council and a Secretariat.'

As is usual practice in international organizations, the Authority is internally organized by legislative, executive and administrative organs which carry out its various functions and act on its behalf. The principal organs of the Authority are the Assembly (a plenary organ), the 4

[11] GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749 (XXV) of 17 December 1970.

[12] See Nordquist/Nandan/Rosenne (note 4), 366 *et seq.* (MN 158(2) *et seq.*).

[13] *Paolillo* (note 3), 224.

[14] *Hans Jürgen Wildberg*, Die internationale Meeresbodenbehörde (ISA): Ihre rohstoffwirtschaftliche Aufgabe, entwicklungspolitische Bedeutung und der Entwurf durch die Dritte Seerechtskonferenz (1978), 101. For a detailed outline of the drafting history, see Nordquist/Nandan/Rosenne (note 4), 366 *et seq.* (MN 158(2) *et seq.*).

[15] Sea-Bed Committee, Chile *et al.*, UN Doc. A/AC.138/49 (1971), reproduced in SBC Report 1971, 93, 96 and 100 (Arts. 20, 33).

[16] *Ibid.* See also UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 141 (Art. 24 (1)).

[17] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 527.

[18] *Paolillo* (note 3), 252, 255.

[19] *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987), 283.

[20] *Wolfrum* (note 17), 527; *Paolillo* (note 3), 242; *Mahmoudi* (note 19), 281.

Council (an executive organ) and the Secretariat (an administrative organ). As the Assembly and the Council are composed of representatives of States Parties, they are political organs of an intergovernmental character. The Secretariat, on the other hand, is independent and obligated to maintain neutrality. The list in Art. 156 (1) is exhaustive. As a result, the only possibility to establish new principal organs would be by way of a modification of UNCLOS or through a new treaty of a similar kind to the 1994 Implementation Agreement.

5 The Assembly, as the plenary organ of the Authority, is composed of all its members (→ Art. 159 (1)) who are, at the same time, also all States Parties to UNCLOS (→ Art. 156 (2)). Owing to its status as the plenary organ of the Authority, the Assembly is (formally) not only a 'principal organ' but the 'supreme organ' of the Authority to which the Secretariat and the Council are accountable (→ Art. 160 (1)). Most of its functions and powers are described in Art. 160, and its decision-making procedures are contained in Art. 159. As is evident from the division of powers between the Assembly and the Council, it is fact the Council which exercises most power within the Assembly.[21]

6 The composition of the Council, the executive organ of the Authority, is restricted to 36 members chosen in accordance with a complex system of special interests and geographical distribution (→ Art. 161 (1)). Most of the Council's powers and functions are laid down in Art. 162, and its decision-making procedures are contained in Art. 161. Two important subsidiary organs of the Council are established by Art. 163 (1), namely the Legal and Technical Commission (→ Art. 163; Art. 165) and the (dormant)[22] Economic Planning Commission (→ Art. 163; Art. 164). While the wording of Arts. 163–165 is rather inconclusive with regard to the question of whether the two Commissions should be considered to be organs of an intergovernmental nature or independent bodies which do not represent State interests, the better view is to classify them as the former.[23]

7 The Secretariat, the administrative body of the Authority, is comprised of the Secretary-General and such staff as required by the Authority (→ Art. 166 (1)). The Secretary-General is the chief administrative officer of the Authority and acts in that capacity in all meetings of the Assembly, of the Council and of any subsidiary organ, and performs administrative functions entrusted to the Secretary-General by these organs (→ Art. 166 (3)). That said, the functions and powers of the Secretary-General are only in part described in Arts. 166–168. Often, other provisions of Part XI or derivative law such as rules of procedures of other organs entrust the Secretary-General with additional tasks. As highlighted by Art. 168 (1), the Secretary-General and the staff of the Secretariat are independent from external (particularly government) influence and obligated to maintain neutrality in that regard.

2. 'There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1.'

8 The Enterprise is arguably the only real innovation in the organic structure of the Authority.[24] It is established by Art. 158 (2) as 'the organ through which the Authority shall carry out the functions referred to in [Art. 170 (1)].' Thus, it is 'the organ of the Authority which shall carry out activities in the Area directly, pursuant to [Art. 153 (2)(a)], as well as the transporting, processing and marketing of minerals recovered from the Area.' (→ Art. 170 (1)). A similar wording can be found in the Statute of the Enterprise (→ Annex IV Art. 1 (1)). The Enterprise deviates from the traditional model of a political organ of an international organization in several respects.[25] As an operative organ designed to compete in a globalized

[21] See *Schatz* on Art. 160 MN 1. See also *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, vol. 2: Sea-bed Mining (2001), 297.

[22] Sec. 1 (3) Annex to the 1994 Implementation Agreement.

[23] In agreement with *van Doorn* on Art. 163 MN 11.

[24] See *Paolillo* (note 3), 217, who gives examples of international organizations whose institutional mechanism comprises entities other than State governments. See also *ibid.*, 251 *et seq.*

[25] See also *ibid.*, 254.

resource market, it is not an intergovernmental organ of a political nature, but a functional organ with a commercial purpose.[26] Its Governing Board is not comprised of representatives of States but of experts who act in their personal capacity (→ Annex IV Art. 5), making it the only non-intergovernmental organ of the Authority, with the possible exception of the Legal and Technical Commission and the Economic Planning Commission.[27] As the Enterprise operates in accordance with sound commercial principles (→ Annex IV Art. 1 (3); Annex IV Art. 12 (7)),[28] it resembles, in some aspects, a private corporation.

The Enterprise also enjoys a considerable degree of autonomy, particularly in the conduct of **9**
its operations (→ Annex IV Art. 2 (2)). Due to the exhaustive nature of Art. 158 (1),[29] the Enterprise is not a principal organ of the Authority; nor is it a subsidiary organ within the meaning of Art. 158 (3).[30] It is not assigned to one of the principal organs but, uniquely, separate from them both with respect to its legal personality and capacity (→ Annex IV Art. 13 (2))[31] and with respect to its functions. As mentioned above, the Enterprise has its own separate staff. Even the funds, assets and expenses of the Enterprise are separated from those of the Authority (→ Annex IV Art. 11 (4)). The same is true of its budget, which is approved by the Governing Board (→ Annex IV Art. 6 (i)). Importantly, the Enterprise has, as a consequence of its separate legal capacity to enter into contracts, separate *locus standi* before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (→ Art. 187 (c)).[32] Another consequence of the Enterprise's separate legal capacity is that it is not liable for the acts and obligations of the Authority and *vice versa* (→ Annex IV Art. 2 (3)).[33] On the other hand, the Enterprise is also part of the Authority and integrated in its hierarchical structure. As such, it is bound by policies, directives and regulations developed by the Assembly and the Council (→ Art. 170 (2); Annex IV Art. 1 (2); Annex IV Art. 2 (1)). In addition, the Council supervises the Enterprise (→ Arts. 170 (2), 160 (2)(i); Annex IV Art. 2 (1)). Due to this 'two-faced' character of the Enterprise, Paolillo has called it a 'hybrid entity'.[34] As a result of its hybrid nature, the Enterprise must, in the absence of special rules, be considered as subject to the general rules of UNCLOS which address the Authority or its organs.[35] This includes the general provisions of Arts. 156 and 157 as well as, for example, the principle of non-discrimination (→ Art. 152 (1)).

Several aspects of the Enterprise's power and independence have been significantly **10**
weakened by the 1994 Implementation Agreement.[36] In particular, the Enterprise is kept in a 'dormant' stage until a practical need for it arises.[37] In the meantime, the Secretariat of the Authority performs the functions of the Enterprise.[38] The triggering event for the activation of the Enterprise lies in the hand of the Council which, 'upon the approval of a plan of work for exploitation for an entity other than the Enterprise, or upon receipt by the Council of an application for a joint-venture operation with the Enterprise', may issue a directive pursuant

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[26] See also *Ferrara* on Art. 170 MN 2.

[27] *Mahmoudi* (note 19), 284.

[28] See also S. 2 (2) Annex to the 1994 Implementation Agreement.

[29] See *supra*, MN 4.

[30] See also *Paolillo* (note 3), 255; *Mahmoudi* (note 19), 283: '*sui generis*'. For a definition of the term 'subsidiary organ' as used by Art. 158 (3), see *infra*, MN 11.

[31] This somehow likens the Enterprise to an international organization itself. See *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 220 *et seq.*

[32] See *Paolillo* (note 3), 256 *et seq.*; see also *Burke* on Art. 187 MN 14.

[33] For details, see *Vrancken* on Annex IV Art. 2 MN 9 *et seq.*

[34] *Paolillo* (note 3), 251.

[35] *Ibid.*, 256.

[36] S. 2 Annex to the 1994 Implementation Agreement. See *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt (1995), 121, 125. See also the discussion by *Ferrara* on Art. 170 MN 2; *Vrancken* on Annex IV Art. 1 MN 2.

[37] S. 2 (1) Annex to the 1994 Implementation Agreement.

[38] *Ibid.*

to Art. 170 (2) which provides for the independent functioning of the Enterprise.[39] However, as of 2013, the Council still considered any such action 'premature', rendering an activation of the Enterprise unlikely in the short term.[40]

3. 'Such subsidiary organs as may be found necessary may be established in accordance with this Part.'

11 Art. 158 (3) lays down a general rule that 'subsidiary organs as may be found necessary may be established in accordance with [Part XI]'. Generally, the term 'subsidiary organ' refers to an organ which, within a hierarchical structure, at least formally derives its function and powers from another organ. In the context of the Authority, a 'subsidiary organ' is either assigned to one of the three principal organs mentioned in Art. 156 (1) or to the Enterprise. The wording 'as may be found necessary' employed by Art. 158 (3) is rather generous and seems to allow for considerable discretion,[41] but surely a link to the functions of the respective superior organ must exist. Moreover, Art. 158 (3) could be considered as being declaratory of a competence which would otherwise have been available to the Authority as an 'implied power' to the extent that it is necessary to effectively exercise its functions. However, no express power is completely redundant in the light of Art. 157 (2). The requirement that the establishment of any 'subsidiary organ' must be 'in accordance with [Part XI]' is a reference to the general obligation of the Authority to act in conformity with its internal law (→ Art. 156 (1)). Part XI itself establishes two subsidiary organs of the Council, namely the still dormant[42] Economic Planning Commission (→ Art. 163 (1)(a)) and the Legal and Technical Commission (→ Art. 163 (1)(b)). The same is true of the Governing Board of the Enterprise, which is established directly by Annex IV Art. 4. While there is no addressee of the right under Art. 158 (3), it seems that each principal organ mentioned by Art. 158 (1) as well as the Enterprise may establish subsidiary organs within the scope of their express and implied powers and functions. In addition, Art. 158 (3) arguably leaves open the possibility that subsidiary organs may also be entitled to establish further subsidiary organs within the scope of their functions.

12 In several instances, provisions of Part XI expressly provide for the establishment of subsidiary organs by the principal organs and the Enterprise. Some of these provisions are framed as obligations to establish subsidiary organs, such as Art. 162 (2)(d) on the establishment of other subsidiary organs of the Council and Art. 162 (2)(y) on the establishment of a financial organ as an organ of the Council. The obligation pursuant to Art. 162 (2)(y) has, however, been discharged by the 1994 Implementation Agreement with the establishment of the Finance Committee as a subsidiary organ of the Assembly.[43] Other provisions create a subsidiary organ which has to be elected on a regularly basis in addition to assisting staff, such as Art. 159 (4) on the election of the President and other officers of the Assembly, Art. 166 (1) on the election of the Secretary-General and the necessary staff as subsidiary organs of the Secretariat, and Annex IV Arts. 4 and 7 (1) on the election of a Director-General and the necessary staff as subsidiary organs of the Enterprise. Finally, Art. 160 (2)(d) on the establishment of further subsidiary organs of the Assembly is, like Art. 158 (3), framed simply as a power. All these legal bases for the establishment of subsidiary organs are *leges speciales* to the general rule established by Art. 158 (3). This distinction may be of importance with regard to additional requirements imposed by these provisions. In the composition of new subsidiary organs, both the Assembly (→ Art. 160 (2)(d)) and the Council (→ Art. 162

[39] S. 2 (2) Annex to the 1994 Implementation Agreement.

[40] ISA, Statement of the President of the Council of the International Seabed Authority on the Work of the Council during the Nineteenth Session, ISBA Doc. ISBA/19/C/18 (2013), 4 (para. 16 (a)).

[41] See also *Mahmoudi* (note 19), 273.

[42] S. 1 (4) Annex to the 1994 Implementation Agreement.

[43] S. 9 (1), (9) Annex of the 1994 Implementation Agreement. For details on the relationship of the Finance Committee and the Council, see *van Doorn* on Art. 162 MN 15 *et seq.*

(2)(d)) must take 'due account' (1) of the need for members qualified and competent in the relevant technical questions dealt with by such organs, (2) of the principle of equitable geographical distribution, and (3) of special interests. In addition, the Council (but, interestingly, not the Assembly) must pay due regard to economy and efficiency. These additional requirements constrain and direct the discretion of the Assembly and the Council in the creation of new subsidiary organs.

4. 'Each principal organ of the Authority and the Enterprise shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.'

Art. 158 (4) contains two general rules which aim to implement the principle of separation 13
of powers between the organs of the Authority.[44] Even though Art. 158 (4) only refers to the principal organs of the Authority (Assembly, Council, Secretariat) and Enterprise, the rule applies to all subsidiary organs of the Authority as they, at least formally, derive their powers and functions from the principal organs or the Enterprise. The first sentence is, as PAOLILLO rightly points out, 'a tautology'.[45] It is self-explanatory that organs of international organizations are responsible for exercising those powers and functions which are conferred upon them. Thus, the first sentence of Art. 158 (4) only makes sense if read in the context of the second sentence of that provision. Despite the in some aspects hierarchical nature of the organic structure of the Authority, headed by the principal organs pursuant to Art. 158 (1) and, in particular, by the Assembly as the supreme organ (→ Art. 160 (1)), the second sentence of Art. 158 (4), as a general rule, prohibits the usurpation of – or interference with – powers and functions conferred to one organ by another.[46] Again, this is a fundamental principle of international organizations law and would not have needed explicit mentioning. As the International Court of Justice has stated: If an act of an organ 'has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the [UN-Charter] prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure'.[47] Consequently, the attribution of express or implied powers and functions to the organs of the Authority by UNCLOS and the 1994 Implementation Agreement can, at least as far as the extent of such attribution can be ascertained, be considered as final.[48] If an organ acts in breach of this distribution of powers and functions, the act must be considered *ultra vires*.[49] Art. 158 (4) does not, however, indicate **how** the powers and functions are in fact distributed between the organs of the Authority.[50] The division of powers and functions between the organs of the Authority, particularly the Assembly and the Council, is a delicate issue. An analysis of the provisions which lay down most of the functions and powers of the two organs, namely (→ Art. 160) for the Assembly and (→ Art. 162) for the Council, shows that both organs to a certain extent exercise legislative **and** executive functions.[51] The issue is only further complicated by other provisions scattered throughout UNCLOS which assign powers and functions to 'the Authority'

[44] Nordquist/Nandan/Rosenne (note 4), 370 (MN 158(10)(c)).

[45] *Paolillo* (note 3), 242.

[46] See also *Wolfrum* (note 17), 527; *Paolillo* (note 3), 242 *et seq*.

[47] ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962), 151, 168.

[48] *Wolfrum* (note 17), 527.

[49] For a discussion of the application of the doctrine of *ultra vires* in the context of the Authority, see *Schatz* on Art. 156 MN 9 *et seq*.

[50] *Paolillo* (note 3), 242.

[51] See also *ibid.*, 243. An example of an executive function of the Assembly is the suspension of the exercise of rights and privileges of membership pursuant to Art. 160 (2)(m). The Council exercises legislative functions, *inter*

without specifically mentioning which organ is responsible, particularly in (→ Annex III). Whenever a question or matter within the competence of the Authority has not been specifically entrusted to a particular organ, the Assembly has the power to allocate the relevant competence to an organ of the Authority (→ Art. 160 (2)(n)). Importantly, any such act of conferral of competence must itself be 'consistent with the distribution of powers and functions among the organs of the Authority'.[52]

Subsection B
The Assembly

Article 159
Composition, procedure and voting

1. The Assembly shall consist of all the members of the Authority. Each member shall have one representative in the Assembly, who may be accompanied by alternates and advisers.

2. The Assembly shall meet in regular annual sessions and in such special sessions as may be decided by the Assembly, or convened by the Secretary-General at the request of the Council or of a majority of the members of the Authority.

3. Sessions shall take place at the seat of the Authority unless otherwise decided by the Assembly.

4. The Assembly shall adopt its rules of procedure. At the beginning of each regular session, it shall elect its President and such other officers as may be required. They shall hold office until a new President and other officers are elected at the next regular session.

5. A majority of the members of the Assembly shall constitute a quorum.

6. Each member of the Assembly shall have one vote.

7. Decisions on questions of procedure, including decisions to convene special sessions of the Assembly, shall be taken by a majority of the members present and voting.

8. Decisions on questions of substance shall be taken by a two-thirds majority of the members present and voting, provided that such majority includes a majority of the members participating in the session. When the issue arises as to whether a question is one of substance or not, that question shall be treated as one of substance unless otherwise decided by the Assembly by the majority required for decisions on questions of substance.

9. When a question of substance comes up for voting for the first time, the President may, and shall, if requested by at least one fifth of the members of the Assembly, defer the issue of taking a vote on that question for a period not exceeding five calendar days. This rule may be applied only once to any question, and shall not be applied so as to defer the question beyond the end of the session.

10. Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber. If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.

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alia, by establishing the specific policies to be pursued by the Authority and by provisionally adopting certain rules, regulations and procedures (Art. 162 (1)).

[52] See *Schatz* on Art. 160 MN 26.

Bibliography: *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001); *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987); Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol V (1989); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Shigeru Oda*, The International Law of Ocean Development (1972); *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135–337; P. Chandrasekhara Rao/Philippe Gautier (eds.), The Rules of the International Tribunal for the Law of the Sea: A Commentary (2008); *Chen Wang*, Issues on Consensus and Quorum at International Conferences, Chinese Journal of International Law 9 (2010), 717–739; *Hans Jürgen Wildberg*, Die internationale Meeresbodenbehörde (ISA): Ihre rohstoffwirtschaftliche Aufgabe, entwicklungspolitische Bedeutung und der Entwurf durch die Dritte Seerechtskonferenz (1978); *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984); *Rüdiger Wolfrum*, The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organisations?, ZaöRV 55 (1995), 310–328; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173–241; *Michael C. Wood*, International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47–98

Documents: GA, Oceans and the Law of the Sea, GA Res 61/222 of 20 December 2010; GA, Rules of Procedure of the General Assembly (embodying amendments and additions adopted by the General Assembly up to September 2007), Doc. A/520/Rev.17; ISA, Rules of Procedures of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in ISA, Basic Texts (2nd ed. 2012), 4–31; ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in ISA, Basic Texts (2nd ed. 2012), 32–54; ITLOS, Rules of the Tribunal (as amended on 17 March 2009), ITLOS/8, accessible at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf; United Nations Office for Ocean Affairs and the Law of the Sea, Budget of the International Sea-Bed Authority – The Provisions of the Law of the Sea Convention: An Assessment, in: *Rüdiger Wolfrum* (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime, Proceedings of an Interdisciplinary Symposium of the Kiel Institute of the International Law, July 10 to 14, 1990 (1991), 213–235

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10

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12. '[…] If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.' 17

I. Purpose and Function

1 The Assembly is a 'principal organ' of the Authority (→ Art. 158 (1)) and its 'supreme organ' (→ Art. 160).[1] Art. 159 (1) establishes that the Assembly consists of all members of the Authority, making it its plenary organ. Pursuant to Art. 159 (6), all members of the Assembly have one vote. Thus, the membership structure of the Assembly is the most representative of the organs of the Authority, reflecting the principle of sovereign equality (→ Art. 157 (3)). It is the purpose of Art. 159 to deal with the composition and internal (voting) procedures of the Assembly. The powers and functions of the Assembly and its role in the decision-making procedures of the Authority are specified in Art. 160. The drafters of Art. 159 were guided by the provisions of the Charter of the United Nations concerning the General Assembly.[2] This parallelism can be of assistance in the interpretation of the provisions on the functioning of the Assembly. Art. 159 (2)–(3) deal with the sessions of the Assembly and their location. Art. 159 (4) permits the Assembly to adopt its rules of procedure and to elect the officers necessary to conduct its internal procedure. Art. 159 (5) establishes the quorum in the Assembly at a majority of the members. Art. 159 (7)–(8) lay down the majority requirements for votes concerning decisions on questions of procedure and questions of substance, respectively. Art. 159 (9) lays down a deference procedure for votes on decisions on questions of substance. In addition, Art. 159 (10) contains a special procedure for a deferral of votes on decisions on questions of procedure after an advisory opinion on the pending matter has been requested from the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS). Importantly, several of the internal procedures laid down in Art. 159 have been modified by the 1994 Implementation Agreement.[3]

II. Historical Background

2 The composition of the Assembly as envisaged by Art. 159 (1), namely universal and equal representation of all members of the Authority, was not a very controversial issue during negotiations. It is based on a proposal of the Sea-Bed Committee which remained largely unchallenged during negotiations and was in that unaltered state included in the final text of UNCLOS.[4] The only alternative proposal in that regard was submitted by the United States in 1975 which sought to divide the Assembly in five categories and foresaw a simple majority vote in at least four of these categories on matters of substance in order to ensure widespread representation. Calls for an institutional framework more representative of 'humankind', including an Assembly composed of different chambers of representatives of States as well as non-governmental institutions, mining corporations and scientists,[5] were apparently not influential enough to have any effect on the composition of the Assembly.[6] The rules on sessions laid down in Art. 159 (2)–(3) were similarly uncontroversial with different views only regarding the question whether they should take place annually or biannually.[7] The basic principle that, pursuant to Art. 159 (6), each State should have one vote, as well as the

[1] See *Schatz* on Art. 160 MN 1.

[2] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 383 (para. 159.10(a)).

[3] See, in particular, S. 3 (1)-(4), (7) Annex to the 1994 Implementation Agreement.

[4] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 528.

[5] See, for example, *Elisabeth Mann Borgese*, The Ocean Regime – Draft Statute, in: Shigeru Oda (ed.), The International Law of Ocean Development (1972), 280, 286 *et seq.* (Art. VIII).

[6] *Wolfrum* (note 4), 528.

[7] See *ibid.*, 529 who argues that biannual sessions would have weakened the Assembly in comparison to the Council.

host of the procedural rules contained in Art. 159 (5), (7)-(10) were equally uncontroversial, with only minor deviations from common practice.[8]

III. Elements

1. 'The Assembly shall consist of all the members of the Authority.'

As stipulated by Art. 159 (1), the Assembly is the only organ of the Authority which consists of all of its 'members' as defined in Art. 156 (2). The inclusion of all members on equal footing into the 'supreme organ' of the Authority as well as the equal representation by one representative (who may be accompanied by alternates and advisers) per State reflect the principle of sovereign equality (→ Art. 157 (3)).[9] In that regard, Art. 159 (1) resembles Art. 9 UN-Charter.[10] As of July 2016, the Assembly of the Authority had 168 members, including 167 States and the European Union. 3

There are also two distinct groups of entities which may attend sessions of the Assembly as observers. First, Art. 156 (3) expressly grants national liberation movements the right to participate in the Authority as 'observers' if they have signed the Final Act of UNCLOS III in accordance with Resolution IV, Annex I of the Final Act.[11] However, that provision is now without function.[12] The second group of entities, which has been granted its right to participate in the Assembly as observers not in UNCLOS but in the Rules of Procedures of the Assembly, consists of non-member States and other entities referred to in Art. 305,[13] national liberation movements which in their respective regions are recognized by the Organization of African Unity (today: African Union) or by the League of Arab States,[14] the United Nations, its specialized agencies, the International Atomic Energy Agency and other intergovernmental organizations invited by the Assembly,[15] and certain non-governmental organisations.[16] The different degrees of participation granted to these entities are further specified in Rule 4 (2)-(6) Rules of Procedures of the Assembly. Even the highest degree involves participation in the deliberations of the Assembly and its subsidiary organs but no entitlement to participate in the taking of decisions.[17] 4

2. 'The Assembly shall meet in regular annual sessions and […] special sessions […]'

Art. 159 (2), which has been modelled in close resemblance to Art. 20 UN-Charter,[18] determines that the Assembly will meet in 'regular annual sessions'. Notably, the wording of Art. 159 (2) **requires** the Assembly to hold these annual sessions.[19] Nonetheless, the Rules of Procedures of the Assembly stipulate that this is only so 'unless [the Assembly] decides otherwise'.[20] This contradiction can be explained by the fact that the 1994 Implementation Agreement has introduced a 'principle of cost-effectiveness'[21] which expressly also applies to the frequency, duration and scheduling of meetings. Therefore, Art. 159 (2) was modified so 5

[8] See *ibid.*, 529 *et seq.*
[9] See *Schatz* on Art. 157 MN 9 *et seq.*
[10] Nordquist/Nandan/Rosenne (note 2), 384 (MN 159.10(b)).
[11] See *Schatz* on Art. 156 MN 15. See also Rule 82 (1)(c) Rules of Procedures of the Assembly.
[12] See *Schatz* on Art. 156 MN 16.
[13] Rule 82 (1)(a) Rules of Procedures of the Assembly.
[14] Rule 82 (1)(b) Rules of Procedures of the Assembly.
[15] Rule 82 (1)(d) Rules of Procedures of the Assembly.
[16] Rule 82 (1)(e) Rules of Procedures of the Assembly.
[17] Rule 82 (2) Rules of Procedures of the Assembly.
[18] Nordquist/Nandan/Rosenne (note 2), 384 (MN 159.10(b)).
[19] See also *ibid.*, 377 (MN 159.1): 'required'.
[20] Rule 1 Rules of Procedures of the Assembly.
[21] S. 1 (2) Annex to the 1994 Implementation Agreement.

as to allow for more flexibility regarding decisions on the duration and frequency of sessions, which consume a significant part of the budget of the Authority.[22] In fact, the option of biannual sessions of the Assembly has previously been discussed at the Authority.[23] The date and duration of the following session is decided in each annual session.[24] Art. 159 (2) grants the Assembly the power to convene 'special sessions' and to determine their date and duration.[25] In addition, the Council and the 'majority of the members of the Authority' have a right to request a 'special session' which, if exercised, triggers an obligation of the Secretary-General of the Authority to convene the session.[26] Of course, all 'members of the Authority' are also members of the Assembly pursuant to Arts. 156 (2) and 159 (1). The object and purpose of the additional procedural rights of the majority of the members of the Authority and of the Council is to ensure sufficient flexibility outside of sessions as the Assembly itself can only decide to hold a 'special session' during a pending session. The procedure is as follows. Any member of the Authority may submit a request to the Secretary-General who then immediately informs the other members of the requests and inquires whether they concur.[27] If a majority is reached within 30 days after the communication of the request, the Secretary-General must convene the Assembly for a 'special session'.[28] The same is true if the Council submits a request.[29] Unless the request specifies a date, the special session shall take place no earlier than 30 days (to allow for sufficient preparation) and no later than 90 days (to avoid an undue delay) after receipt of the concurrence of the members of the Authority or the request of the Council.[30]

3. 'Sessions shall take place at the seat of the Authority […]'

6 In accordance with Art. 159 (3) all sessions (both regular and special) of the Assembly shall take place at the 'seat of the Authority', i. e. in Kingston, Jamaica (→ Art. 156 (4)), unless the Assembly decides otherwise.[31] As the location of sessions is an important factor for ensuring sufficient participation in – and low costs of – sessions, the relocation of sessions to, for example, New York is a real option.[32]

4. 'The Assembly shall adopt its rules of procedure.'

7 Art. 159 itself does not offer exhaustive procedural guidance for the practical functioning of the Assembly. Therefore, Art. 159 (4) requires the Assembly to adopt in own 'rules of procedure'. A first draft of the rules of procedure was prepared by the Preparatory Commission[33] but needed extensive revision after the conclusion of the 1994 Implementation Agreement, which included a revised procedure.[34] Thus, changes were made by a working

[22] *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 194, 197 *et seq.*; For an interesting estimate of the costs of sessions, see UN DOALOS, Budget of the International Sea-Bed Authority – The Provisions of the Law of the Sea Convention: An Assessment, in: *Rüdiger Wolfrum* (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime, Proceedings of an Interdisciplinary Symposium of the Kiel Institute of the International Law, July 10 to 14, 1990 (1991), 213, 225 *et seq.*

[23] *Michael C. Wood*, International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47, 61, 94.

[24] Rule 2 Rules of Procedures of the Assembly.

[25] See also Rule 4 (1) Rules of Procedures of the Assembly.

[26] See also Rule 4 Rules of Procedures of the Assembly.

[27] Rule 4 (3) Rules of Procedures of the Assembly.

[28] *Ibid.*

[29] Rule 4 (2) Rules of Procedures of the Assembly.

[30] Rule 4 (2)-(3) Rules of Procedures of the Assembly.

[31] See also Rule 6 Rules of Procedures of the Assembly.

[32] See *Wood* (note 22), 194, 217, who also gives an example of such a meeting which was held in New York in 1998.

[33] This body was established by Resolution I of the Final Act of the Conference and operated from 1983 to the first session of the Assembly in 1995. For further details, see *Wood* (note 22), 177 *et seq.*

[34] Nordquist/Nandan/Rosenne (note 2), 383 (para. 159.10(a)) at footnote 5.

group[35] established during the First Session of the Authority which adopted the new draft rules of procedure on 16 March 1995.[36] The Assembly can amend its rules of procedure with a 'simple majority of the members present and voting, after a committee has considered the proposed amendment'.[37]

5. 'The Assembly shall […] elect its President and such other officers as may be required […]'

Pursuant to Art. 159 (4), the Assembly elects, as subsidiary organs, a President and 'such officers as may be required'. Thus, Art. 159 (4) mirrors Art. 21 UN-Charter except in that it expressly provides for additional officers. In particular, the Assembly has four Vice-Presidents.[38] Together, the President and Vice-Presidents constitute the 'Bureau' of the Assembly.[39] The officers of the Assembly, including the President, are elected at the beginning of each regular session. The President and the four Vice-Presidents are to be elected 'in such a way as to ensure the representative character of the Bureau'.[40] Compared to the 21 Vice-Presidents of the General Assembly of the United Nations,[41] the four positions for Vice-Presidents of the Assembly of the Authority make it harder to reach broad geographical representation in the Bureau.[42] The reason for this small number of Vice-Presidents can be traced back to the principle of cost-effectiveness introduced by the 1994 Implementation Agreement.[43] Nonetheless, elections are generally uncontested[44] and based on a rotation among five regional groups: African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States, and Western European and Other States.[45] As of May 2016, the current President of the Assembly is the Austrian lawyer and former judge and vice-president of the ITLOS, Helmut Tuerk, who was elected at the 21st Session Meeting on 14 July 2015. The representatives of Cameroon, Chile, the Republic of Korea and the Russian Federation were elected as Vice-Presidents. The President and the other officers will hold their office during any special sessions which may take place until they are replaced by newly elected officers at the next regular session. The President's main function is to conduct the work of the Assembly.[46] In particular, the President has 'complete control of the proceedings'.[47] Whereas the Bureau officially meets periodically throughout each session and assists the President in carrying out his functions,[48] it is rarely convened in practice.[49] If necessary, the Vice-Presidents will act as the President's deputies.[50] In order to safeguard the neutrality of their office, neither the President nor the Vice-Presidents take part in voting.[51] 8

[35] For details on the working group and its drafting process, see Nordquist/Nandan/Rosenne (note 2), 384 (MN 159.10(a)); *Wood* (note 22), 196 *et seq.*

[36] ISA Doc. ISBA/A/L.2/Rev.1 (1995).

[37] Rule 97 Rules of Procedures of the Assembly.

[38] Rule 28 Rules of Procedures of the Assembly.

[39] Rule 35 Rules of Procedures of the Assembly. The Bureau's equivalent in the United Nations General Assembly is the 'General Committee'.

[40] Rule 28 Rules of Procedures of the Assembly.

[41] Rule 30 Rules of Procedure of the General Assembly of United Nations.

[42] Nordquist/Nandan/Rosenne (note 2), 383 (MN 159.10(c)).

[43] S. 1 (2) Annex to the 1994 Implementation Agreement.

[44] For an account of the elections during the first four years of the Authority, see *Wood* (note 22), 196.

[45] See *Wood* (note 23), 64. A list of the Presidents of the Assembly is available at https://www.isa.org.jm/assembly-presidents.

[46] For details, see Rule 32 Rules of Procedures of the Assembly.

[47] Rule 32 Rules of Procedures of the Assembly. Pursuant to Rule 33 Rules of Procedures of the Assembly, however, the President 'in the exercise of his functions, remains under the authority of the Assembly'.

[48] Rule 35 Rules of Procedures of the Assembly.

[49] *Wood* (note 22), 198.

[50] Rule 29 Rules of Procedures of the Assembly.

[51] Instead, they designate another member of their delegation to vote in their place. See Rule 34 Rules of Procedures of the Assembly.

6. 'A majority of the members of the Assembly shall constitute a quorum.'

9 Art. 159 (5) states that a majority of the members of the Assembly as defined by Art. 159 (1) constitutes a quorum.[52] Due to the rather moderate participation of members in the sessions of the Assembly, the question of whether the necessary quorum is established is of practical importance.[53] Indeed, there have apparently been incidences in which the absence of a quorum in the Assembly has been used to exercise significant pressure to block proposals.[54] In the absence of any indication in Part XI and the 1994 Implementation Agreement, the quorum requirement in the Assembly is not, as WANG contemplates,[55] inapplicable if a decision is taken by consensus instead of a vote. To complicate the matter, the calculation of the quorum must also take account of the membership of international organizations in the Authority (→ Art. 156 (2))[56] and thereby, pursuant to Art. 159 (1), also the Assembly.[57] This poses difficulties in the light of the principle of single representation laid down in Annex IX Art. 4 (4). Currently, however, the problem is mitigated by the fact that only the European Union is a member of the Assembly; and so are all of its member States. Thus, a practical solution would be to not let the European Union representative count towards the quorum. In any case, decisions adopted in the absence of the necessary quorum must be challenged promptly, i. e. in a timely manner once the lack of quorum has come to the attention of the challenging member of the Assembly.[58] Otherwise the right to challenge the decision will be forfeited.[59]

7. 'Each member of the Assembly shall have one vote.'

10 The fact that, per Art. 159 (6), each member of the Assembly has one vote, is an expression of the principle of sovereign equality among States (→ Art. 157 (3)). In that regard, voting in the Assembly differs significantly from that in the Council in which only 36 members have a vote (→ Art. 161 (1), (7)). As international organizations can be members of the Authority (→ Art. 156 (2)), both the organization and its member States are members of the Assembly (→ Art. 159 (1)). Consequently, they are both entitled to one vote.[60] This causes problems in light of the principle of single representation, which prescribes that the participation of such an entity may not lead to an increase in representation for its member States (→ Annex IX Art. 4 (4)).[61] This is particularly so in situations in which some members of such an international organization are State Parties to UNCLOS and others are not: Those member States which are States Parties to UNCLOS will be represented by their own vote and that of the international organization. As a result, either their own right to vote or that of the organization must be neutralized. The other member States will only receive representation at all if the organization keeps its right to vote.[62] Rule 60 of the Rules of Procedure of the Assembly has specifically been

[52] See also Rule 45 Rules of Procedures of the Assembly.

[53] *Wood* (note 23), 200. Apparently, a quorum was only achieved in one session between the 6th and the 12th session of the Assembly. Nonetheless, the Assembly adopted its decisions without challenges by individual members. See *Wood* (note 23), 62. The situation has even been addressed in a resolution of the United Nations General Assembly. See GA, Oceans and the Law of the Sea, GA Res 61/222 of 20 December 2010, 8 (para. 32).

[54] See *Wood* (note 22), 216 *et seq*.

[55] *Chen Wang*, Issues on Consensus and Quorum at International Conferences, Chinese JIL 9 (2010), 717, 732 *et seq*. and 736 *et seq*.

[56] See further *Schatz* on Art. 156 MN 11 *et seq*.

[57] See also *Wood* (note 22), 200.

[58] *Ibid*.

[59] See also *Wang* (note 55), 737, who expressly refers to the principle of acquiescence.

[60] See generally *Schatz* on Art. 156 MN 11 *et seq*.

[61] See *Schatz* on Art. 156 MN 13.

[62] Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol V (1989), 458 *et seq*.; Paolillo, however, considers the rule enshrined in Annex IX Art. 4 (4) 'sufficient' with regard to the Assembly. See *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135, 221.

drafted to address this problem.[63] However, that provision is only declaratory of Annex IX Art. 4 (4) and thus insufficient to solve the problem.[64] Fortunately, the issue does, for the moment, not pose major difficulties in practice as all EU member States are also States Parties to UNCLOS.[65]

As shown by Art. 159 (7)–(10), the required majority depends on the nature of the question on which a vote is conducted. These rules require, *inter alia*, a simple majority of the members present and voting for 'decisions on questions of procedure' and a qualified two-thirds majority of the members present and voting for decisions on 'questions of substance'. The 1994 Implementation Agreement introduced the general principle that the decision-making in the organs of the Authority, including the Assembly, should be by consensus.[66] Therefore, a vote pursuant to the procedures prescribed in Art. 159 (7)–(8) may only take place if 'all efforts to reach a decision by consensus have been exhausted'.[67] Interestingly, the concept of 'consensus' had already been included as an option in earlier drafts of Part XI for the Assembly, but was later deleted.[68] Whereas the precise meaning of 'consensus' is defined in neither Art. 159 nor in the 1994 Implementation Agreement, the term is defined by Art. 161 (8)(e) as 'the absence of any formal objection'. Arguably, the definition can now also be applied, by analogy, in the context of the Assembly. Apparently, this was the first ever express definition of consensus in an international instrument.[69] The only provision in the entirety of UNCLOS which expressly requires consensus for a decision of the Assembly, without the option of deciding by majority vote, is Annex IV Art. 11 (3)(c).[70] The only other instance in which it has been argued that consensus was originally implicitly required is Art. 160 (2)(e), which prescribes that decisions on the assessment of financial contributions of members to the administrative budget of the Authority are to be taken in accordance with an 'agreed scale of assessment'.[71] As Wood reports, all decisions of the Assembly until the 12th Session were taken by consensus.[72] **11**

8. 'Decisions on questions of procedure […]'

According to Art. 159 (7), decisions on 'questions of procedure' require a simple majority of the members present and voting. There is no explanation of what matters constitute 'questions of procedure' except for the statement that decisions to convene special sessions of the Assembly pursuant to Art. 159 (2) are included. It follows that most or all decisions regarding sessions and their conduct, including date, duration, frequency and location, are procedural. The same is true of the adoption and amendment of the Assembly's rules of procedures pursuant to Art. 159 (4).[73] **12**

9. 'Decisions on questions of substance […]'

Due to the importance of 'questions of substance', the majority required by Art. 159 (8) for decisions on such questions, in the absence of consensus,[74] is a two-thirds majority of the **13**

[63] Rule 60 Rules of Procedure of the Assembly.
[64] Rule 60 Rules of Procedure of the Assembly.
[65] See also *Franckx* on Annex IX Art. 4 MN 12.
[66] S. 3 (2) Annex to the 1994 Implementation Agreement.
[67] S. 3 (3) Annex to the 1994 Implementation Agreement.
[68] *Hans Jürgen Wildberg*, Die internationale Meeresbodenbehörde (ISA): Ihre rohstoffwirtschaftliche Aufgabe, entwicklungspolitische Bedeutung und der Entwurf durch die Dritte Seerechtskonferenz (1978), 109.
[69] *Rüdiger Wolfrum*, The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organisations?, ZaöRV 55 (1995), 310, 319; *Paolillo* (note 62), 236; *van Doorn* on Art. 161 MN 14.
[70] *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987), 272.
[71] See *Schatz* on Art. 160 MN 12.
[72] *Wood* (note 23), 64.
[73] This can also be deduced from Rule 97 Rules of Procedures of the Assembly, which requires only a simple majority of the members present and voting for decisions on amendments.
[74] For details on the consensus 'requirement', see *supra*, MN 11.

members present and voting, provided that it includes a majority of the members participating in the session. In order to prevent circumventions of this rule, any potential issue as to whether a question is one of substance or not is to be treated as one of substance unless otherwise decided, again, by a two-thirds majority. Notably, this majority requirement differs significantly from the simple majority requirement applied in the General Assembly of the United Nations for decisions on the treatment of questions as 'important questions'.[75] According to WOLFRUM, this voting procedure weakens the protection of minority views in the Assembly, increases the power of the President of the Assembly as the one who will undertake a first determination of the nature of the question, but also increases the effectiveness of decision-making in the Assembly.[76] On the other hand, it could also be said that minority views are protected by the fact that the minority may more easily be able to block decisions due to the high majority requirement. Matters which qualify as 'questions of substance' as opposed to 'questions of procedure' are, *inter alia*, all legislative matters which do not purely concern the internal procedure of the Assembly, but also electoral and executive decisions which have direct effects for other organs of the Authority, members of the Authority, or other entities. Examples are decisions on the establishment of general policies (→ Art. 160 (1)), decisions pursuant to legislative, electoral and executive powers and functions enumerated in Art. 160 (2), decisions to permit a State Party which is in arrears in the payment of its financial contributions to vote (→ Art. 184), and decisions to request an advisory opinion from the SDC (→ Art. 191).

10. '[…] defer the issue of taking a vote […]'

14 Art. 159 (9) lays down a special procedure for deferral of voting on a question of substance which comes up for the first time. This may happen in two possible ways. First, the President of the Assembly has the right to defer voting *proprio motu* if the need arises. Second, if at least one fifth of the members of the Assembly request a deferral, the President has an obligation to do so. In order to prevent abuse and intentional delays, Art. 159 (9) may only be applied once to each question. Moreover, the maximum period of deferral may not exceed five calendar days and may not reach beyond the end of the session. As the 1994 Implementation Agreement aims for decisions taken by consensus in the Assembly,[77] the deferral now serves, *inter alia*, the purpose to enable further negotiations which may lead to consensus, to a higher majority in case of voting, and/or to adjust the proposal in order to safeguard the interests of all groups of States.[78]

11. '[…] request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion […] and […] defer voting on that proposal pending receipt of the advisory opinion by the Chamber.'

15 Art. 159 (10) provides for a special procedure by which 'at least one fourth of the members of the Authority' can compel the Assembly to request an advisory opinion from the SDC of the ITLOS prior to deciding on a proposal before it and to defer voting on that proposal pending receipt of the advisory opinion. Curiously, Art. 159 (10) refers to 'at least one fourth of the members of the Authority' (→ Art. 156 (2)) rather than a fourth of the members of the Assembly or a fourth of the members of the Assembly present and voting. This requirement resembles the 'majority of the members of the Authority' envisaged by Art. 159 (2) for requests of special sessions of the Assembly. By contrast, the Rules of Procedure of the Assembly refer to a fourth of the members of 'the Assembly'.[79] Of course, all members of the

[75] Art. 18 UN-Charter requires only a simple majority. See *Wolfrum* (note 4), 530; *Paolillo* (note 62), 231.
[76] *Wolfrum* (note 4), 530.
[77] See *supra*, MN 11.
[78] For the object and purpose before the 1994 Implementation Agreement, see *Paolillo* (note 62), 232. For comparisons with the procedure of the General Assembly of the United Nations, see *Wolfrum* (note 4), 531.
[79] Rule 65 Rules of Procedures of the Assembly.

Authority within the meaning of Art. 156 (2) are, pursuant to Art. 159 (1), also members of the Assembly. Nonetheless, Art. 159 (10) can, in the absence of a reference to the requesting members being present and voting, be read as enabling members of the Authority who are not present at a session of the Assembly to take part in a request for an advisory opinion, which then triggers an obligation of the Assembly to adopt the request and to defer voting on the matter.

16 The rule laid down in Art. 159 (10) is based on the Assembly's power to engage the SDC with a request for an advisory opinion 'arising within the scope of [its] activities' (→ Art. 191). Thus, Art. 159 (10) is not, as some commentators claim,[80] a separate legal basis for a competence of the Assembly to request advisory opinions. As can be deduced from its wording and its location in Section 4 of Part XI rather than Art. 191, Art. 159 (10) is a purely **procedural** rule. The scope of this procedure is restricted to questions 'on the conformity with [UNCLOS] of a proposal before the Assembly on any matter' and, therefore, does not cover the Assembly's broad right under Art. 191 in its entirety.[81] The reason for this is quite obvious: If a proposal has already been decided upon or if a request does not relate to a proposal of the Assembly at all, there is no need for a deferral of a vote in the Assembly. It is true that neither Art. 191 nor the Rules of Procedures of the Assembly contain any other rules for requests for advisory opinions in general. Whereas the procedure laid down Art. 159 (10) qualifies as *lex specialis* to the general voting procedure, any other requests for advisory opinions pursuant to Art. 191 would arguably qualify as 'questions of substance' and thus be subject to consensus or, in its absence, a two-thirds majority.[82] This view is supported by the fact that Art. 161 (8)(b) identifies requests of the Council pursuant to Art. 191 as 'questions of substance'. Although Art. 161 (8)(b) is declared inapplicable by the 1994 Implementation Agreement,[83] the determination of such requests as 'questions of substance' still seems appropriate.

12. '[…] If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.'

17 Given the considerable time advisory proceedings before international courts and tribunals usually take, the rule that the Assembly will decide when it will meet to vote upon the deferred proposal '[i]f the advisory opinion is not received before the final week of the session' seems very optimistic. It is true that advisory opinions by the SDC on the request of the Assembly or Council 'shall be given as a matter of urgency' (→ Art. 191) in order not to unduly prolong the procedure on a pending decision and thereby endanger the proper functioning of the Authority.[84] This matter has been taken up in Art. 132 of the Rules of the ITLOS, which provides: 'If the request for an advisory opinion states that the question necessitates an urgent answer the [SDC] shall take all appropriate steps to accelerate the procedure.' Thus, if Art. 132 Rules of the ITLOS is taken literally, advisory opinions of the Assembly and the Council will, contrary to the wording of Art. 191, only be given as a matter of urgency if this is explicitly requested.[85] Nonetheless, the SDC expressly took note of this requirement in its first advisory opinion of 2011 on a request of the Council.[86] In any case, it

[80] See, for example, *Paolillo* (note 62), 232. Probably also *Mahmoudi* (note 70), 294.

[81] For a similar interpretation of Art. 191, see *Paolillo* (note 62), 232.

[82] See *supra*, MN 13. The decision is not, however, subject to a 'consensus requirement'. But see *Burke* on Art. 191 MN 7.

[83] S. 3 (8) Annex to the 1994 Implementation Agreement. For details, see *van Doorn* on Art. 161 MN 14 *et seq*.

[84] *José Luis Jesus*, Art. 132, in: *P. Chandrasekhara Rao/Philippe Gautier*, The Rules of the International Tribunal for the Law of the Sea: A Commentary (2008), 183 *et seq*.

[85] On this point, see also *ibid*., 183.

[86] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, 18 (para. 8), available at: https://www.itlos.org/cases/list-of-cases/case-no-17/.

may still take up to a year or longer until an advisory opinion is rendered. Thus, if Art. 159 (10) is taken literally, a proposal before the Assembly may be blocked not only for the remainder of a pending regular session but also for the entire following regular session. This also confers great influence and responsibility on the SDC. Remarkably, however, the SDC rendered its first advisory opinion of 2011 on a request of the Council within less than nine months.[87]

Article 160
Powers and functions

1. The Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in this Convention. The Assembly shall have the power to establish general policies in conformity with the relevant provisions of this Convention on any question or matter within the competence of the Authority.

2. In addition, the powers and functions of the Assembly shall be:

(a) **to elect the members of the Council in accordance with article 161;**

(b) **to elect the Secretary-General from among the candidates proposed by the Council;**

(c) **to elect, upon the recommendation of the Council, the members of the Governing Board of the Enterprise and the Director-General of the Enterprise;**

(d) **to establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Part. In the composition of these subsidiary organs due account shall be taken of the principle of equitable geographical distribution and of special interests and the need for members qualified and competent in the relevant technical questions dealt with by such organs;**

(e) **to assess the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment based upon the scale used for the regular budget of the United Nations until the Authority shall have sufficient income from other sources to meet its administrative expenses;**

(f) (i) **to 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 and the payments and contributions made pursuant to article 82, taking into particular consideration the interests and needs of developing States and peoples who have not attained full independence or other self-governing status. If the Assembly does not approve the recommendations of the Council, the Assembly shall return them to the Council for reconsideration in the light of the views expressed by the Assembly;**

(ii) **to 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, the financial management and internal administration of the Authority, and, upon the recommendation of the Governing Board of the Enterprise, to the transfer of funds from the Enterprise to the Authority;**

(g) **to 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;**

(h) **to consider and approve the proposed annual budget of the Authority submitted by the Council;**

[87] *Ibid.*

(i) **to examine periodic reports from the Council and from the Enterprise and special reports requested from the Council or any other organ of the Authority;**
(j) **to initiate studies and make recommendations for the purpose of promoting international cooperation concerning activities in the Area and encouraging the progressive development of international law relating thereto and its codification;**
(k) **to consider problems of a general nature in connection with activities in the Area arising in particular for developing States, as well as those problems for States in connection with activities in the Area that are due to their geographical location, particularly for land-locked and geographically disadvantaged States;**
(l) **to establish, upon the recommendation of the Council, on the basis of advice from the Economic Planning Commission, a system of compensation or other measures of economic adjustment assistance as provided in article 151, paragraph 10;**
(m) **to suspend the exercise of rights and privileges of membership pursuant to article 185;**
(n) **to discuss any question or matter within the competence of the Authority and to decide as to which organ of the Authority shall deal with any such question or matter not specifically entrusted to a particular organ, consistent with the distribution of powers and functions among the organs of the Authority.**

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I. Purpose and Function

1 Art. 160 defines the role of the Assembly of the Authority by laying down its main functions and powers. Art. 160 (1) describes the general role of the Assembly. The Assembly is the only organ of the Authority which is composed of all of its members (→ Art. 159 (1)) and thus its plenary organ. As such, the Assembly is not only a principal organ (→ Art. 158 (1)) but the 'supreme organ' of the Authority to which the other two principal organs, namely the Council and the Secretariat, are accountable as specifically provided for in UNCLOS. Importantly, the Assembly has the power to establish general policies on any question or matter within the competence of the Authority as long as these policies are in conformity with UNCLOS. Art. 160 (2) lists most of the other powers and functions of the

Assembly, the majority of which are electoral and budgetary functions, as well as internal law-making powers. The title 'supreme organ' as such does not, however, mean that the Assembly is truly the most powerful organ of the Authority, as can also be deduced from the wording 'shall be considered'.[1] Instead, the supremacy of the Assembly is of a formal, symbolic nature linked to its status as the plenary organ of the Authority.[2] The real influence of any organ of the Authority must be determined in accordance with the powers and functions which have in fact been conferred upon it.[3] As is the case for international organizations generally, the decisive elements of the Authority's decision-making process are the composition of its organs, their procedures, the allocation of rights of initiative and the relationship of its organs within the decision-making process.[4] In light of the powers and functions conferred upon the Assembly in Art. 160 (1)-(2) and those of the Council in Art. 162 and elsewhere, there has been consensus among commentators, even before the 1994 Implementation Agreement, that it is in fact the Council which enjoys true supremacy.[5] Importantly, the 1994 Implementation Agreement has further strengthened this dominant position of the Council.[6] First, the general policies are to be established by the Assembly in collaboration with the Council.[7] Second, the decision-making procedure for most of the Assembly's powers has been reorganized along the lines of the procedure already contained in Art. 160 (2)(f)(i) ensuring the significant influence of the Council.[8] Therefore, decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter must now be based on the recommendations of the Council.[9] If the Assembly does not accept the recommendation of the Council on any matter, it will return the matter to the Council for further consideration. The Council will reconsider the matter in the light of the views expressed by the Assembly.[10] As a result, the Council now has the right of initiative for most matters.[11]

II. Historical Background

The fact that the Authority should have an Assembly as its plenary organ was never controversial. As is also evident from the wording of Art. 160 (1), the classification of the Assembly as the 'supreme organ' of the Authority can be traced back to the controversial wish of the Group of 77 to emphasize that, based on a 'democractic approach', the most representative organ of the Authority should enjoy superiority in the hierarchical organic structure of the Authority.[12] At the same time, industrial States opposed a powerful plenary **2**

[1] See *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987), 280.

[2] *Ibid.*; *Felipe H. Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984) 135, 243 *et seq.*; *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 67.

[3] See also *Hauser* (note 2), 67 *et seq.*

[4] *Rüdiger Wolfrum*, The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organisations?, ZaöRV 55 (1995), 310, 311.

[5] *Paolillo* (note 2), 244, 246 *et seq.*; *Mahmoudi* (note 1), 282; *E. D. Brown*, Sea-bed Energy and Minerals: The International Legal Regime, vol. 2: Sea-bed Mining (2001), 297.

[6] See also *L. Dolliver M. Nelson*, The New Deep Sea-Bed Mining Regime, IJMCL 10 (1995), 189, 198.

[7] S. 3 (1) Annex to the 1994 Implementation Agreement. According to *Wolfrum* (note 4), 324, this 'eliminates the prerogative the Assembly formerly had concerning the issue'.

[8] *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt (1995), 121, 123 *et seq.*

[9] S. 3 (4) Annex to the 1994 Implementation Agreement. See also Rule 61 (3) Rules of Procedures of the Assembly.

[10] *Ibid.*

[11] See also the analysis by *Wolfrum* (note 4), 324.

[12] *Paolillo* (note 2), 243 *et seq.*

organ given that the majorities in the Assembly clearly favored developing States.[13] They sought to strengthen the Council, the composition of which was more favorable to them.[14] The situation was summed up quite accurately by the Chairman of the First Committee, Mr. ENGO, in 1976:

> 'One of the central issues before us has been the relationship between the Assembly and the Council. […] From the discussion, it was obvious that a system based on either the supremacy of one organ or the other, or on the strict division of functions and powers of the two principal organs could not constitute a compromise solution. On the other hand, a possible agreement seemingly lies in the following direction: the Assembly would have the power to prescribe general policies; the Council would have certain prerogatives but would be subject to these general policies. As a result, the Council presumably would have sufficient latitude to execute the various tasks assigned to it and to carry out day-to-day operations on the basis of the policies established by the Assembly. […] Another issue taken up here relates to the descriptive use of the term "supreme policy-making" for the Assembly as an organ of the Authority. […] I have adopted the term "supreme" only. […] It is employed merely to describe the organ most representative of the membership of mankind. The interrelationship between the Assembly and the Council must be examined in the scope of their respective powers and functions.'[15]

The powers, functions and decision-making procedures contained in Arts. 160 and 162 reflect this division and the compromises finally reached.[16]

III. Elements

1. 'The Assembly […] shall be considered the supreme organ of the Authority […]'

3 Art. 160 (1) emphasizes the importance of the Assembly by stating that it is the 'supreme organ' of the Authority. As the wording makes clear, the supremacy of the Assembly is based on – or at least linked to – the fact that the Assembly is the plenary organ of the Authority which ensures full and equal representation of all its members.[17] This declaration is followed by two rules which, on their face, aim to give effect to this supremacy.

4 First, the other principal organs of the Authority, i. e. the Council and the Secretariat (→ Art. 158 (1)), are accountable to the Assembly. Interestingly, this is not the case for the Enterprise which is not a principal organ of the Authority (→ Art. 158 (2)).[18] The other principal organs are only accountable to the Assembly 'as specifically provided for in UNCLOS'. However, UNCLOS does not contain any such provisions and, importantly, also no procedures by which the Council and the Secretariat could be held accountable. Art. 160 (2) contains only some reporting duties. Consequently, the concept of 'accountability' as envisaged by Art. 160 (1) is mere lip service.[19]

5 Second, Art. 160 (1) confers upon the Assembly the power to establish general policies on any question or matter within the competence of the Authority. Importantly, this is a separate power of the Assembly which must be distinguished from those enumerated in Art. 160 (2).[20] As the wording refers to the competence of the Authority as a whole, the

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[13] *Hauser* (note 2), 56.

[14] *Ibid.*

[15] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125 127–28 (Statement of Mr. P. B. Engo, Chairman of the First Committee).

[16] For a detailed description of the drafting process of Art. 160, see Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 392 *et seq.* (MN 160.2 *et seq.*).

[17] *Mahmoudi* (note 1), 280.

[18] For a discussion of the nature of the Enterprise, see *Schatz* on Art. 158 MN 8 *et seq.*

[19] *Paolillo* (note 2), 245; *Mahmoudi* (note 1), 280.

[20] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 537; *Hauser* (note 2), 66.

Assembly can also establish general policies on matters within the competence of other organs.[21] Of course, any such general policy would have to respect the system already established by UNCLOS, including the division of powers and functions between the organs of the Authority (→ Art. 158 (4)).[22] The statement that the Assembly can only exercise this power 'in conformity with the relevant provisions of [UNCLOS]' is declaratory of the general rule that international organizations and their organs must act in accordance with their legal framework.[23] In the case of Art. 160 (1), important provisions are Arts. 136 to 149, 150 and 151.[24] As the other organs of the Authority must act in accordance with the general policies established by the Assembly, this competence of the Assembly, in theory, underscores its supremacy.[25] Nonetheless, there are some limiting factors. First, the Council makes recommendations to the Assembly concerning policies on any question or matter within the competence of the Authority (→ Art. 162 (2)(s)). While these are only non-binding recommendations, they will nonetheless have considerable influence on the general policies of the Assembly.[26] In fact, the 1994 Implementation Agreement now forces the Assembly to 'collaborate' with the Council in establishing general policies.[27] This further strengthens the position of the Council, although it is not entirely clear what 'collaboration' means procedurally.[28] Second, the Council establishes the 'specific policies' to be pursued by the Authority on any question or matter within the competence of the Authority in conformity with the 'general policies' established by the Assembly (→ Art. 162 (1)). The same is true of the exercise of other powers and functions by the Council.[29] However, it is difficult to distinguish between these two broad legal terms. In the absence of other distinctive elements, the degree of generality (or specificity) of a question or matter is the only (and certainly insufficient) interpretive guidance.[30] In practice, this may cause a shift of power towards the Council as the Council can not only claim the competence for certain matters but is also the executive organ entrusted with their implementation.[31]

2. '[…] the powers and functions of the Assembly […]'

6 In addition to those mentioned in the previous paragraph, Art. 160 (2) provides an enumeration of the powers and functions of the Assembly. It should be noted that this list is not exhaustive. There are various instances in which Part XI and the Annexes attribute additional powers and functions to the Assembly.[32] Notably, the Assembly also has, pursuant to Art. 160 (2)(n), the power to attribute to itself such powers and functions which are not specifically entrusted to a particular organ.[33]

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[21] See also *Paolillo* (note 2), 247.
[22] *Wolfrum* (note 20), 538; *Hauser* (note 2), 68.
[23] For a detailed description of the legal framework of the Authority, see *Schatz* on Art. 156 MN 7 *et seq.*
[24] Nordquist/Nandan/Rosenne (note 16), 402 (MN 160.11).
[25] *Paolillo* (note 2), 247; *Wolfrum* (note 20), 537 *et seq.*
[26] *Paolillo* (note 2), 248.
[27] S. 3 (1) Annex to the 1994 Implementation Agreement.
[28] *Jaenicke* (note 8), 124.
[29] See *Paolillo* (note 2), 248, who argues that this must be so *a fortiori*.
[30] *Ibid.*
[31] *Ibid.*
[32] Examples include the Assembly's powers to request advisory opinions from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (Art. 191), to undertake a general and systematic review of the manner in which the international regime of the Area has operated in practice (Art. 154), to carry out, upon recommendation of the Council, a review of the matters concerning provisions relating to the system of exploration and exploitation of the resources of the Area enumerated in Art. 155 (1), to approve amendments of these provisions by the States Parties (Art. 314 (1)), and to determine the remuneration of the members of the Governing Board of the Enterprise (Annex IV Art. 5 (5)). The Assembly also appoints an independent auditor for the Enterprise (Art. 175) and approves agreements with other international organizations (Art. 162 (2)(f)).
[33] See *infra*, MN 26.

7 **a) '[…] to elect the members of the Council […]'.** Pursuant to Art. 160 (2)(a), the Assembly elects the members of the Council in accordance with Art. 161, a provision which has been modified significantly by the 1994 Implementation Agreement.[34] The Assembly is now tasked with the establishment of lists on which the States Parties are allocated to the different groups of Council members in accordance with the relevant criteria for membership prior to elections.[35] If a member of the Authority is eligible to be a member of more than one group, this member will be included in the list of all the groups for which it qualifies but may be nominated by only one group.[36] In order to limit the Assembly's influence on the majorities in the Council,[37] this important right is heavily qualified by the fact that the right of nomination lies with the groups of State Parties which will be represented by these Council members (→ Art. 161 (2)(c)).[38] Consequently, election by the Assembly in fact means to confirm the binding nominations of the States Parties, rendering it a mere formality.[39]

8 **b) '[…] to elect the Secretary-General […]'.** Pursuant to Art. 160 (2)(b) in conjunction with Art. 166 (2), the Assembly elects the Secretary-General of the Authority for a term of four years from among the candidates proposed by the Council.[40] Whereas Art. 160 (2)(b) speaks of the plural 'candidates', Art. 162 (2)(b) expressly refers to a 'list of candidates'. This wording as well as the reference to an 'election' implies that the Council is obliged to propose at least two candidates – from which the Assembly must then elect a candidate.[41] In practice, however, the procedure so far looked quite different. In the election of the first Secretary-General Satya N. Nandan (Fiji) in 1996, he was the only candidate on the list.[42] The same happened in the first re-election of Mr Nandan in 2000.[43] In the second re-election of Mr. Nandan in 2004, the Council proposal for the first and only time contained two candidates.[44] The current Secretary-General of the Authority, Nii A. Odunton (Ghana), was elected by the Assembly in 2008[45] and re-elected in 2012[46] in the mere execution of Council proposals which provided for no other option.[47] Of course, the Council can only propose a list if there is indeed more than one candidate. Nonetheless, it may be concluded that the Assembly's right under Art. 160 (2)(b) is on its way of becoming a mere formality.

9 **c) '[…] to elect […] the members of the Governing Board of the Enterprise and the Director-General of the Enterprise […]'.** As prescribed by Art. 160 (2)(c), the Assembly

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[34] S. 3 (9)(b), (10), (15) Annex to the 1994 Implementation Agreement. See also Art. 161 (3)-(4).

[35] S. 3 (9)(b) Annex to the1994 Implementation Agreement. See also Rule 83 Rules of Procedures of the Assembly. The lists are usually prepared by the Secretariat. See, for example, ISA, Indicative List of Member States of the International Seabed Authority Which Would Fulfil the Criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 of Section 3 of the Annex to the Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISA Doc. ISBA/22/A/CRP.2 (2016).

[36] S. 3 (9)(b) Annex to the 1994 Implementation Agreement; Rule 83(1) Rules of Procedures of the Assembly.

[37] *Hauser* (note 2), 60; *Mahmoudi* (note 1), 274.

[38] See also S. 3 (10) Annex to the1994 Implementation Agreement.

[39] See also *van Doorn* on Art. 161 MN 3; *Paolillo* (note 2), 246; *Wolfrum* (note 4), 316.

[40] See also Rule 88 Rules of Procedures of the Assembly.

[41] See also *van Doorn* on Art. 162 MN 13; *Wolfrum* (note 20), 532; *Paolillo* (note 2), 246; *Hauser* (note 2), 229.

[42] *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 210. There was, however, a second candidate who had withdrawn his candidacy after a secret indicative vote.

[43] This time, there was no other candidate at all. See *Michael C. Wood*, International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47, 67.

[44] ISA, Decision of the Council of the International Seabed Authority Concerning the Candidates for the Election of the Secretary-General, ISBA Doc. ISBA/10/C/9 (2004).

[45] ISA, Draft Decision of the Assembly of the International Seabed Authority Concerning the Appointment of the Secretary-General of the International Seabed Authority, ISBA Doc. ISBA/14/A/L.3 (2008).

[46] ISA, Decision of the Assembly of the International Seabed Authority Concerning the Appointment of the Secretary-General of the International Seabed Authority, ISBA Doc. ISBA/18/A/6* (2012).

[47] ISA, Decision of the Council of the International Seabed Authority Concerning the Candidate for the Election of the Secretary-General, ISBA Doc. ISBA/14/C/9 (2008); ISA, Decision of the Council of the International Seabed Authority Concerning the Candidate for the Election of the Secretary-General, ISBA Doc. ISBA/18/C/14 (2012).

elects the 15 members of the Governing Board of the Enterprise (→ Annex IV Art. 5 (1)) and its Director-General (→ Annex IV Art. 7 (1)).[48] The members of the Governing Board are elected for four years and may be re-elected (→ Annex IV Art. 5 (2)). The Director-General is elected for a fixed term not exceeding five years and may also be re-elected (→ Annex IV Art. 7 (1)). In a first step, members of the Authority may nominate suitable candidates for the Governing Board who are 'of the highest standard of competence, with qualifications in relevant fields, so as to ensure the viability and success of the Enterprise' (→ Annex IV Art. 5 (1)). Candidates for the position of the Director-General, who is not a member of the Governing Board, are nominated by the Governing Board (→ Annex IV Art. 7 (1)). The wording is not clear as to whether the Governing Board has to nominate more than one candidate. Next, the Council recommends to the Assembly 'candidates for the election' of the Governing Board (→ Art. 162 (2)(c)), which could be read as requiring the Council to recommend more candidates than there are positions available.[49] The wording 'candidates for the election' arguably does not apply to the Director-General, meaning that the recommendation may only contain one candidate, namely the nominee of the Governing Board.[50] In light of the different wording of Art. 160 (2)(c) 'upon the recommendation' as opposed to 'from among the candidates proposed' in Art. 160 (2)(b) there was some discussion as to whether, unlike the proposals of the Council regarding candidates for the position of the Secretary-General,[51] its recommendations regarding the members of the Governing Board and the Director-General are not binding.[52] Due to the modified decision-making procedure of the 1994 Implementation Agreement, it is now clear that the recommendations are binding.[53] In electing the members of the Governing Board, the Authority must pay due regard to the principle of equitable geographical distribution (→ Annex IV Art. 5 (1)). As there is, interestingly, no similar obligation of the Council, it is conceivable that this obligation may at times conflict with the Council's recommendations. In addition, due regard must be paid to the principle of rotation of membership at least when re-elections are considered (→ Annex IV Art. 5 (2)). The members of the Governing Board continue in office until their successors are elected (→ Annex IV Art. 5 (3)). However, if the office of a member of the Governing Board becomes vacant, the Assembly must elect a new member for the remainder of his predecessor's term (→ Annex IV Art. 5 (3)). In doing so, the Assembly must again observe both the procedure and requirements mentioned above.[54] As long as the Enterprise is dormant,[55] it remains to be seen how Arts. 160 (2)(c), Art. 162 (2)(c), and Annex IV Art. 5 will be implemented in practice.

d) '[…] to establish […] subsidiary organs […]'. In that it expressly allows the Assembly to establish subsidiary organs, Art. 160 (2)(d) contains a *lex specialis* to the general right to establish subsidiary organs laid down in Art. 158 (3).[56] The requirement 'as it finds necessary for the exercise of its functions in accordance with [Part XI]', generous as it may be, exists in order to ensure compliance with the legal framework of the Authority[57] and to make sure any establishment of a subsidiary organ of the Assembly is at least linked to – and reasonably of assistance in – the exercise of the functions of the Authority. Importantly, the Assembly is **10**

[48] Rules 89–92 Rules of Procedures of the Assembly. On the election procedure, see also *Vrancken* on Annex IV Art. 5 MN 3 *et seq*.

[49] See *van Doorn* on Art. 162 MN 26; *Wolfrum* (note 20), 572; with some doubts *Hauser* (note 2), 229 *et seq*.

[50] This interpretation is arguably supported by the nomination requirement contained in Annex IV Art. 7. *Hauser* (note 2), 230. The wording is, however, quite open. For a different opinion, see *Wolfrum* (note 20), 572.

[51] See *supra*, MN 8.

[52] See also *Paolillo* (note 2), 246: 'may or may not endorse'. With doubts, *Hauser* (note 2), 228 *et seq*., who draws a parallelism to the practice concerning Art. 4 (2) UN-Charter.

[53] Sec. 3 (4) Annex to the 1994 Implementation Agreement. See also Rule 61 (3) Rules of Procedures of the Assembly. See also Nordquist/Nandan/Rosenne (note 16), 402 (MN 160.11).

[54] In agreement with *Vrancken* on Annex IV Art. 5 MN 4.

[55] S. 2 (1) Annex to the 1994 Implementation Agreement.

[56] See *Schatz* on Art. 158 MN 11 *et seq*.

[57] See *Schatz* on Art. 156 MN 7 *et seq*.

further restrained in the exercise of its power to establish subsidiary organs by its obligation to take 'due account' (1) of the need for members qualified and competent in the relevant technical questions dealt with by such organs, (2) of the principle of equitable geographical distribution, and (3) of special interests. In addition, the 1994 Implementation Agreement now requires that the organs and subsidiary organs of the Authority shall be 'cost-effective'.[58] In addition, the establishment and functioning of subsidiary organs

> 'shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.'[59]

11 The Finance Committee, a 'subsidiary organ to deal with financial matters' which was established by the 1994 Implementation Agreement in the implementation of Art. 162 (2)(y),[60] could be considered a subsidiary organ of the Assembly which elects its 15 members.[61] The members of the Finance Committee are elected for a term of five years and may be re-elected for a further term.[62] Prior to the election, the States Parties nominate candidates 'of the highest standards of competence and integrity' and 'with appropriate qualifications relevant to financial matters'.[63] No State Party may be represented by more than one of its nationals.[64] In electing the members of the Finance Committee, the Assembly is required to take due account of 'the need for equitable geographical distribution and the representation of special interests'.[65] In particular, all groups of States represented in the Council are also represented in the Finance Committee by at least one member.[66] Decisions in the Finance Committee on questions of procedure require a simple majority of the members present and voting, whereas decisions on questions of substance must be taken by consensus.[67] As prescribed by Sec. 3 (7) Annex to the 1994 Implementation Agreement, 'decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee'.[68] Whereas the term 'based on' is not defined,[69] it seems that the recommendations are binding in so far as a (factual) right of initiative of the Finance Committee has been established.[70] Thus, the decision-making power regarding some important functions of both the Council and the Assembly, which are principal organs of the Authority, has effectively been transferred to the Finance Committee.[71] Nonetheless, the more specific enumeration of important matters in which the Finance Committee must be involved in Sec. 9 (7) Annex to the 1994 Implementation Agreement uses the weaker term 'take into consideration'. This provision should be considered as *lex specialis* to Sec. 3 (7) Annex to the 1994 Implementation Agreement,[72] meaning that, at least in these matters, the powers and functions of the Assembly and Council are preserved.

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[58] S. 1 (2) Annex to the 1994 Implementation Agreement. See also *Nelson* (note 6), 196.

[59] A. 1 (3) and 2 (1) Annex to the 1994 Implementation Agreement.

[60] S. 9 (1), (9) Annex to the 1994 Implementation Agreement. Therefore, the Finance Committee was not, also not at the same time, established on the basis of Art. 160 (2)(d).

[61] S. 9 (3) Annex to the 1994 Implementation Agreement. See also *van Doorn* on 162 MN 15.

[62] S. 9 (4) Annex to the 1994 Implementation Agreement.

[63] S. 9 (1) Annex to the 1994 Implementation Agreement.

[64] S. 9 (2) Annex to the 1994 Implementation Agreement.

[65] S. 9 (3) Annex to the 1994 Implementation Agreement.

[66] S. 9 (3) and 3 (15) Annex to the 1994 Implementation Agreement. Until the Authority has sufficient funds other than assessed contributions to meet its administrative expenses, the membership of the Committee must also include representatives of the five largest financial contributors to the administrative budget of the Authority. Once sufficient funds are available, the election of one member from each group will be based on the nomination by the members of the respective group, without prejudice to the possibility of further members being elected from each group.

[67] S. 9 (8) Annex to the 1994 Implementation Agreement.

[68] S. 3 (7) Annex to the 1994 Implementation Agreement.

[69] For a detailed discussion, see *Brown* (note 5), 315 *et seq.* See also *van Doorn* on Art. 162 MN 16.

[70] See also *Wolfrum* (note 4), 324.

[71] *Ibid.*

[72] *Brown* (note 5), 315 *et seq.*

e) '[…] to assess the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment […]'. Pursuant to Art. 160 (2)(e), the Assembly assesses the contributions of its members (→ Art. 156 (2)) to the administrative budget of the Authority.[73] Any such assessment must be carried out 'in accordance with an agreed scale of assessment'. Interestingly, during the drafting of the Rules of Procedures of the Assembly, the Preparatory Commission interpreted the wording 'agreed scale of assessment' as 'scale agreed upon by consensus'.[74] As this would have unduly increased the power of individual member States, particularly the major financial contributors,[75] the consensus requirement was removed in the revised Rules of Procedures.[76] Until the Authority has sufficient income of its own to meet its administrative expenses, the scale of assessment is to be based on 'the scale used for the regular budget of the United Nations'. The wording is unclear as to whether the scale of assessment should be based on the scale of assessment of the United Nations of the same or the previous year.[77] As the scale for the current year (and, naturally, also the following year) is not always available in time, it is now established practice to refer to the scale of assessment of the previous year for **both** years of a financial period,[78] e. g. to the 2016 scale for the 2017–2018 budgets.[79] Another unclear issue is the amount, if any, to be paid by international organizations which are members of the Authority, i. e. currently only the European Union. It has been argued that, particularly in light of Annex IX Art. 4, international organizations are not required to contribute to the budget in addition to their member States unless provision in that regard has been made as a matter of their internal law.[80] Indeed, the Financial Regulations of the Authority now provide for 'agreed' (as opposed to 'assessed') contributions of international organizations which are based on a separate arrangement between the Authority and the international organization, but subject to determination by the Authority.[81] The procedure for decisions based on Art. 160 (2)(e) is as follows: As the both assessment and the establishment of the scale of assessment have budgetary implications, the Council will obtain the recommendations of the Finance Committee, take them into account in establishing its own recommendations, and submit both to the Assembly, which then must base its decision on these recommendations.[82] If the Assembly does not accept the recommendations of the Council, it will return the matter to the Council for further consideration. The Council will then consider the matter in the light of the views expressed by the Assembly.[83] 12

f) '[…] to consider and approve […] the rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82; [and] 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) […]'. Pursuant to Art. 160 (2)(f)(i), the Assembly considers and approves 'rules, regulations and procedures' on (1) the equitable sharing of financial and other economic benefits derived from activities in the Area (→ Art. 140 (2)) and (2) the payments and contributions made pursuant to Art. 82 13

[73] See also Reg. 6 (1)(a) Financial Regulations of the International Seabed Authority.

[74] See Rule 35 Draft Rules of Procedure of the Assembly of the Authority.

[75] See *Paolillo* (note 2), 231.

[76] Rule 95 Rules of Procedures of the Assembly now just repeats the wording of Art. 160 (2)(e).

[77] *Wood* (note 42), 216 *et seq.*

[78] A financial period has two years. See Regulation 2 Financial Regulations of the International Seabed Authority.

[79] See, for example, ISA, Proposed Budget for the International Seabed Authority for the Financial Period 2017–2018, ISBA Doc. ISBA/22/A/6–ISBA/22/C/9 (2016), 17 (paras. 57 *et seq.*).

[80] *Wood* (note 42), 216.

[81] Reg. 6 (1)(b) Financial Regulations of the International Seabed Authority. See *Wood* (note 43), 73 *et seq.*, who criticizes the fact that this practice leads to a higher financial burden on EU Member States.

[82] S. 3 (4), (7), and 9 (7)(b) Annex to the 1994 Implementation Agreement. See also Rule 61 (3)-(4) Rules of Procedures of the Assembly.

[83] *Ibid.*

with respect to the exploitation of the continental shelf beyond 200 NM (→ Art. 82 (4))[84]. Any funds of the Authority which qualify as a surplus exceeding its administrative expenses, and are not assessed contributions within the meaning of Art. 171 (a), may be shared in accordance with Arts. 160 (2)(g), 140 (→ Art. 173 (2)(a)). This is to be done on a non-discriminatory basis through 'any appropriate mechanism' (→ Art. 140 (2)). Neither Art. 160 (2)(f)(i) nor any other provision of UNCLOS, particularly Art. 140 (2), provide for a specific entitlement of certain member States with regard to the mentioned 'economic benefits'.[85] The Assembly is, however, obliged to take into particular consideration the interests and needs of developing States and peoples who have not attained full independence or other self-governing status. This sentence repeats Art. 140 (1) and, in line with that rule, deviates from the principle of non-discrimination enshrined in Art. 140 (2).[86] The wording 'particular consideration' also implies that industrialized States are, at least theoretically, not excluded from the sharing of benefits.[87] The situation with regard to payments and contributions made pursuant to Art. 82 is similar.[88] The procedure for decisions based on Art. 160 (2)(f)(i) is as follows: The Council will prepare its recommendations which are formulated by the Legal and Technical Commission, obtain the recommendations from the Finance Committee, and finally submit all recommendations to the Assembly for decision (→ Art. 162 (2)(o)(i); Art. 165 (2)(f)).[89] The Assembly will either approve the recommendations or return them to the Council for reconsideration in the light of the views expressed by the Assembly, which will again trigger the procedure explained above. Importantly, the Assembly is, under Art. 160 (2)(g), also responsible for decisions on the implementation of the 'rules, regulations and procedures' established pursuant to Art. 160 (2)(f)(i).[90]

14 Pursuant to Art. 160 (2)(f)(ii), the Assembly considers and approves the 'rules, regulations and procedures, and any amendments thereto' of the Authority provisionally adopted by the Council pursuant to Art. 162 (2)(o)(ii), which relate to (1) 'prospecting, exploration and exploitation in the Area' (→ Art. 17 Annex III), (2) the 'financial management and internal administration of the Authority' and (3) the 'transfer of funds from the Enterprise to the Authority'.[91] Thus, Art. 160 (2)(f)(ii), arguably constitutes the most important specific legislative competence of the Assembly,[92] and also the Authority generally.[93] Important examples of legislation regarding 'prospecting, exploration and exploitation in the Area', often referred to as 'the Mining Code', are the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area,[94] the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area,[95] and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area[96]. An example of legislation concerning the 'financial management and internal administration of the Authority' are the Financial Regulations of the Authority.[97] Notably, in approving the Financial Regulations in their present form, the Assembly did not fulfil its duty to

[84] For details on this provision, which is not related to activities in the Area, see *Chircop* on Art. 82 MN 1 *et seq*.

[85] *Wolfrum* (note 20), 533.

[86] For details, see *Vöneky/Höfelmeier* on Art. 140 MN 11 *et seq*.

[87] *Wolfrum* (note 20), 533.

[88] See *Chircop* on 82 MN 21 *et seq*.; *van Doorn* on Art. 162 MN 24.

[89] S. 9 (7)(f) Annex to the 1994 Implementation Agreement.

[90] See *infra*, MN 16.

[91] For a description of the procedure, see *Wood* (note 42), 228.

[92] *Wolfrum* (note 20), 536; *Mahmoudi* (note 1), 282.

[93] *Hauser* (note 2), 69.

[94] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9 (2013); ISBA/19/A/12 (2013); ISBA/20/A/9 (2014).

[95] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013); ISBA/20/A/10 (2014).

[96] ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013).

[97] ISA, Financial Regulations of the International Seabed Authority (2000).

'prescribe the limits on the borrowing power of the Authority' (→ Art. 174 (2)).[98] As the Enterprise remains dormant,[99] there was no necessity for legislation on the 'transfer of funds from the Enterprise to the Authority'.

15 The procedure for decisions based on Arts. 160 (2)(f)(ii), 162 (2)(o)(ii) is as follows: The Council receives the recommendations of the Legal and Technical Commission and provisionally adopts the 'rules, regulations and procedures'. If the matter has financial implications, both the Assembly and Council have to base their decisions on recommendations of the Finance Committee.[100] If the matter concerns the transfer of funds from the Enterprise to the Authority, the Council also obtains the recommendations of the Governing Board of the Enterprise. In case the Assembly declines to approve the 'rules, regulations and procedures' adopted by the Council, the Council must consider amendments in light of any views expressed by the Assembly. The Assembly has no power to amend the 'rules, regulations and procedures' submitted to it or to draft its own.[101] Due to the provisional application of the 'rules, regulations and procedures' irrespective of whether the Assembly approves them after consideration or not (in which case they would be returned to the Council for amendment), the Assembly, though formally the 'supreme organ' of the Authority, is essentially powerless in this key area of legislative activity of the Authority.[102] The Assembly can neither itself adopt an amended version of the Council's 'rules, regulations and procedures', nor are its views regarding amendment binding for the Council.[103] While HAUSER has doubted whether future amendments or supplements of approved 'rules, regulations and procedures' are subject to provisional application,[104] the wording 'and any amendments thereto' in both Art. 160 (2)(f)(ii) and 162 (2)(o)(ii) shows that, particularly in light of considerations of effectiveness, both amendments and supplements should be included. As WOLFRUM points out, however, the Council is unlikely to make permanent use of this provisional application in a confrontational manner.[105]

16 **g) '[…] to decide upon the equitable sharing of financial and other economic benefits derived from activities in the Area […]'.** Pursuant to Art. 160 (2)(g), the Assembly has the executive power to decide upon the equitable sharing of financial and other economic benefits derived from activities in the Area. Any such decision must be consistent with UNCLOS and the 'rules, regulations and procedures of the Authority', i. e. the Financial Regulations of the Authority. The applicable 'rules, regulations and procedures of the Authority' are those established on the basis of Art. 160 (2)(f)(i).[106] The procedure for decisions based on Art. 160 (2)(g) is identical to that of Art. 160 (2)(f)(i) except in that it must also follow the Financial Regulations of the Authority.[107]

17 **h) '[…] to consider and approve the proposed annual budget of the Authority […]'.** Pursuant to Art. 160 (2)(h) in conjunction with Art. 172, the Assembly considers and approves the budget of the Authority. This is a quite typical task for the plenary organ of

[98] See *Ferrara* on Art. 174 MN 7. However, as Reg. 6 (1) Financial Regulations does not make provision for borrowed funds at all, limits are currently unnecessary.

[99] S. 2 (1) Annex to the 1994 Implementation Agreement.

[100] S. 3 (7) and 9 (7) Annex to the 1994 Implementation Agreement. See also Rule 61 (4) Rules of Procedures of the Assembly.

[101] See also *Mahmoudi* (note 1), 282.

[102] See *ibid.*; *Hauser* (note 2), 69 *et seq.*; *Paolillo* (note 2), 249. See also *van Doorn* on Art. 161 MN 18.

[103] *Hauser* (note 2), 70 *et seq.*

[104] *Ibid.*, 70 *et seq.*

[105] *Wolfrum* (note 20), 536.

[106] See *supra*, MN 13.

[107] For a different opinion, see Nordquist/Nandan/Rosenne (note 16), 403 (MN 160.11). However, it is not clear why Art. 160 (2)(g) would not concern a 'budgetary or financial matter' within the meaning of S. 3 (4) Annex to the 1994 Implementation Agreement. As far as the legal situation before the 1994 Implementation Agreement is concerned, Mahmoudi surprisingly reads Arts. 160 (2)(g), 162 (o)(i) as providing for (non-binding) recommendations of the Council: see *Mahmoudi* (note 1), 273.

an international organization.[108] While Part XI does not contain a definition, the term 'budget' as used in the context of the United Nations is commonly understood as referring to 'legal acts to authoritatively estimate an organization's income and expenditures in order to provide for its accountability to the governments and parliamentary organs of States Members'.[109] As the budgetary provisions for the Authority are, at least in part, guided by those of the United Nations, this definition seems appropriate in the context of Art. 160 (2)(h). The procedure is as follows:[110] The Secretary-General drafts the proposed budget and sends it to the Council, with recommendations from the Finance Committee. Once the Council has considered both the proposed budget and the recommendations of the Finance Committee,[111] it submits the budget and its own recommendations to the Assembly for approval (→ Art. 162 (2)(r)). The decision of the Assembly must be based on the recommendations of the Council.[112] If the Assembly does not approve the recommendations of the Council, it returns the matter to the Council, which will reconsider the matter in the light of the views expressed by the Assembly.[113] Notably, all relevant provisions, including those of the 1994 Implementation Agreement,[114] refer to an 'annual budget' of the Authority. In practice, the Authority adopted its budgets annually only until 2000. Since then, the Authority has, for 'reasons of efficiency and cost-effectiveness',[115] adopted two **separate** annual budgets at the same time.[116] The proposed budgets for 2017 and 2018 were USD 9 068 300 and USD 8 898 600, respectively.[117]

18 **i) '[…] to examine periodic reports from the Council and from the Enterprise and special reports requested from the Council or any other organ of the Authority […]'.** The Assembly examines, pursuant to Art. 160 (2)(i), reports submitted to it by the other organs of the Authority. In particular, this includes periodic (in practice annual) reports from the Council (→ Art. 162 (2)(h)). Moreover, the Enterprise submits periodic (annual) reports to the Council for consideration (→ Annex IV Art. 9 (1)), which then transmits them to the Assembly with its own recommendations (→ Art. 162 (2)(g)). In addition to these periodic reports, the Assembly has the power to request special reports from the Council[118] or any other organ of the Authority.[119] All reports are subject to the Authority's competence to discuss any question or matter within the competence of Authority in accordance with Art. 160 (2)(n),[120] with special consideration given to the problems of certain groups of States as prescribed by Art. 160 (2)(k).[121] For this reason, Wildberg has compared the Assembly's powers under Art. 160 (2)(i) to a 'right of interpellation', a common parliamentary power in domestic legal systems.[122]

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[108] *Klaus Dicke*, Deciding upon the Budget of the United Nations: A Comparison, in: *Rüdiger Wolfrum* (ed.), Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Régime, Proceedings of an Interdisciplinary Symposium of the Kiel Institute of the International Law, July 10 to 14, 1990 (1991), 189, 193.

[109] *Ibid.*

[110] For a detailed discussion of the procedure prior to the conclusion of the 1994 Implementation Agreement, see *ibid.*, 205 *et seq.*

[111] S. 3 (7) and 9 (7)(c) Annex to the 1994 Implementation Agreement. See also Rule 93 Rules of Procedures of the Assembly.

[112] S. 3 (4) Annex to the 1994 Implementation Agreement. See also Rule 61 (3) Rules of Procedures of the Assembly.

[113] *Ibid.*

[114] S. 9 (7)(c)-(d) Annex to the 1994 Implementation Agreement.

[115] *Wood* (note 42), 71.

[116] Regulation 2 Financial Regulations of the International Seabed Authority. See, for example, the proposal for the most recent budget: ISA, Proposed Budget for the International Seabed Authority for the Financial Period 2017–2018, ISBA Doc. ISBA/22/A/6–ISBA/22/C/9 (2016).

[117] *Ibid.*; for an overview of budget developments between 2000 and 2008, see *Wood* (note 42), 72.

[118] See also Art. 162 (2)(h).

[119] For a discussion of the organs and subsidiary organs of the Authority, see *Schatz* on Art. 158 MN 4 *et seq.*

[120] See *infra*, MN 25.

[121] See *infra*, MN 20.

[122] *Hans Jürgen Wildberg*, Die internationale Meeresbodenbehörde (ISA): Ihre rohstoffwirtschaftliche Aufgabe, entwicklungspolitische Bedeutung und der Entwurf durch die Dritte Seerechtskonferenz (1978), 107.

j) '[…] to initiate studies and make recommendations for the purpose of promoting international cooperation concerning activities in the Area and encouraging the progressive development of international law relating thereto and its codification […]'. Art. 160 (2)(j) highlights an issue of particular importance for the Authority, namely to initiate studies and make recommendations for the purpose of (1) promoting international cooperation concerning activities in the Area, and (2) encouraging the progressive development of international law relating thereto and its codification. This wording is similar to Art. 13 (1)(a) UN-Charter and shares its distinction of 'progressive development' and 'codification' of international law.[123] Notably, UNCLOS III, which led to the conclusion of UNCLOS and the drafting of Art. 160 (2)(j), itself can be placed in the context of 'progressive development' and 'codification' pursuant to Art. 13 (1)(a) UN-Charter.[124] According to WOLFRUM, 'codification' refers to the evaluation and systematization of pre-existing rules of international law in its entirety, whereas 'progressive development' denotes the establishment of new rules.[125] Yet, the distinction between these two concepts in the context of international law is both versatile and elusive.[126] Whereas the United Nations General Assembly has established, *inter alia*, the International Law Commission (ILC) to fulfil this role, Art. 160 (2)(j) does not indicate how this function of the Assembly of the Authority should be implemented. But it seems reasonable to assume that the Assembly can make use of its power to establish new subsidiary organs pursuant to Art. 160 (2)(d) and create a body with tasks which resemble those of the ILC,[127] albeit limited to the context of 'activities in the Area'. That said, given the independent legislative competence of the Authority with regard to 'activities in the Area', it is unlikely that Art. 160 (2)(j) will gain similar importance to the Authority as Art. 13 (1)(a) did for the United Nations.[128] Nonetheless, as WOLFRUM rightly points out, Art. 160 (2)(j) is, despite its limited practical perspective, an expression of the purpose of the Authority to contribute to the legal framework appertaining to the administration of the Area; and to do so as an intergovernmental organization which was established to represent mankind.[129] 19

k) '[…] to consider problems of a general nature in connection with activities in the Area […]'. Whereas Art. 160 (2)(n) establishes a right of the Assembly to discuss any question or matter within the competence of Authority,[130] Art. 160 (2)(k) expressly requires the Assembly to consider 'problems of a general nature in connection with activities in the Area'. Special consideration must be given to problems 'arising […] for developing States' and 'problems for States in connection with activities in the Area that are due to their geographical location, particularly for land-locked and geographically disadvantaged States'. The discussion of these problems in the Assembly is not limited to periodic reports submitted by the Council or the Enterprise pursuant to Art. 160 (2)(i),[131] but also involves a proactive right of the Assembly to engage in these issues.[132] 20

l) '[…] to establish […] a system of compensation or other measures of economic adjustment assistance as provided in article 151, paragraph 10 […]'. Pursuant to Art. 160 (2)(l), the Assembly establishes a 'system of compensation or other measures for economic 21

[123] *Wolfrum* (note 20), 534. For details on the drafting history of Art. 13 (1)(a) UN-Charter as the 'model' for Art. 160 (2)(j), see *Carl-August Fleischhauer/Bruno Simma*, Article 30, in: Bruno Simma/Daniel-Erasmus Khan/Georg Nolte/Andreas Paulus (eds.), The Charter of the United Nations: A Commentary, vol. I (3rd edn. 2012), MN 7 *et seq*.

[124] See *Fleischhauer/Simma* (note 123), MN 72 *et seq*.

[125] *Wolfrum* (note 20), 534.

[126] *Ibid*.

[127] *Ibid*., 535.

[128] *Ibid*.

[129] See *ibid*., with a reference to Art. 137 (2).

[130] See *infra*, MN 25.

[131] See *supra*, MN 18.

[132] *Wolfrum* (note 20), 534.

adjustment assistance' as provided in Art. 151 (10). Art. 151 (10) deals with the compensation of developing States for the adverse economic effects on the land-based exploitation of mineral resources resulting from activities in the Area.[133] Importantly, however, the compensation regime of Part XI, including Art. 160 (2)(l), has been modified by the 1994 Implementation Agreement and must be interpreted accordingly.[134] First, whereas Art. 160 (2)(l) mentions 'a system of compensation' and 'other measures of economic adjustment assistance', the system of compensation **must** now be based on an 'economic assistance fund' which consists of the means exceeding those necessary to cover the administrative expenses of the Authority.[135] Therefore, the 'compensation fund' originally foreseen for the purposes of Art. 151 (10) (→ Art. 171 (f)) has been replaced. The sources of the new 'economic assistance fund' are in line with Art. 173 (2)(c).[136] Second, the economic assistance fund is meant to assist **developing** land-based producer States whose economies have been determined to be seriously affected by the production of minerals from the deep seabed.[137] Thus, the compensation scheme is not preventive or, indeed, speculative; it will take effect only **after** adverse effects have occurred.[138] Third, whereas Art. 151 (10) provides that the measures to be taken may include 'cooperation with specialized agencies and other international organizations', it must now be read as **requiring**, where appropriate, that compensation is carried out in cooperation with existing global or regional development institutions which have the infrastructure and expertise to carry out such assistance programmes.[139] Finally, the extent and period of such assistance will be determined on a case-by-case basis, taking into consideration the nature and magnitude of the problems encountered by the affected developing land-based producer States.[140] It may be concluded that most of the original discretion of the Authority in establishing a system of compensation has vanished with the conclusion of the 1994 Implementation Agreement.[141]

22 The procedure for the adoption of legislation pursuant to Art. 160 (2)(l) is as follows: The Council will obtain advice from the Economic Planning Commission (→ Art. 164 (2)(d)), whose functions are currently being carried out by the Legal and Technical Commission,[142] and the recommendations of the Finance Committee[143] before submitting all recommendations to the Assembly for decision (→ Art. 162 (2)(n)).[144] If the Assembly does not accept the recommendations of the Council, it will return the matter to the Council for further consideration. The Council will then reconsider the matter in the light of the views expressed by the Assembly.[145] As far as the implementation is concerned, the amount of funds to be set aside for the economic assistance fund will be determined by the Council from time to time,

[133] See *Siegfried* on 151 MN 9 *et seq.*; see also *D. H. Anderson*, Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment, ZaöRV 55 (1995), 275, 287 *et seq.*, who is critical of the term 'compensation' in the context of 'assistance' received from the proceeds of mining.

[134] S. 7 (2) Annex to the 1994 Implementation Agreement.

[135] Sec. 7 (1)(a) Annex to the 1994 Implementation Agreement. The economic assistance fund has been set up by Regulation 5 (8) Financial Regulations of the International Seabed Authority.

[136] In particular, the coverage of the administrative expenses of the Authority is a priority before any funds can be made available. See also Reg. 5 (7)(c), (8) Financial Regulations of the International Seabed Authority. See further *Ferrara* on Art. 173 MN 6 *et seq.*

[137] S. 7 (1)(b) Annex to the 1994 Implementation Agreement.

[138] See *Siegfried* on Art. 151 MN 9.

[139] S. 7 (1)(c) Annex to the 1994 Implementation Agreement.

[140] S. 7 (1)(d) Annex to the 1994 Implementation Agreement.

[141] In agreement with *Ferrara* on Art. 171 MN 14.

[142] S. 1 (4) Annex to the 1994 Implementation Agreement.

[143] S. 3 (7) and 9 (7) Annex to the 1994 Implementation Agreement. See also Rule 61 (4) Rules of Procedures of the Assembly.

[144] S. 3 (4) Annex to the 1994 Implementation Agreement. See also Rule 61 (3) Rules of Procedures of the Assembly.

[145] *Ibid.*

upon the recommendation of the Finance Committee, and may only consist of funds from payments received from contractors, including the Enterprise, and voluntary contributions.[146]

m) '[…] to suspend the exercise of rights and privileges of membership pursuant to article 185 […]'. Art. 160 (2)(m) confers upon the Assembly a power to suspend the exercise of rights and privileges of membership in the Authority if a State Party 'has grossly and persistently violated the provisions of [Part XI]' (→ Art. 185 (1)).[147] As can be deduced from the wording of Art. 185 (1), the threshold of 'gross' and 'persistent' is rather high and requires not only severe, but also either multiple or continuing violations. In order to trigger the Assembly's right, the conduct of States Parties must either violate provisions of Part XI, the Annexes (→ Art. 318), or the 1994 Implementation Agreement.[148] In addition, the Assembly is prevented from suspending the exercise of rights and privileges of membership until the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has confirmed that the requirements of Art. 185 (1) are fulfilled (→ Art. 185 (2)).[149] While Art. 185 (2) aims to safeguard the rights of individual member States and minorities in the Assembly,[150] it also renders the prospect of practice under Art. 160 (2)(m) highly unlikely.[151] The suspension of rights and privileges does not involve the suspension of obligations arising out of membership.[152] As far as the procedure is concerned, the Assembly acts 'upon the recommendation of the Council' (→ Art. 162 (2)(t)). It has been argued, prior to the conclusion of the 1994 Implementation Agreement, that the wording implies that the Assembly may also take action in the absence of such a recommendation.[153] According to the modified decision-making procedure, however, the Assembly must base its decision on the recommendations of the Council.[154] If the Assembly declines to adopt the recommendation of the Council, it will return the matter to the Council for further consideration. The Council will then reconsider the matter in the light of the views expressed by the Assembly.[155] 23

In addition to the optional sanction envisaged by Art. 185, a State Party which is in arrears in the payment of its financial contributions to the Authority **automatically**, i. e. *de iure*, loses its right to vote in the Assembly (→ Art. 159 (6)) if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years (→ Art. 184).[156] Art. 160 (2)(m) makes no reference to Art. 184 despite the fact that this provision confers upon the Assembly the power to permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member. Importantly, members which have forfeited their right to vote may, arguably, still be counted towards the quorum in the Assembly (→ Art. 159 (5)).[157] When it comes to voting, however, they have to be discounted for the purposes of calculating 'a majority of the members present **and voting**' (→ Art. 159 (7)–(8)). 24

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[146] Reg. 5 (8) Financial Regulations of the International Seabed Authority.

[147] See also Rule 81 Rules of Procedures of the Assembly.

[148] See S. 2 (1) Annex to the 1994 Implementation Agreement. For a description of the legal framework of the Authority as a whole, see *Schatz* on Art. 156 MN 7 *et seq*.

[149] See *Ferrara* on Art. 185 MN 6.

[150] Art. 160 (2)(m) concerns questions of substance within the meaning of Art. 159 (8). Consequently, decisions under Art. 160 (2)(m) require consensus or a qualified two-thirds majority. See further *Schatz* on Art. 159 MN 13.

[151] See also *Ferrara* on Art. 185 MN 7.

[152] See, for an earlier draft, *Wildberg* (note 122), 108.

[153] According to *Wolfrum* (note 20), 535, this fact distinguishes Art. 160 (2)(m) from Art. 5 UN-Charter.

[154] S. 3 (4) Annex to the 1994 Implementation Agreement. See also Rule 61 (3) Rules of Procedures of the Assembly.

[155] *Ibid*.

[156] See also Rule 80 Rules of Procedures of the Assembly.

[157] See also *Ferrara* on Art. 184 MN 6. For details on the quorum, see *Schatz* on Art. 159 MN 9.

25 **n) '[…] to discuss any question or matter within the competence of the Authority and to decide as to which organ of the Authority shall deal with any such question or matter not specifically entrusted to a particular organ […]'.** Pursuant to Art. 160 (2)(n), the Assembly may discuss any question or matter within the competence of Authority irrespective of whether it is the organ to which this competence has been attributed.[158] This is an expression of the formal supremacy of the Assembly as the plenary organ in which all members of the Authority meet and discuss.[159]

26 In those cases in which it is possible to establish with certainty that a question or matter has not been specifically entrusted by UNCLOS to a particular organ, the Assembly can, pursuant to Art. 160 (2)(n), entrust the competence over the question or matter to an organ of the Authority. This 'competence of attribution of competences' flows from the formal status of the Assembly as the supreme organ of the Authority as envisaged by Art. 160 (1).[160] At the same time, Art. 160 (2)(n) expressly acknowledges that there are (or at least may be) questions and matters within the competence of the Authority which do not fall under the competence of a particular organ. Naturally, the relevance of such a provision depends on the amount and importance of non-attributed powers and functions within the relevant regime. Any attribution of competence by the Assembly must be 'consistent with the distribution of powers and functions among the organs of the Authority'. This is a reference to the general principle of separation of powers and functions as one of the fundamental principles underlying the functioning of the Authority and, indeed, any international organization (→ Art. 158 (4)).[161] Importantly, as long as all requirements are fulfilled, there is nothing in Art. 160 (2)(n) which would stop the Assembly from attributing such powers and functions **to itself**.[162]

Subsection C
The Council

Article 161
Composition, procedure and voting

1. The Council shall consist of 36 members of the Authority elected by the Assembly in the following order:

(a) **four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world consumption or have had net imports of more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one State from the Eastern European (Socialist) region, as well as the largest consumer;**

(b) **four members from among the eight States Parties which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one State from the Eastern European (Socialist) region;**

(c) **four members from among States Parties which on the basis of production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies;**

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[158] In that regard, Art. 160 (2)(n) resembles Art. 10 UN-Charter. See *Wolfrum* (note 20), 534.
[159] *Paolillo* (note 2), 244 *et seq.*
[160] *Ibid.*, 245.
[161] *Hauser* (note 2), 66.
[162] *Paolillo* (note 2), 245 *et seq.*

(d) six members from among developing States Parties, representing special interests. The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States;

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose, the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western European and Others.

2. In electing the members of the Council in accordance with paragraph 1, the Assembly shall ensure that:

(a) land-locked and geographically disadvantaged States are represented to a degree which is reasonably proportionate to their representation in the Assembly;

(b) coastal States, especially developing States, which do not qualify under paragraph 1(a), (b), (c) or (d) are represented to a degree which is reasonably proportionate to their representation in the Assembly;

(c) each group of States Parties to be represented on the Council is represented by those members, if any, which are nominated by that group.

3. Elections shall take place at regular sessions of the Assembly. Each member of the Council shall be elected for four years. At the first election, however, the term of one half of the members of each group referred to in paragraph l shall be two years.

4. Members of the Council shall be eligible for re-election, but due regard should be paid to the desirability of rotation of membership.

5. The Council shall function at the seat of the Authority, and shall meet as often as the business of the Authority may require, but not less than three times a year.

6. A majority of the members of the Council shall constitute a quorum.

7. Each member of the Council shall have one vote.

8. (a) Decisions on questions of procedure shall be taken by a majority of the members present and voting.

(b) Decisions on questions of substance arising under the following provisions shall be taken by a two-thirds majority of the members present and voting, provided that such majority includes a majority of the members of the Council: article 162, paragraph 2, subparagraphs (f); (g); (h); (i); (n); (p); (v); article 191.

(c) Decisions on questions of substance arising under the following provisions shall be taken by a three-fourths majority of the members present and voting, provided that such majority includes a majority of the members of the Council: article 162, paragraph 1; article 162, paragraph 2, subparagraphs (a); (b); (c); (d); (e); (l); (q); (r); (s); (t); (u) in cases of non-compliance by a contractor or a sponsor; (w) provided that orders issued thereunder may be binding for not more than 30 days unless confirmed by a decision taken in accordance with subparagraph (d); article 162, paragraph 2, subparagraphs (x); (y); (z); article 163, paragraph 2; article 174, paragraph 3; Annex IV, article 11.

(d) Decisions on questions of substance arising under the following provisions shall be taken by consensus: article 162, paragraph 2(m) and (o); adoption of amendments to Part XI.

(e) For the purposes of subparagraphs (d), (f) and (g), "consensus" means the absence of any formal objection. Within 14 days of the submission of a proposal to the Council, the President of the Council shall determine whether there would be a formal objection to the adoption of the proposal. If the President determines that there would be such an objection, the President shall establish and convene, within

three days following such determination, a conciliation committee consisting of not more than nine members of the Council, with the President as chairman, for the purpose of reconciling the differences and producing a proposal which can be adopted by consensus. The committee shall work expeditiously and report to the Council within 14 days following its establishment. If the committee is unable to recommend a proposal which can be adopted by consensus, it shall set out in its report the grounds on which the proposal is being opposed.

(f) **Decisions on questions not listed above which the Council is authorized to take by the rules, regulations and procedures of the Authority or otherwise shall be taken pursuant to the subparagraphs of this paragraph specified in the rules, regulations and procedures or, if not specified therein, then pursuant to the subparagraph determined by the Council if possible in advance, by consensus.**

(g) **When the issue arises as to whether a question is within subparagraph (a), (b), (c) or (d), the question shall be treated as being within the subparagraph requiring the higher or highest majority or consensus as the case may be, unless otherwise decided by the Council by the said majority or by consensus.**

9. The Council shall establish a procedure whereby a member of the Authority not represented on the Council may send a representative to attend a meeting of the Council when a request is made by such member, or a matter particularly affecting it is under consideration. Such a representative shall be entitled to participate in the deliberations but not to vote.

Bibliography: *A. O. Adede*, The Group of 77 and the Establishment of the International Sea-Bed Authority, ODIL 7 (1979), 31–64; *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001); *Betzy Ellingsen Tunold*, The Deep Sea-Bed Regime: An Introduction to Major Problems. Innovation or Perpetuation of the Status Quo?, in: Albert W. Koers/Bernard H. Oxman (eds.), The 1982 Convention on the Law of the Sea. Proceedings Law of the Sea Institute Seventeenth Annual Conference Co-Sponsored by Fridtjof Nansen Institute, July 13–16, 1983, Oslo, Norway (1984), 110–144; *Paul Bamela Engo*, Issues of First Committee at UNCLOS III, in: Albert W. Koers/Bernard H. Oxman (eds.), The 1982 Convention on the Law of the Sea. Proceedings Law of the Sea Institute Seventeenth Annual Conference Co-Sponsored by Fridtjof Nansen Institute, July 13–16, 1983, Oslo, Norway (1984), 33–52; *Euripides L. Evriviades*, The Third World's Approach to the Deep Seabed, ODIL 11 (1982), 201–264; *James Harrison*, Making the Law of the Sea: A Study in the Development of International Law (2011); *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the agreement relating to the implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin/Michael Bothe/Rainer Hofmann/Ernst-Ulrich Petersmann (eds.), Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt (1995), 120–134; *Satya Nandan*, Administering the Mineral Resources of the Deep Seabed, in: David Freestone/Richard Barnes/David M. Ong (eds), The Law of the Sea: Progress and Prospects (2006), 75–92; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Roderick C. Ogley*, Internationalizing the Seabed (1984); *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135–337; *Moragodage Christopher Walter Pinto*, The Common Heritage of Mankind: Then and Now, RdC 361 (2012), 9–129; *Elliot L. Richardson*, Decision Making in the International Seabed Authority, Marine Policy 5 (1981), 256–260; *P. Sreenivasa Rao*, Structure and Powers of the International Seabed Authority, in: Ram Prakesh Anand (ed.), Law of the Sea: Caracas and Beyond (1978), 277–292; *Klaus Dieter Wolf*, Die Dritte Seerechtskonferenz der Vereinten Nationen. Beiträge zur Reform der internationalen Ordnung und Entwicklungstendenzen in Nord-Süd-Verhältnis (1981); *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984); *Rüdiger Wolfrum*, The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organisations?, ZaöRV 55 (1995), 310–328; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173–241; *Michael C. Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007) 47–98

Documents: ISA, Rules of Procedures of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in ISA, Basic Texts (2nd ed. 2012), 4–31; ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in ISA, Basic Texts (2nd ed. 2012), 32–54; ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (1997); ISA, Election to Fill Vacancies in the Council for the Period 2017 to 2020 in Accordance with Article 161, Paragraph 3 of the Convention –

Note by the Secretariat, ISA Doc. ISBA/22/A/CRP.1 (2016); ISA, Indicative List of States Members of the International Seabed Authority Which Would Fulfil the Criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 Section 3 of the Annex to the Agreement to the Implementation of Part XI of the United Nations Convention on the Law of the Sea Of 10 December 1982, ISA Doc. ISBA/22/A/CRP.2 (2016)

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I. Purpose and Function

The Council is the executive body of the International Seabed Authority (ISA or the Authority).[1] Where the latter as a whole should be the representative of humankind, as far as the mining of marine mineral resources beyond national jurisdiction is concerned, it is especially the Assembly that takes up this role within the Authority. As within many other international organisations, the functioning of the Authority can best be understood emphasising the interconnectedness of the Council and the Assembly. Art. 161 embodies rather the interests of different groups of States than the representation of the humankind in general. This division in groups results in a difficult process of decision-making. It is to be seen as a trade-off between developing and developed States. The former accepted the emphasis on representation of particular economic interests in the Council, where the latter accepted the Assembly as the supreme organ of the Authority where all members would be represented.[2] **1**

The total of 36 seats in the Council needs to be divided in such a manner that half of the seats represent States with particular interests. The other half should be filled in a way that balances the geographical reflection of the Council overall, according to the five major groups of the United Nations.[3] The particular interests to be represented are those of States with the largest consumption of the minerals to be derived from the Area, States with the largest investment in deep sea mining, major exporters of minerals to be derived from the Area and developing States. The members of the latter group shall represent special interests of States with a large population, land-locked or geographically disadvantaged States, island States, major importers of minerals to be derived from the Area, potential producers of such minerals and least developed States. **2**

It is up to the Assembly of the International Seabed Authority to elect the members of the Council.[4] In addition to the requirements in the first paragraph of Art. 161, the second paragraph provides that land-locked and geographically disadvantaged States as well as coastal States that have none of the particular interests listed should be represented in the Council in a similar proportion as they are in the Assembly, provided that this is reasonable. Members of the Council are elected for four years. At the first election in 1996, half of the members was elected for two years in order to have some continuance in the membership of the Council.[5] **3**

[1] Art. 162 (1).

[2] Arts. 160 (1) & 159 (1). See *Betzy Ellingsen Tunold*, The Deep Sea-Bed Regime: An Introduction to Major Problems. Innovation or Perpetuation of the Status Quo?, in: Albert W. Koers/Bernard H. Oxman (eds.), The 1982 Convention on the Law of the Sea. Proceedings Law of the Sea Institute Seventeenth Annual Conference Co-Sponsored by Fridtjof Nansen Institute, July 13–16, 1983, Oslo, Norway (1984), 110, 125.

[3] For information on the implementation of geographical distribution in recent years, see ISA, Election to fill vacancies in the Council for the Period 2017 to 2020 in accordance with Article 161, Paragraph 3 of the Convention – Note by the Secretariat, ISA Doc. ISBA/22/A/CRP.1 (2016).

[4] Art. 160 (2)(a).

[5] Art. 161 (3).

Re-election is possible but States should take into account that rotation might be desirable. Each group with particular interests should only nominate so many candidates as there are seats available for this particular group. When, however, there are more potential candidates than seats, the principle of rotation shall apply. How this is given effect is to be determined within the groups itself.[6] The system of rotation reflects the principle of sovereign equality.[7]

4 A majority of the members of the Council needs to be present in order for a vote to take place. Yet, in general, the organs of the Authority should take their decisions by consensus.[8] If consensus cannot be reached, procedural questions will be decided by simple majority. Substantial questions will be decided by a two-thirds majority, except where the Convention requires consensus. Moreover, a vote on substantial questions should also have a majority in any of the chambers of the Council. These chambers are based on the different groups with particular interests in the Council. Interestingly, the Council shall promote the interests of all members of the Authority in its decision-making.[9] This reminder appears to encourage considerations that go beyond these of the 36 members of the Council but it is far from certain that this constitutes a legal obligation or even an enforceable legal obligation.[10] In any case, a member of the Authority not occupying a seat on the Council may, upon request by this member, attend Council meetings or if the matter discussed affects this particular member. Participation in the deliberations by this member is allowed, voting, however, is not.[11] Moreover, observers in the Assembly have the same rights in the Council. This may be non-member States, international organisations, non-governmental organisations and the entities listed in Art. 305 of the Convention.[12]

II. Historical Background

5 During UNCLOS III, and before that in the Seabed Committee, almost all proposals for how an International Seabed Authority should look like included an Assembly and a Council.[13] This might not come as a surprise when one has a quick glance at the structure of other international organisations. Yet, for a long time the creation of both an Assembly and a Council was as much agreement as could be reached during the negotiations. An Assembly would have one seat for every member and the Council would have a smaller amount of seats for States with particular interest, making it a workable, executive body. Developing States would have a majority in the Assembly and wanted, as a consequence, the Assembly to be the supreme organ of the Authority. Technologically more advanced States preferred the Council as the responsible organ for the main issues of the international machinery.[14] The result is regarded by many as one of the most complex articles of the Convention.[15] The Chairman of

[6] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3, Annex, S. 3, para. 10.

[7] *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135, 223.

[8] 1994 Implementation Agreement, Annex, S. 3, para. 2.

[9] 1994 Implementation Agreement, Annex, S. 3, para. 5.

[10] *James Harrison*, Making the Law of the Sea: A Study in the Development of International Law (2011), 125.

[11] Art. 161 (9). One author regards this as a reflection of the principle of sovereign equality: *Paolillo* (note 7), 223.

[12] ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in: ISA, Basic Texts (2nd edn. 2012), 32–54, Rule 75; ISA, Rules of Procedures of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in: *ibid.*, 4–31, Rule 82. These observers are listed on the website of the ISA: The Authority, Organs of the Authority, Assembly, Observers: http://www.isa.org.jm/observers.

[13] *P. Sreenivasa Rao*, Structure and Powers of the International Seabed Authority, in: Ram Prakesh Anand (ed.), Law of the Sea: Caracas and Beyond (1978), 277, 280.

[14] *Ibid.*, 281.

[15] See, among others, Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 431.

the First Committee of UNCLOS III, the committee responsible for the negotiation of the deep sea mining regime, recalls after the adoption of the Convention that the current Art. 161 was the only set of provisions 'that achieved consensus, and then only after resolution of other matters had opened the way for realism on this issue.'[16]

Many of the characteristics of the current composition and decision-making mechanism in the Council can be traced to proposals discussed in the Seabed Committee. The United States proposed already in 1970 that the Council should represent the industrially most advanced States, developing States and also land-locked and geographically disadvantaged States. Voting would take place according to a chamber system.[17] In 1970 the United States also proposed the provision that is currently Art. 161 (9).[18] The Soviet Union included the need for geographical distribution in its provisional articles. Voting should take place by agreement.[19] Tanzania and thirteen Latin American States opposed any proposals for a veto.[20] Developing States saw a veto power as a violation of the principles of universal representation and sovereign equality and as being antithetical to the concept of common heritage of humankind.[21] There was no attempt to find a compromise between the proposals in 1973.[22] **6**

During the Third Session, the balance between the seats mentioned in Art. 161 (1)(a)-(d) on the one hand and Art. 161 (1)(e) on the other evolved with eighteen being the result.[23] Between the Third and the Fourth Sessions, the United States proposed amendments to the Informal Single Negotiating Text[24]. Among them was the suggestion of different interest groups. Art. 161 (1)(a)-(d) reflect these groups to a large extent.[25] Developing States opposed the wishes of the United States.[26] After the Sixth Session, it became clear that a deal on the deep sea mining regime could only be reached when the developed States would be satisfied.[27] At the Seventh Session in 1978, the amount of seats in the Council was fixed at 36.[28] Among other issues, the feeling was then that matters of substance should be decided by two-thirds majority.[29] **7**

In the summer of 1979, at the resumed Eighth Session, the negotiators came to the conclusion that none of the known veto systems within the United Nations system would be acceptable regarding the regime for mining in the deep sea.[30] A year later, at the resumed Ninth Session, the Federal Republic of Germany, France, Japan, the United Kingdom and the **8**

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[16] *Paul Bamela Engo*, Issues of First Committee at UNCLOS III, in: Koers/Oxman (note 2), 33, 47.

[17] Sea-Bed Committee, USA: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), cited in: GAOR 25th Sess. Suppl. 21 (A/8021), Arts. 36 & 38.

[18] *Ibid.*, Art. 39.

[19] Sea-Bed Committee, USSR: Provisional Draft of a Treaty on the Use of the Sea-bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-VI), Arts. 21–23.

[20] Sea-Bed Committee, Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-VI); Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-II).

[21] *Rao* (note 13), 281.

[22] Sea-Bed Committee, Report of Sub-Committee I, Annex III: Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), reproduced in: GAOR 28th Sess. Suppl. 21 (A/9021-II), 39 *et seq.*

[23] Nordquist/Nandan/Rosenne (note 15), 421.

[24] UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137–181.

[25] UNCLOS III, Proposed Amendments to the Committee I Single Negotiating Text (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 153, 159.

[26] Nordquist/Nandan/Rosenne (note 15), 422.

[27] *Ibid.*, 424.

[28] UNCLOS III, Report to the First Committee on the Work of Negotiating Group 3, UN Doc. NG3/2 (1978, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IX (1986), 264, 266.

[29] *Ibid.*, 269.

[30] UNCLOS III, Report on Negotiations Held by the Chairman and Co-ordinators of the Working Group of 21 UN Doc. A/CONF.62/C.1/L.26 (1979), OR XII, 77 *et seq.*

United States continued to have a collective blocking power 'on an issue critical to those interests', those interests being the fact that their companies and consortia would likely invest billions of dollars in mining the deep seabed.[31]

9 In the end, it was Ambassador Tommy Koh of Singapore who was able to broker the compromise that is now laid down in Art. 161.[32] Yet, this did not mean that matters of decision-making were ultimately resolved. In the consultations after the adoption of the Convention in 1982 concerning the set-up of the Authority, confidence in the system for deep sea mining strongly depended on the general acceptance of the manner in which decisions were to be made in the organs of the Authority.[33] The support of the developed States that did not ratify the Convention was still to be won. As a consequence, the 1994 Agreement Relating to the Implementation of Part XI of Convention gave these States an even larger power in the Council in the form of a blocking vote. In other words, the power of the Council increased relative to the 1982 Convention.[34]

III. Elements

1. Composition

10 Although the 1994 Implementation declares Art. 161 (1) inapplicable, the groups represented in the Council do not change in substance.[35] Regarding the group of States with the highest consumption, the 1994 Agreement specifies the Convention in giving the guaranteed seat for the Eastern European group *de facto* to the Russian Federation and adding a guaranteed seat for the United States upon ratification of the Convention.[36] In exchange, the Eastern European group loses its guaranteed seat in the group of States Parties with the highest investment. The nomination of the members that represent a particular group occurs within that group itself.[37] Election by the Assembly is to be regarded as a 'mere formality', in this regard.[38] Nevertheless, the election of the first Council in 1996 turned out to be far from easy.[39] Subsequent elections have been less difficult.[40] The Assembly establishes the criteria for membership of the groups.[41] If a State fulfils the criteria for more than one group, this State will be included in the list of all the groups for which it qualifies but may be nominated by only one of these groups.[42]

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[31] UNCLOS III, Report of the Co-ordinators of the working group of 21 to the First Committee, UN Doc. A/CONF.62/C.1/L.28 and Add.1 (1980), OR XIV, 161, 170.

[32] Nordquist/Nandan/Rosenne (note 15), 404 and 431. See also *Roderick C. Ogley*, Internationalizing the Seabed (1984), 205–206.

[33] Nordquist/Nandan/Rosenne (note 15), 431–432.

[34] *Günther Jaenicke*, The United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention: Treaty Law Problems in the Process of Revising the Deep Seabed Mining Regime of the Convention, in: Ulrich Beyerlin *et al.* (eds.), Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt (1995), 120, 123.

[35] 1994 Implementation Agreement, Annex, S. 3, paras. 16 and 15.

[36] 1994 Implementation Agreement, Annex, S. 3, para. 15(a).

[37] Art. 161 (2)(c) UNCLOS and 1994 Implementation Agreement, Annex, S. 3, para. 10.

[38] Nordquist/Nandan/Rosenne (note 15), 406.

[39] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (1997), para. 14; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999) 173, 201–208.

[40] *Michael C. Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007) 47, 65–66.

[41] 1994 Implementation Agreement, Annex, S. 3, para. 9(b).

[42] 1994 Implementation Agreement, Annex, S. 3, para. 9(b); ISA Rules of Procedures of the Assembly (note 12), Rule 83(1). See also ISA, Indicative List of States Members of the International Seabed Authority Which Would Fulfil the Criteria for Membership in the Various Groups of States in the Council in Accordance with Paragraph 15 Section 3 of the Annex to the Agreement to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISA Doc. ISBA/22/A/CRP.2 (2016).

During UNCLOS III, one group of States felt disadvantaged by the current balance between Art. 161 (1)(a)-(d) on the one hand and Art. 161 (1)(e) on the other. States like Sweden, Switzerland, Austria, Portugal and Spain do not reach the level of industrialisation that would qualify them to be part of one of the groups with particular economic interest. They would have the opportunity to be elected approximately once in every sixty years because their only chance to become a member of the Council would be on the grounds of equitable geographical representation.[43] To resolve this issue, these States proposed to add two seats to the total amount of seats in the Council. The Chairman of the First Committee, however, was afraid that any adaptation of the delicate balance in favour of these States would change the amount of seats in the Council and consequently require renegotiation.[44] 11

Though mostly thought of as uniquely difficult, some authors see similarities between the composition of the Council of the Authority and other international organisations, for example the Board of Governors of the International Atomic Energy Agency.[45] The similarity derives from the fact that both organs represent groups with particular economic interest in an institutionalised manner. Concerning the Council of the Authority, the developing States were only willing to accept the representation of particular interests, something they were initially opposed to, on the condition that equitable geographical representation would be required as well.[46] 12

2. Procedure

According to Art. 161 (3), elections of members of the Council shall take place at regular sessions of the Assembly.[47] The Rules of Procedure of the Assembly clarify the distinction between regular and special sessions.[48] Art. 161 (5) requires the Council to meet at least three times a year. Following the fact that one of the goals of the 1994 Implementation Agreement is cost-effectiveness of the Authority, the obligatory amount of Council meetings is reduced.[49] The Rules of Procedure of the Council now prescribe that the 'Council shall meet in regular annual sessions unless it decides otherwise.'[50] 13

3. Voting

A majority of the members present establishes a quorum and each member of the Council has one vote according to the principle of sovereign equality among States.[51] During the consultations for the set-up of the Authority, States realised that a rather low amount of members could already take decisions that endanger the interests of a particular group under the rules of the Convention.[52] These considerations found their way into the 1994 Agreement, which changed the provision in the Convention concerning voting on questions of substance.[53] These questions shall be decided by two-thirds majority.[54] In addition, the 14

[43] *Paolillo* (note 7), 229.
[44] Nordquist/Nandan/Rosenne (note 15), 427.
[45] Art. VI Statute of the International Atomic Energy Agency of 23 October 1956 (entered into force 29 July 1957), 276 UNTS 3. See *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 549; *Moragodage Christopher Walter Pinto*, The Common Heritage of Mankind: Then and Now, RdC 361 (2012), 9, 72.
[46] This provision is now reflected in Art. 161 (1)(e) UNCLOS and 1994 Implementation Agreement, Annex, S. 3, para. 15(e).
[47] For an extensive coverage of the first election, see *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001), 299–307.
[48] ISA Rules of Procedures of the Assembly (note 12), Part I.
[49] Nordquist/Nandan/Rosenne (note 15), 419.
[50] ISA Rules of Procedures of the Council (note 12), Rule 1.
[51] Arts. 161 (6) and (7).
[52] Nordquist/Nandan/Rosenne (note 14), 432–433.
[53] 1994 Implementation Agreement, Annex, S. 3, para. 8.
[54] 1994 Implementation Agreement, Annex, S. 3, para. 5.

Agreement introduces four chambers in total in each of which a majority shall be in favour as well. The first chamber consists of the largest consumer States, the second of the States with the largest investment, the third of the States with the largest production in relevant minerals and the fourth of the developing States combined with the other half of the Council that assures the geographical balance.[55] Exceptions to this rule are decisions where the Convention requires consensus,[56] for instance, the case regarding policies mentioned in Arts. 82[57] and 150(h)[58], as well as the Mining Code[59] and the adoption of any amendments to Part XI of the Convention[60].[61] The requirement of different majorities for different questions appears similar to that for the Assembly.[62]

Consensus as used in Art. 161 is defined as the absence of any formal objection.[63] This begs the question what a formal objection is. States may object within fourteen days after the submission of a proposal. If this is done, the President of the Council shall establish and convene a conciliation commission of a maximum of nine members of the Council within three days after the initial two weeks. The President will chair the conciliation commission. It is the task of this commission to reconcile the differences and produce a proposal that can be adopted by consensus. Within fourteen days, the conciliation commission needs to report back to the Council. This report shall contain the grounds for objection if consensus cannot be reached.[64] One author suggests that this form of consensus might come closer to unanimity because there are no alternative rules in the absence of consensus.[65]

15 Any rules, regulations and procedure of the Authority outside the Convention might also require decision-making by the Council. Art. 161 (8)(f) uses the phrase '[d]ecisions on questions not listed above'. Since the 1994 Agreement declared these lists inapplicable,[66] this provision appears to be dealing with the distinction between questions of procedure and questions of substance. These rules, regulations or procedures then preferably contain a choice concerning the kind of voting that should take place regarding the particular issue. If this is not the case, then the Council needs to determine, if possible beforehand, which voting mechanism will be applied.[67] There might be disagreement about if a question is one of procedure or one of substance. The Convention then requires the highest majority or consensus to be chosen unless the Council decides with this highest majority or consensus that it proceeds otherwise.[68]

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[55] 1994 Implementation Agreement, Annex, S. 3, paras. 5 and 9(a).

[56] 1994 Implementation Agreement, Annex, S. 3, para. 5.

[57] Arts. 161 (8)(d) and 162 (2)(o)(i).

[58] Arts. 161 (8)(d) and 162 (2)(m).

[59] Arts. 161 (8)(d) and 162 (2)(o)(ii); 1994 Implementation Agreement, Annex, S. 1, paras. 15 and 16.

[60] Art. 161 (8)(d).

[61] ISA Rules of Procedures of the Council (note 12), Rule 58. Interestingly, the then Secretary-General of the Authority notes 'that over the first ten years of the existence of the Authority, all decisions on matters of substance in the Assembly, the Council and the two subsidiary bodies – the Legal and Technical Commission and the Finance Committee – have indeed been taken by consensus and therefore without the need for a vote'; *Satya Nandan*, Administering the Mineral Resources of the Deep Seabed, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006) 75, 82–83.

[62] 1994 Implementation Agreement, Annex, S. 3, para. 3.

[63] Art. 161 (8)(e); ISA Rules of Procedures of the Council (note 12), Rule 59. This might be the first definition of consensus in a treaty; *Paolillo* (note 7), 236; *Rüdiger Wolfrum*, The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organisations?, ZaöRV 55 (1995), 310, 319.

[64] Art. 161 (8)(e).

[65] *Harrison* (note 10), 125–126.

[66] 1994 Implementation Agreement, Annex, S. 3, para. 8.

[67] Art. 161 (8)(f).

[68] Art. 161 (8)(g).

Article 162
Powers and functions

1. The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

2. In addition, the Council shall:

(a) **supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance;**

(b) **propose to the Assembly a list of candidates for the election of the Secretary-General;**

(c) **recommend to the Assembly candidates for the election of the members of the Governing Board of the Enterprise and the Director-General of the Enterprise;**

(d) **establish, as appropriate, and with due regard to economy and efficiency, such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Part. In the composition of subsidiary organs, emphasis shall be placed on the need for members qualified and competent in relevant technical matters dealt with by those organs provided that due account shall be taken of the principle of equitable geographical distribution and of special interests;**

(e) **adopt its rules of procedure including the method of selecting its president;**

(f) **enter into agreements with the United Nations or other international organizations on behalf of the Authority and within its competence, subject to approval by the Assembly;**

(g) **consider the reports of the Enterprise and transmit them to the Assembly with its recommendations;**

(h) **present to the Assembly annual reports and such special reports as the Assembly may request;**

(i) **issue directives to the Enterprise in accordance with article 170;**

(j) **approve plans of work in accordance with Annex III, article 6. The Council shall act upon each plan of work within 60 days of its submission by the Legal and Technical Commission at a session of the Council in accordance with the following procedures:**

  (i) **if the Commission recommends the approval of a plan of work, it shall be deemed to have been approved by the Council if no member of the Council submits in writing to the President within 14 days a specific objection alleging non-compliance with the requirements of Annex III, article 6. If there is an objection, the conciliation procedure set forth in article 161, paragraph 8(e), shall apply. If, at the end of the conciliation procedure, the objection is still maintained, the plan of work shall be deemed to have been approved by the Council unless the Council disapproves it by consensus among its members excluding any State or States making the application or sponsoring the applicant;**

  (ii) **if the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may approve the plan of work by a three-fourths majority of the members present and voting, provided that such majority includes a majority of the members participating in the session;**

(k) **approve plans of work submitted by the Enterprise in accordance with Annex IV, article 12, applying, *mutatis mutandis*, the procedures set forth in subparagraph (j);**

(l) **exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority;**

(m) **take, upon the recommendation of the Economic Planning Commission, necessary and appropriate measures in accordance with article 150, subparagraph (h), to provide protection from the adverse economic effects specified therein;**

(n) **make recommendations to the Assembly, on the basis of advice from the Economic Planning Commission, for a system of compensation or other measures of economic adjustment assistance as provided in article 151, paragraph 10;**

(o) (i) **recommend to the Assembly rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82, taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status;**

(ii) **adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto, taking into account the recommendations of the Legal and Technical Commission or other subordinate organ concerned. These rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority. Priority shall be given to the adoption of rules, regulations and procedures for the exploration for and exploitation of polymetallic nodules. Rules, regulations and procedures for the exploration for and exploitation of any resource other than polymetallic nodules shall be adopted within three years from the date of a request to the Authority by any of its members to adopt such rules, regulations and procedures in respect of such resource. All rules, regulations and procedures shall 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;**

(p) **review the collection of all payments to be made by or to the Authority in connection with operations pursuant to this Part;**

(q) **make the selection from among applicants for production authorizations pursuant to Annex III, article 7, where such selection is required by that provision;**

(r) **submit the proposed annual budget of the Authority to the Assembly for its approval;**

(s) **make recommendations to the Assembly concerning policies on any question or matter within the competence of the Authority;**

(t) **make recommendations to the Assembly concerning suspension of the exercise of the rights and privileges of membership pursuant to article 185;**

(u) **institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance;**

(v) **notify the Assembly upon a decision by the Seabed Disputes Chamber in proceedings instituted under subparagraph (u), and make any recommendations which it may find appropriate with respect to measures to be taken;**

(w) **issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area;**

(x) **disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment;**

(y) **establish a subsidiary organ for the elaboration of draft financial rules, regulations and procedures relating to:**

(i) **financial management in accordance with articles 171 to 175; and**

(ii) **financial arrangements in accordance with Annex III, article 13 and article 17, paragraph 1(c);**

(z) **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.**

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Documents: ISA, Rules of Procedures of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in: ISA, Basic Texts (2nd edn. 2012), 4–31; ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in: ISA, Basic Texts (2nd edn. 2012), 32–54; ISA, Recommendation by the Council Relating to the Agreement Concerning the Relationship between the United Nations and the International Seabed Authority, ISA Doc. ISBA/3/C/4 (1997); ISA, Decision of the Assembly Relating to the Agreement Concerning the Relationship between the United Nations and the International Seabed Authority, ISA Doc. ISBA/3/A/3 (1997); ISA, Statement of the President on the Work of the Assembly during the Resumed Fourth Session, ISA. Doc. ISBA/4/A/18 (1998); ISA, Draft Regulations on Prospecting and Exploration for Cobalt Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/17/C/8 (2011); ISA, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, ISA Doc. ISBA/19/C/5 (2013); ISA, Outcomes of the International Workshop on Further Consideration of the Implementation of Article 82 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/19/A/4 (2013); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013); ISA, Consultations with the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, ISA Doc. ISBA/21/C/9 (2015); ISA, Agreement of Cooperation between the International Maritime Organization and the International Seabed Authority, ISA Doc. ISBA/21/C/10 (2015); ISA, Memorandum of Understanding between the International Seabed Authority and the Pacific Community – Note by the Secretariat, ISA Doc. ISBA/21/C/11 (2015); ISA, Decision of the Council of the International Seabed Authority Relating to the Procedures and Criteria for the Extension of an Approved Plan of Work for Exploration Pursuant to Section 1, Paragraph 9, of the Annex to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISA Doc. ISBA/21/C/19 (2015); ISA, Agreement of Cooperation between the International Seabed Authority and the International Hydrographic Organization – Note by the Secretary-General, ISA Doc. ISBA/22/C/6 (2016)

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I. Purpose and Function

1 In the case of the Authority, the supreme organ decides on the general policies and the executive organ on the specific policies. These organs are the Assembly and the Council, respectively.[1] The specific policies need to be in conformity with both the Law of the Sea Convention and the general policies but may consider any matter within the competence of the Authority. The 1994 Implementation Agreement strengthens the position of the Council even further by providing that the Assembly shall collaborate with the Council in its determination of the general policies.[2] The second paragraph of Art. 162 lists all other tasks of the Council.

2 The Convention does not categorise the tasks of the Council but general differentiation between kinds of responsibilities is recognisable. Many of the internal duties of the Council relate to the work of the Assembly, for instance. The Council shall make recommendations to the Assembly concerning policies on any matter within the competence of the Authority. Furthermore, it shall supervise and coordinate the deep sea mining regime and make the Assembly aware of any cases of non-compliance with the regime. In the name of the Authority, the Council shall exercise control over activities in the Area. The direction and supervision of inspectors involved in this control is subsequently also part of the role of the Council. It is also the Council that, on behalf of the Authority, can institute proceedings before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in cases of non-compliance.

3 Other internal tasks are the adoption of Rules of Procedures, the submission of a proposed annual budget of the Authority to the Assembly, the presentation of an annual report to the Assembly and special report on request and recommendation to the Assembly concerning suspension. It is significant that the Council has freedom to create subsidiary organs that it finds necessary to exercise its functions. A special organ for financial matters shall also be established. The 1994 Implementation Agreement fulfilled this through the establishment of the Finance Committee.[3]

4 Relationships between the Council and other organs involved in the governance of deep sea mining can be found in, for example, the duty to propose to the Assembly a list of candidates for the election of the Authority's Secretary-General. The Council shall notify the Assembly upon decisions of the Seabed Disputes Chamber and make recommendations for measures to be taken. One external duty of the Council is to enter into agreements with the United Nations and other international organisations on behalf of the Authority. This task is, however, subject to approval by the Assembly.

5 Regarding deep sea mining itself, the Council shall adopt the rules, regulations and procedures of the Authority relating to prospecting, exploration and exploitation in the Area, financial management and internal administration of the Authority and any amendments to them. Upon recommendation by the Legal and Technical Commission, the Council shall approve or disapprove plans of work for exploration and exploitation. The Council shall also review all the payments to be made by or to the Authority and recommend rules, regulations and procedure concerning the sharing of benefits derived from deep sea mining to the Assembly. The mere production of minerals from the deep seabed might negatively affect developing States. The Council is in charge of the means of compensation that will be available for these countries as economic adjustment assistance. If substantial evidence points in the direction of a serious risk for the marine environment, the Council shall disapprove areas for exploitation or issue emergency orders to, for example, suspend or adjust operations.

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[1] Arts. 160 (1) and 162 (1).

[2] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 28 July 1994 (entered into force 28 July 1996), 1836 UNTS 3, Annex, S. 3, para. 1.

[3] 1994 Implementation Agreement, Annex, S. 9, para. 9.

Last but not least, the Council has a few responsibilities towards the functioning of the Enterprise.[4] It shall recommend to the Assembly candidates for the election of the Director-General and members of the Governing Board of the Enterprise. Yet, more importantly, the Council shall issue directives to the Enterprise when the latter functions.[5] Also, it shall approve the Enterprise's plans of work, consider the reports of the Enterprise and transmit them to the Assembly with its recommendations. 6

II. Historical Background

During the negotiations in the Seabed Committee, many of the questions relating to the international machinery for deep sea mining turned around the distribution of powers between the Assembly and the Council. Developing States favoured the Assembly as the supreme policy-making organ but the developed States would only be willing to vest general powers in the Assembly and entrust the Council with specific powers.[6] Many proposals, both from developing and developed States, entailed that the Council in some form or another should be responsible for the rule-making process.[7] Some of the provisions proposed by the United States, for example the ability of the Council to establish subsidiary bodies and the issuance of emergency orders, survived the dozen years of negotiation from 1970 to 1982 more or less unchanged.[8] 7

The current Art. 162 is unmistakably recognisable in the Informal Single Negotiating Text of May 1975.[9] Art. 28 clearly resembles the current text. One year later, the contents of the current first paragraph were added.[10] Apparently, this was the interconnectedness between the Assembly and the Council where the negotiators could agree upon. A strict separation of the powers of these two organs or the one being supreme to the other turned out not to be an acceptable compromise.[11] What now forms Art. 162 (2)(r), (b) and (n) was added at the Sixth Session of UNCLOS III in 1977.[12] A year later, some delegations pointed out that provisions on the Council's dealings with financial matters did not yet appear in the text. As a solution, the Council was given the power to establish a subsidiary organ dealing with these matters in Art. 162 (2)(y).[13] 8

In the Convention, a close connection existed between the tasks of the Council as listed in Art. 162 (2) and the decision-making procedure on these issues as described in Art. 161 (8). With the current inapplicability of substantial parts of the latter due to the 1994 Implementation Agreement,[14] the link between the two articles seems loosened, at least on paper. Moreover, the 1994 Agreement fulfilled the duty of the Council laid down in Art. 162 (2)(y) 9

[4] At the moment of writing, the Enterprise has not yet been established.

[5] See also Art. 170 (2) UNCLOS and 1994 Implementation Agreement, Annex, S. 2, particularly para. 2.

[6] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 443.

[7] Sea-Bed Committee, USA: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), cited in: GAOR 25th Sess. Suppl. 21 (A/8021), Art. 40; Sea-Bed Committee, Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-VI), Art. 29; Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-II), Art. 32.

[8] USA Draft Convention (note 7), Art. 40.

[9] UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 142–143.

[10] UNCLOS III, Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8/REV.1/PART I** (1976), OR V, 125, 133.

[11] *Ibid.*, 127.

[12] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 29–30.

[13] UNCLOS III, Negotiating Group 2 Chairman's Suggested Compromise Formula on Financial Arrangements of the Enterprise, UN Doc. NG3/2 and Corr.1 (1978, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IX (1986), 210.

[14] 1994 Implementation Agreement, Annex, S. 3, para. 8.

by establishing a Finance Committee.[15] In addition, it modified the procedure for the adoption of the Mining Code[16] and the approval of plans of work[17] and declared Art. 162 (2)(q) inapplicable[18].

III. Elements

1. Policy Making

10 Art. 162 (1) distinguishes between general policies established by the Assembly and specific policies 'on any question or matter within the competence of the Authority' established by the Council. Yet, it is unclear what the difference between general and specific policies exactly is. It can be difficult to determine if a particular policy is general or specific. This vagueness in definition could potentially be used by either organ to prescribe certain policies. Even if the Council adopts a policy that is not in conformity with the general policies of the Assembly, legal means to invalidate such a policy are lacking.[19] As its executive body, the Council already plays a quintessential role in the implementation of the general policies of the Authority. Art. 162 (2)(a) and (s) are proof of this. The 1994 Implementation Agreement strengthened the Council's influence even further by requiring the Assembly to collaborate with the Council regarding the establishment of general policies.[20] In case the Assembly decides not to accept the recommendation of the Council, the Assembly needs to return the matter to the Council for further consideration.[21]

11 Notwithstanding the above, it is still the Assembly's responsibility to establish general policies of the Authority. The Council is involved in this process through the requirement of collaboration[22] but also before and after this. Art. 162 (2)(s) stipulates that the Council shall 'make recommendations to the Assembly concerning policies on any question or matter'. The provision does not differentiate between general and specific policies and the recommendation of the Council can be on any policy as a consequence. One could also read into this provision that the negotiators preferred some kind of last resort clause for all the topics where the Council is not specifically assigned any power of recommendation to the Assembly.

2. Implementation and Compliance

12 It is the Council that is responsible for the supervision and coordination of the implementation of the Convention's deep sea mining regime. In addition, cases of non-compliance shall be brought to the attention of the Assembly.[23] Helpful in this regard is that the Council shall exercise control over the activities in the Area to secure compliance with the Convention's regime but also subsequent rules, regulations and procedures of the Authority.[24] States Parties are required to assist in this process.[25] To be able to control the activities in the Area, the Council shall establish mechanisms for the direction and supervision of inspectors.[26] The

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[15] 1994 Implementation Agreement, Annex, S. 9, particularly para. 9.
[16] 1994 Implementation Agreement, Annex, S. 1, para. 15.
[17] 1994 Implementation Agreement, Annex, S. 3, paras. 11–12.
[18] 1994 Implementation Agreement, Annex, S. 6, para. 7.
[19] *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135, 248–249.
[20] 1994 Implementation Agreement, Annex, S. 3, para. 1.
[21] ISA, Rules of Procedures of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in ISA, Basic Texts (2nd edn. 2012), 4–31 (Rule 61(3)).
[22] 1994 Implementation Agreement, Annex, S. 3, para. 1.
[23] Art. 162 (2)(a).
[24] Art. 162 (2)(l).
[25] Arts. 153 (4) and 139 (1).
[26] Art. 162 (2)(z).

Legal and Technical Commission shall make recommendations to the Council for this purpose.[27] WOLFRUM describes the difference between Art. 162 (2)(z) and Art. 153 (4): The former speaks about contracts where the latter mentions plans of work. He concludes that this would mean that Art. 162 (2)(z) is not applicable to the Enterprise because contracts are only concluded with independent companies. This conclusion would, however, be contrary to the object and purpose of the Convention.[28] The Council is also the organ that shall 'institute proceedings on behalf of the Authority before the Seabed Disputes Chamber' of ITLOS in cases of non-compliance.[29] It shall also notify the Assembly when the Seabed Disputes Chamber has taken a decision in such a case and recommend measures to be taken.[30] Both actions happen on the recommendation of the Legal and Technical Commission.[31]

3. Internal Duties

Some of the responsibilities of the Council that are listed in Art. 162 are rather internal in nature. First, Art. 162 (2)(e) requires the Council to adopt its Rules of Procedure, which it did in August 1996. It is specifically mentioned that these Rules should contain the method of how the Council will select its president. Rule 22 prescribes that the election of the president and the four vice-presidents shall happen at the first regular session of each year. They shall all represent a different regional group.[32] For the office of president, rotation between these regional groups shall be observed and the election should preferably occur without a vote.[33] The principle of rotation has indeed been strictly applied in the first two decades of the existence of the Council. Rotation within the groups is less observed; Chile, Germany and Fiji have already occupied the presidency twice and Poland has always presided over the Council on behalf of the Eastern European group in the first two decades.[34] Vice-presidents are eligible for re-election.[35] This is not permissible for the president as this may possibly interfere with the required use of the rotation system. Besides the election of its own president and vice-presidents, the Council shall also propose a list of candidates for the election of the Secretary-General of the Authority.[36] **13**

The Council has a role to play in the approval of the annual budget of the Authority.[37] The Secretary-General drafts the proposed budget and sends it to the Council, with recommendations from the Finance Committee. The Council then considers the budget with the recommendations, adds its own recommendations and submits it to the Assembly.[38] The **14**

[27] Art. 165 (2)(m).

[28] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 580–581.

[29] Art. 162 (2)(u).

[30] Art. 162 (2)(v).

[31] Art. 165 (2)(i) and (j).

[32] ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in: ISA Basic Texts (note 21), 32–54 (Rule 22(1)).

[33] *Ibid.*, Rule 22(2).

[34] ISA, The Authority, Organs of the Authority, Council, Council presidents: http://www.isa.org.jm/authority/council-presidents. Fiji and Poland also occupied the presidency of the Assembly twice (International Seabed Authority, The Authority, Organs of the Authority, Assembly, Assembly presidents: http://www.isa.org.jm/assembly-presidents) and the Secretary-General in the first twelve years of the Authority was of Fijian nationality (International Seabed Authority, The Authority, The Secretariat, Office of the Secretary-General, The Secretary-General: http://www.isa.org.jm/authority/Secretary-General).

[35] ISA Rules of Procedures of the Council (note 32), Rule 22(3).

[36] Art. 162 (2)(b). See also Art. 166 (2) & ISA Rules of Procedures of the Assembly (note 21), Rule 88. A personal account of the first election of a Secretary-General is given in *Hasjim Djalal*, Reflections on Ambassador Satya Nandan, in: Michael W. Lodge/Myron H. Nordquist (eds.), Peaceful Order in the World's Oceans. Essays in Honor of Satya N. Nandan (2014), 25, 27.

[37] Art. 172.

[38] 1994 Implementation Agreement, Annex, S. 9, para. 7(c); ISA Rules of Procedures of the Council (note 32), Rule 31; Art. 162(2)(r) UNCLOS; and ISA Rules of Procedures of the Assembly (note 21), Rule 93.

Council shall also adopt rules, regulations and procedures relating to the financial management and internal administration of the Authority, which the Assembly shall then consider and approve.[39] The Council shall present the annual report to the Assembly alongside special reports, if the Assembly so requests.[40] The Assembly may suspend the exercise of rights and privileges of a member of the Authority involved in gross and persistent violation of Part XI of the Convention upon recommendation of the Council and a decision of the Seabed Disputes Chamber that these violations indeed occurred.[41]

4. Finance Committee

15 If need be, for the exercise of its function, the Council shall establish subsidiary organs. Art. 162 (2)(d) mentions a few requirements concerning the membership of these organs.[42] Obviously, members need to be qualified and competent in the relevant technical matters that the particular organ has to deal with. Additionally, the principle of equitable geographical spread and special interests shall be taken into account.[43] Besides the Commissions that are subject of Arts. 163–165, the so far only subsidiary organ is the Finance Committee established under the Art. 162 (2)(y) by the last section of the Annex to the 1994 Implementation Agreement.[44] Germany proposed such a committee in 1976. Its functions are deliberately not included in Art. 164 of the Convention. Strictly speaking, however, the Finance Committee is an organ of the Assembly.[45] The Assembly shall elect the members of the Committee.[46] Nevertheless, the four groups with particular interests that are represented in the Council[47] shall also be represented on the Finance Committee.[48]

16 The Assembly shall base any decision on an administrative, budgetary or financial matter on recommendations of the Council.[49] In turn, both the Assembly and the Council shall base decisions with budgetary or financial implications on recommendations of the Finance Committee.[50] The precise meaning of 'to base on' is not further specified[51] – the rules of procedure of the Assembly and the Council use the same language[52] – but a more detailed provision uses 'to take into account.'[53] 'To take into account' is then also the verb of choice for the similar, more detailed rules of procedure of the Assembly and the Council.[54] The influence of the Finance Committee seems potentially large on the financial aspects of the Authority but this influence is mainly internal. The determination of the financial terms of the mining contracts, for example, is a responsibility of the Legal and Technical Commission.[55]

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[39] Art. 162 (2)(o)(ii).

[40] Art. 162 (2)(h).

[41] ISA Rules of Procedures of the Assembly (note 21), Rule 81; Art. 162 (2)(t) UNCLOS.

[42] See also ISA Rules of Procedures of the Council (note 32), Rules 71–73.

[43] These requirements are reiterated in Art. 163 (3) and (4) UNCLOS and specified in Arts. 164 (1), 165 (1) and the 1994 Implementation Agreement, Annex, S. 9, paras. 1 and 3.

[44] 1994 Implementation Agreement, Annex, S. 9, para. 9.

[45] Nordquist/Nandan/Rosenne (note 6), 407.

[46] 1994 Implementation Agreement, Annex, S. 9, para. 3. For the first election, see *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999) 173, 212–213.

[47] 1994 Implementation Agreement, Annex, S. 3, para. 15(a)-(d).

[48] 1994 Implementation Agreement, Annex, S. 9, para. 3. For coverage of the first election, see *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001), 314–315.

[49] 1994 Implementation Agreement, Annex, S. 3, para. 4.

[50] 1994 Implementation Agreement, Annex, S. 3, para. 7.

[51] *James Harrison*, Making the Law of the Sea: A Study in the Development of International Law (2011), 121.

[52] ISA Rules of Procedures of the Assembly (note 21), Rule 61(4); ISA Rules of Procedures of the Council (note 32), Rule 56(4).

[53] 1994 Implementation Agreement, Annex, S. 9, para. 7.

[54] ISA Rules of Procedures of the Assembly (note 21), Rule 93; ISA Rules of Procedures of the Council (note 32), Rules 31 & 33(2).

[55] *Michael W. Lodge*, The Deep Seabed, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015) 226, 237.

5. Agreements with International Organizations

17 It is the Council that can enter into agreements with the United Nations or other international organisations on behalf of the Authority. This requires the Assembly's approval.[56] The Secretary-General is responsible for consultation and co-operation with these organisations.[57] One of the more pragmatic reasons to enter into agreement with the United Nations was that the Authority preferred to maintain certain support services that the Conference Service Division of the United Nations provided.[58] Many of the collaborations between the Authority and international organisations, for example the OSPAR Commission, the International Maritime Organization, the Pacific Community and the International Hydrographic Organization, seem to be based rather on Art. 169 than on Art. 162 of the Convention.[59]

6. Mining Code

18 Art. 162 prescribes that the Council adopts rules, regulations and procedures relating to prospecting, exploration and exploitation of the Area.[60] This set of rules is known as the Mining Code and is formulated by the Legal and Technical Commission and then submitted to the Council.[61] As the provision requires, the part of the Mining Code on polymetallic nodules was adopted first, and updated in 2013.[62] Member States of the Authority may request the adoption of rules concerning the exploration and exploitation of any other resource. The Council shall adopt these rules within three years of the request. Otherwise, the rules apply provisionally if approval by the Assembly fails.[63] If a State makes such a request because one of its nationals[64] intends to apply for approval of a plan of work for exploitation, the adoption shall occur within only two years.[65] When the Council fails to meet

[56] Art. 162 (2)(f). For example, see ISA, Decision of the Assembly relating to the Agreement Concerning the Relationship between the United Nations and the International Seabed Authority, ISA Doc. ISBA/3/A/3 (1997); ISA, Recommendation by the Council Relating to the Agreement Concerning the Relationship between the United Nations and the International Seabed Authority, ISA Doc. ISBA/3/C/4 (1997).

[57] Art. 169 UNCLOS; ISA Rules of Procedures of the Council (note 32), Rule 76.

[58] *Satya N. Nandan*, Legislative and Executive Powers of the International Seabed Authority for the Implementation of the Law of the Sea Convention, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 73, 78.

[59] ISA, Consultations with the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, ISA Doc. ISBA/21/C/9 (2015); ISA, Agreement of Cooperation between the International Maritime Organization and the International Seabed Authority, ISA Doc. ISBA/21/C/10 (2015); ISA, Memorandum of Understanding between the International Seabed Authority and the Pacific Community – Note by the Secretariat, ISA Doc. ISBA/21/C/11 (2015); ISA, Agreement of Cooperation between the International Seabed Authority and the International Hydrographic Organization – Note by the Secretary-General, ISA Doc. ISBA/22/C/6 (2016).

[60] Art. 162 (2)(o)(ii).

[61] Art. 165 (2)(f). At the time of writing, no rules, regulations and procedures on exploitation were adopted yet but the need is felt to do so soon; ISA, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, ISA Doc. ISBA/19/C/5 (2013).

[62] ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013).

[63] Arts. 162 (2)(o)(ii) & 160 (f)(ii). In relation to this provision, Mahmoudi concludes that '[t]he helplessness of the Assembly, as the "supreme organ" of the Authority, to act against the will of the Council is remarkable. […]. [W]hile the Assembly is formally the supreme organ of the Authority, the Council holds a *de facto* superior status with the real power. This is exactly in line with the original demand of the industrialized countries'; *Said Mahmoudi*, The Law of Deep Sea-Bed Mining (1987), 282.

[64] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014), Regulation 10(3)(a); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014), Regulation 10(3)(a); and ISA Ferromanganese Crusts Regulations (note 62), Regulation 10(3)(a).

[65] 1994 Implementation Agreement, Annex, S. 1, para. 15(a) & (b).

this requirement, the plan of work needs to be approved provisionally.[66] The Legal and Technical Commission drafted the parts of the Mining Code on cobalt-rich ferromanganese crusts and polymetallic sulphides at the request of a member of the Authority – the Russian Federation – as is prescribed by the Convention.[67] These were, however, not ready within three years of the request.[68] All three parts of the Mining Code now foresee a review by the Council after five years. The Council has the possibility to apply any revisions provisionally when the Assembly has not approved them yet.[69]

7. Protection of the Environment

19 On the recommendation of the Legal and Technical Commission, the Council shall disapprove certain areas for exploitation by either contractors or the Enterprise 'where substantial evidence indicates the risk of serious harm to the marine environment'.[70] Prospecting is also not allowed in these disapproved areas.[71] That no complete evidence is required before action is taken appears to be proof for the incorporation of the precautionary approach here.[72] The provision as a whole might function as the basis for environmental protection from deep sea mining. In other words, Art. 162 (2)(x) may be a tool to implement the more general obligations to protect the environment of the deep sea.[73] The Mining Code mentions particularly vulnerable marine ecosystems, which are then specified depending on the resource the part of the Mining Code covers.[74]

20 Disapproval of areas may happen before any activity in the deep sea has started. As soon as activities have begun, the Council can issue emergency orders for the suspension or adjustment of operations on the recommendation of the Legal and Technical Commission to prevent serious harm to the marine environment.[75] Already before the adoption of UNCLOS, it was obvious that such a measure could serve the marine environment because the effects on the environment are still not very clear.[76] The fact that an emergency order can be the reason for a special session of the Council emphasises that the organ takes this provision seriously.[77]

21 Before the Council can take action, the contractor needs to inform the Secretary-General of the Authority about any incident that caused, causes or poses a threat to cause serious harm to the marine environment. The Secretary-General then notifies the sponsoring State or States and reports to the Legal and Technical Commission, the Council and all members of the Authority. In addition, competent international organisations and other concerned organisations and bodies shall receive a copy of the report. The Secretary-General is responsible for monitoring the situation and reporting on developments if necessary to the

[66] 1994 Implementation Agreement, Annex, S. 1, para. 15(c).

[67] Polymetallic Sulphides Regulations (note 64); Ferromanganese Crusts Regulations (note 62); ISA, Statement of the President on the Work of the Assembly during the Resumed Fourth Session, ISA. Doc. ISBA/4/A/18 (1998), para. 14.

[68] For a short drafting history, see *Michael C. Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47, 89–90. See also ISA, Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/17/C/8 (2011).

[69] Reg. 42 Polymetallic Nodules Regulations; Reg 44.Polymetallic Sulphides Regulations; Reg. 44 Ferromanganese Crusts Regulations.

[70] Arts. 165 (2)(l) and 162 (2)(x).

[71] Reg. 2(3) Polymetallic Nodules Regulations; Reg. 2(3) Polymetallic Sulphides Regulations; Reg 2(4) Ferromanganese Crusts Regulations.

[72] Reg. 31(2) Polymetallic Nodules Regulations; Reg 33(2) Polymetallic Sulphides Regulations; Reg 33(2) Ferromanganese Crusts Regulations.

[73] Arts. 145 (b) and 209 (1). See also ISA, Activities, Biodiversity: http://www.isa.org.jm/biodiversity-0.

[74] Reg 31(4) Polymetallic Nodules Regulations; Reg. 33 (2) Polymetallic Sulphides Regulations; Reg 33(4) Ferromanganese Crusts Regulations.

[75] Arts. 162 (2)(w) and 165 (2)(k). See Reg. 33(4)-(6) Polymetallic Nodules Regulations; Reg. 35(4)-(6) Polymetallic Sulphides Regulations; Reg. 35(4)-(6) Ferromanganese Crusts Regulations.

[76] *Wolfgang Hauser*, Die rechtliche Gestaltung des Tiefseebergbaus nach der Seerechtskonvention (1982), 127.

[77] ISA Rules of Procedures of the Council (note 32), Rules 6 and 13.

said organs and members of the Authority.[78] In the time between the contractor's notification and any action by the Council, the Secretary-General shall take 'immediate measures of a temporary nature […] to prevent, contain and minimize serious harm'.[79]

8. Plans of Work

22 The 1994 Implementation Agreement seems to have simplified regulation of the approval by the Council of plans of work.[80] The negotiations of the 1994 Agreement concentrated more on the composition and decision-making of the Council than on its powers and functions. As a result, the procedure for the approval of plans of work is now adjusted due to the introduction of chamber voting[81] within the Council.[82] First, the Legal and Technical Commission reviews the formal plans of work and submits recommendation to the Council.[83] The Council's Rules of Procedure contain a detailed list of requirements for these plans of work.[84] Then, the Council can either agree or disagree with the recommendation of the Legal and Technical Commission. A positive recommendation of the Commission will be confirmed by the Council unless '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 the plan of work.' This needs to happen within 60 days unless the Council decides to prolong this period.[85] The Council can reverse a negative recommendation of the Commission. Such an approval of the plan of work against the recommendation of the Commission is a matter of substance when it comes to the decision-making.[86]

23 A plan of work for exploration can receive approval for a maximum of fifteen years. Within six months after the end of these fifteen years, the contractor may apply for extension under the condition that the reasons for not being able to conduct the necessary preparatory work are beyond the control of the contractor. Only then shall the Council approve the requested extension, on a recommendation of the Legal and Technical Commission.[87] For the approval of an extension, the Council shall use the same procedure as the one for the approval of the plan of work itself.[88] A contractor shall have preference and priority among other applicants who submit plans of work for the exploitation of the same resources in the same are if such a contractor has an approved plan of work for exploration. Under certain conditions, however, the Council may revoke this preference and priority if the contractor did not comply with the plan of work for exploration. Evidently, the Council needs to provide the grounds for withdrawal and consider the contractor's reply. Moreover, time limits should be reasonable.[89]

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[78] Reg. 33(1) and (2) Polymetallic Nodules Regulations; Reg. 35(1) and (2) Polymetallic Sulphides Regulations; Reg. 35(1) and (2) Ferromanganese Crusts Regulations.

[79] Reg. 33(3) Polymetallic Nodules Regulations; Reg. 35(3) Polymetallic Sulphides Regulations; Reg. 35(3) Ferromanganese Crusts Regulations.

[80] 1994 Implementation Agreement, Annex, S. 3, para. 11. See also ISA Rules of Procedures of the Council (note 32), Rule 70.

[81] 1994 Implementation Agreement, Annex, S. 3, para. 9(a).

[82] Nordquist/Nandan/Rosenne (note 6), 453.

[83] Art. 165 (2)(b).

[84] Polymetallic Nodules Regulations, Part III; Polymetallic Sulphides Regulations, Part III; Ferromanganese Crusts Regulations, Part III.

[85] 1994 Implementation Agreement, Annex, S. 3, para. 11(a).

[86] 1994 Implementation Agreement, Annex, S. 3, paras. 11(a) and 5.

[87] 1994 Implementation Agreement, Annex, S. 1, para. 9; Reg. 26(1) and (2) Polymetallic Nodules Regulations; Reg. 28(1) and (2) Polymetallic Sulphides Regulations; Reg. 28(1) and (2) Ferromanganese Crusts Regulations.

[88] ISA, Decision of the Council of the International Seabed Authority Relating to the Procedures and Criteria for the Extension of an Approved Plan of Work for Exploration Pursuant to Section 1, Paragraph 9, of the Annex to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISA Doc. ISBA/21/C/19 (2015) Annex, Part IV.

[89] Reg. 24 Polymetallic Nodules Regulations; Reg. 26 Polymetallic Sulphides Regulations; Reg. 26 Ferromanganese Crusts Regulations.

9. Equitable Sharing of Benefits and Adverse Effects

24 The existence of a geological continental shelf beyond 200 NM from a coastal State's low-water baseline creates the opportunity for the coastal State to exploit natural resources there after it fulfils the requirements of Art. 76. Notwithstanding the fact that the geographical size of the Area can only be known after all claims regarding an outer continental shelf have been dealt with, one could get the impression that a continental shelf beyond 200 NM 'reduces' the application of the common heritage of humankind. To prevent this issue, Art. 82 provides for payments and contributions to be made by the coastal State with regard to its exploitation of natural resources of the outer continental shelf. These 'payments or contributions shall be made through the Authority'. Distribution among States Parties shall occur on the basis of equitable sharing. Developing States, in particular the least developed and the land-locked, deserve special consideration in this distribution.[90] It is up to the Council to recommend rules, regulations and procedures on the equitable sharing of these payments and contributions but also the financial and other economic benefits derived from activities in the Area. The Legal and Technical Commission shall formulate these rules, regulations and procedures and submit them to the Council.[91] Interestingly, developing States are emphasised again; this time not the least developed or land-locked in particular but 'peoples who have not attained full independence or other self-governing status'.[92] Once recommended by the Council, the Assembly shall consider and approve these rules, regulations and procedures. Upon non-approval by the Assembly, the Council shall reconsider 'in the light of the views expressed by the Assembly'.[93]

25 Benefit-sharing is one objective of the Authority; the other side of the coin is sharing the burden of adverse effects of deep sea mining. As soon as the production of minerals in the deep sea starts, States that produce the same minerals on land might suffer economically due to a reduction in price or volume of their exports. First, the Council shall take measures to protect developing States from such effects upon recommendation of the Economic and Planning Commission.[94] Second, the Convention requires the Assembly to set up a system of compensation or to take other measure that economically assist these states. That might also be through co-operation with international organisations.[95] On the basis of advice of the Economic Planning Commission, the Council shall make recommendations to the Assembly for such a system.[96] The financial arrangements of the Authority foresee such a system of compensation and provide for it.[97]

10. Actions Concerning the Enterprise

26 The Council has a couple of duties regarding the functioning of the Enterprise. First, the Council shall recommend candidates for the election of both the members of the Governing Board as well as the Director-General of the Enterprise to the Assembly.[98] Wolfrum rightly points out that the Council should recommend more candidates than there are seats. Otherwise, there would be no election necessary.[99] Candidates for the Governing Board

[90] Art. 82 (4). A couple of technical studies and a workshop of the Authority dealt with the topic but no rules, regulations or procedures have been recommended at the time of writing. See ISA, Outcomes of the International Workshop on Further Consideration of the Implementation of Article 82 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/19/A/4 (2013).

[91] Art. 165 (2)(f).

[92] Art. 162 (2)(o)(i).

[93] Art. 160 (2)(f)(i). See also Art. 140 (2).

[94] Art. 162 (2)(m).

[95] Art. 151 (10).

[96] Arts. 164 (2)(d) and 162 (2)(n).

[97] Arts. 171 (f) and 173 (2)(c).

[98] Arts. 162 (2)(c) and 160 (2)(c).

[99] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 572.

need to have the highest competence and qualifications in relevant fields. In the election of the candidates, the principle of equitable geographical distribution is applicable.[100] Interestingly, the candidates for a function at the Enterprise require a higher standard of approval by the Council than the candidates for the election of the Secretary-General of the Authority because the former concerns a recommendation by the Council where the latter concerns a mere proposal.[101] The influence of the Council on the Enterprise is obvious throughout the Statute of the Enterprise.[102] That the Council shall issue directives to the Enterprise is another confirmation of this point.[103] The procedure for the approval of plans of work is applicable to the Enterprise, *mutatis mutandis*, as it is to contractors.[104] The Council shall transmit reports of the Enterprise with its recommendations.[105]

Article 163
Organs of the Council

1. There are hereby established the following organs of the Council:
(a) an Economic Planning Commission;
(b) a Legal and Technical Commission.

2. Each Commission shall be composed of 15 members, elected by the Council from among the candidates nominated by the States Parties. However, if necessary, the Council may decide to increase the size of either Commission having due regard to economy and efficiency.

3. Members of a Commission shall have appropriate qualifications in the area of competence of that Commission. States Parties shall nominate candidates of the highest standards of competence and integrity with qualifications in relevant fields so as to ensure the effective exercise of the functions of the Commissions.

4. In the election of members of the Commissions, due account shall be taken of the need for equitable geographical distribution and the representation of special interests.

5. No State Party may nominate more than one candidate for the same Commission. No person shall be elected to serve on more than one Commission.

6. Members of the Commissions shall hold office for a term of five years. They shall be eligible for re-election for a further term.

7. In the event of the death, incapacity or resignation of a member of a Commission prior to the expiration of the term of office, the Council shall elect for the remainder of the term, a member from the same geographical region or area of interest.

8. Members of Commissions shall have no financial interest in any activity relating to exploration and exploitation in the Area. Subject to their responsibilities to the Commissions upon which they serve, they shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article l4, or any other confidential information coming to their knowledge by reason of their duties for the Authority.

9. Each Commission shall exercise its functions in accordance with such guidelines and directives as the Council may adopt.

10. 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.

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[100] Annex IV UNCLOS, Art. 5(1).
[101] Compare Arts. 160 (2)(c) and 162 (2)(c) UNCLOS with Arts. 160 (2)(b) and 162 (2)(b) UNCLOS.
[102] Annex IV UNCLOS.
[103] Art. 162 (2)(i). See also 1994 Implementation Agreement, Annex, S. 2, para. 2.
[104] Art. 162 (2)(k), Reg. 9 Polymetallic Nodules Regulations; Reg. 9 Polymetallic Sulphides Regulations; Reg. 9 Ferromanganese Crusts Regulations.
[105] Arts. 162 (2)(g) and 160 (2)(i); Annex IV UNCLOS Arts. 6(k) and 9.

11. The decision-making procedures of the Commissions shall be established by the rules, regulations and procedures of the Authority. Recommendations to the Council shall, where necessary, be accompanied by a summary on the divergencies of opinion in the Commission.

12. Each Commission shall normally function at the seat of the Authority and shall meet as often as is required for the efficient exercise of its functions.

13. In the exercise of its functions, each Commission may, where appropriate, consult another commission, any competent organ of the United Nations or of its specialized agencies or any international organizations with competence in the subject-matter of such consultation.

Bibliography: *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Bernard H. Oxman*, The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15–35; *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135–337

Documents: ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in: ISA, Basic Texts (2nd edn. 2012), 32–54; ISA, Rules of Procedures of the Legal and Technical Commission (adopted 13 July 2000), reprinted in: ISA, Basic Texts (2nd edn. 2012), 70–84; ISA, Decision of the Council relating to the election of members of the Legal and Technical Commission, ISA Doc. ISBA/12/C/11 (2006); ISA, Considerations Relating to the Interpretation and Application of Article 163(8) of the United Nations Convention on the Law of the Sea and of Rule 11 of the Rules of Procedure of the Legal and Technical Commission, ISA Doc. ISBA/20/LTC/CRP.2 (2014); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013)

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I. Purpose and Function

1 Early on in the negotiations of a regime for deep sea mining, two of the more influential proposals in the first round of submissions by States for a new regulatory system contained the idea that the Council of the International Seabed Authority (ISA or the Authority), or at least the Authority, could use the support of specialised commissions in its day-to-day work.[1] The Council currently has two of these commissions, established by Art. 163: the Economic Planning Commission and the Legal and Technical Commission.[2] Most of the similarities between them are laid down in Art. 163 in order to prevent repetition in the two following articles, which deal with the two Commissions individually. These similarities exist mainly

[1] Sea-Bed Committee, USA: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), cited in: GAOR 25th Sess. Suppl. 21 (A/8021), Arts. 42–44; Sea-Bed Committee, Malta: Draft Ocean Space Treaty – Working Paper, UN Doc. A/AC.138/53 (1971) Ch. XXVIII, cited in GAOR 28th Sess. Suppl. 21 (A/9021-I).

[2] Only the latter had been constituted at the time of writing.

concerning the composition and its general relationship with the Council. In a way, Art. 163 may be read as a prelude or introduction to the two subsequent articles.

About half of the article concerns the members of the Commissions. It regulates the amount of members and provides the possibility for the Council to increase it. Evidently, candidates for membership should have the right qualifications, something that the nominating States Parties need to take into account. Next to that, equitable geographical distribution and the representation of special interests shall also play a role in the composition of the Commissions. A States Party can only nominate one candidate for a Commission and the same person is not allowed to be a member of both Commissions. The length of the terms of the members is set but re-election is possible. 2

For obvious reasons, the Convention does not allow members of the Commissions to have financial interest in any activity relating to the exploration and exploitation of the deep seabed. The term 'financial interest', however, is not defined.[3] Even beyond their period of service on a Commission, a member shall not disclose any confidential information. The Commissions themselves shall formulate the rules and regulations with regard to their function yet the Council needs to approve these. It is, furthermore, made clear that the Council instructs each Commission through guidelines and directives. 3

The 1994 Implementation Agreement elaborates on the decision-making procedures of the Commissions. In the case that a Commission does not take a decision unanimously, the recommendation to Council shall be accompanied by a summary of the different opinions. In order to make decisions, a Commission may consult other commissions, international organisations and specialised agencies of the United Nations. 4

II. Historical Background

A few of the earliest proposals on a regime for mining in the deep sea showed awareness of the fact that the Authority might be better off when a few specialised commissions would support it.[4] These proposals date from before the start of the UNCLOS III and had consequently much time to develop. Many of the proposals preferred one commission to deal with the regulatory processes and another one for, very generally, most aspects of mining licences.[5] In addition, the United States proposed a International Seabed Boundary Review Commission.[6] This suggestion evolved into the Commission on the Limits of the Continental Shelf.[7] Malta also proposed a Scientific and Technological Commission.[8] 5

In 1975, the negotiators at the Third Session of UNCLOS III brought the amount of commissions down to two. The Economic Planning Commission and the Technical Commission would both work under the Council of the Authority.[9] One year later, at the Fourth Session, the subsequent draft text also included a Rules and Regulation Commission.[10] Towards the end of the 1970s, it became clear that these commissions should merely have an advisory role, effectuated by a recommendatory function to the Council. The number of 6

[3] ISA, Considerations Relating to the Interpretation and Application of Article 163(8) of the United Nations Convention on the Law of the Sea and of Rule 11 of the Rules of Procedure of the Legal and Technical Commission, ISA Doc. ISBA/20/LTC/CRP.2 (2014), Part III.

[4] For example, USA Draft Convention (note 1), Arts. 43 and 44; Malta: Draft Ocean Space Treaty (note 1), Ch. XXVIII.

[5] For example, USA Draft Convention (note 1), Arts. 42–45; Malta: Draft Ocean Space Treaty (note 1), Arts. 191–195 and 177–182.

[6] USA Draft Convention (note 1), Art. 45.

[7] Art. 76 (8) and Annex II UNCLOS. See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 462.

[8] USA Draft Convention (note 1), Arts. 42–45; Malta: Draft Ocean Space Treaty (note 1), Arts. 183–190.

[9] UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 143.

[10] UNCLOS III, Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Rev.1/PART I** (1976), OR V, 125, 134.

commissions was again reduced to two: an Economic Planning Commission and a Legal and Technical Commission. For both Commissions, the provisions on structure and membership would be consolidated in one article.[11] That article became what is now Art. 163.

III. Elements

1. Establishment and Membership

7 Although Art. 163 (1) explicitly establishes both the Economic Planning Commission and the Legal and Technical Commission, the 1994 Implementation Agreement put the functioning of the Economic Planning Commission on hold. Until the approval of the first plan of work for exploitation, the Legal and Technical Commission shall perform the functions of the Economic Planning Commission unless the Council decides otherwise.[12] As a consequence, examples of practical experience can only derive from the work of the Legal and Technical Commission. Both Commissions shall have fifteen members but the Legal and Technical Commission has actually always had more. The Commission started with 22 members in order to prevent difficulties during an otherwise necessary election and the Council increased the Commission's membership one by one until 25 from 2007 onwards.[13] The Council's decision to increase the membership of any Commission needs to be taken with a two-thirds majority, which seems to suggest that it is regarded as an issue of substance rather than of procedure.[14] The Convention does not provided for any decrease in the size of either Commission although such action might very well improve economy and efficiency. Yet, public international organisations appear not to have a tendency to decrease themselves nor their subsidiary bodies in size.

8 Art. 163 (3) sets out the qualitative requirements for the individual members of the Commissions. These are more detailed in the first paragraphs of the two subsequent articles, which deal with the two Commissions specifically.[15] The member States are responsible for nominating people that possess these qualifications. Only one nomination per State per Commission is allowed. Neither may one person serve on both Commissions.[16] The latter provision becomes only relevant when the Economic Planning Commissions starts functioning but the chance is small that a person would qualify for both commissions because there is not much overlap between the specific requirements for membership for each of them.[17] As with the Council itself, the Commissions shall represent an equitable geographic distribution and special interests in their membership.[18]

9 Each member shall be elected for one term of five years. Re-election is possible for 'a further term'.[19] The use of the word 'term' in singular suggests that re-election is only possible once. Nevertheless, the Council has re-elected two members of the Legal and Technical Commission twice in its first two decades of existence.[20] Whenever members are not able to fulfil their duties until the end of the term of office, the Council shall elect a new

[11] Nordquist/Nandan/Rosenne (note 7), 405.

[12] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 28 July 1994 (entered into force 28 July 1996), 1836 UNTS 3, para. 4.

[13] Nordquist/Nandan/Rosenne (note 7), 481; ISA, Decision of the Council Relating to the Election of Members of the Legal and Technical Commission, ISA Doc. ISBA/12/C/11 (2006).

[14] ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in ISA, Basic Texts (2nd edn. 2012), 32–54 (Rule 77(3)).

[15] Arts. 164 (1) and 165 (1).

[16] Art. 163 (5).

[17] Arts. 164 (1) and 165 (1).

[18] Art. 163(4).

[19] Art. 163 (6).

[20] See the table 'Legal and Technical Commission Membership at ISA, The Authority, Organs of the Authority, Legal and Technical Commission': http://www.isa.org.jm/authority/legal-and-technical-commission. It has to be added that these two members did not serve a full first term of five years.

member from the same geographical region or area of interest.[21] In the first two decades, a member of the Legal and Technical Commission to whom this provision was applicable has always been succeeded by a member of the same State with only one exception.[22]

2. Confidentiality

Obviously, the Law of the Sea Convention forbids the members of the Commission to have financial interest in any activity relating to exploration and exploitation.[23] Otherwise, the members would decide upon issues that have a direct bearing on their own investments. Furthermore, disclosure of any industrial secret 'or other confidential information coming to their knowledge by reason of their duties for the Authority' is forbidden, even when the person is no longer a member of a Commission.[24] An additional category of data to which confidentiality applies are the proprietary data that the operator transferred 'in respect of the area covered by the plan of work'. Except for those on the design of equipment, data that are necessary for the formulation of the parts of the Mining Code concerning the protection of the marine environment and safety are not deemed proprietary.[25] The term 'proprietary', however, is not defined.[26] The same provision applies, *mutatis mutandis*, to the Secretariat of the Authority and the Finance Committee.[27] **10**

3. Remuneration

During the negotiations at UNCLOS III, delegates discussed the political representation of the Commissions' members. Any reference to it did not end up in the final text but some delegates favoured the idea of independent experts where others saw the members of the Commissions rather as representatives of their respective States. There is no mention of any remuneration from the organisation for which they work.[28] This makes sense because the Authority does not pay the members of the Commissions. The Commissions are not 'additional layers of bureaucracy' but simply small bodies that represent the interests of the States.[29] **11**

4. Functions

As subsidiary bodies of the Council, the Commissions shall comply with any directives and guidelines that the Council adopts.[30] The Convention requires the Commissions to formulate rules and regulations for their functioning and submit these to the Council.[31] The Council **12**

[21] Art. 163 (7).

[22] See the table 'Legal and Technical Commission Membership at ISA' (note 20).

[23] Art. 163 (8); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014), Part VI; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014), Part VI; ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013), Part VI. Any member of the Legal and Technical Commission has to make a written declaration concerning this confidentiality in the presence of the Secretary-General: ISA, Rules of Procedures of the Legal and Technical Commission (adopted 13 July 2000), reprinted in ISA Basic Texts (note 14), 70–84 (Rule 11(2)).

[24] Art. 163 (8) and Annex III, Art. 14 (3).

[25] Annex III, Art. 14 (2).

[26] *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001), 182.

[27] Art. 168 (2); 1994 Implementation Agreement, Annex, S. 7, Annex Section 9(6).

[28] *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135, 225–226.

[29] *Bernard H. Oxman*, The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, in: Davos Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 15, 33–34.

[30] Art. 163 (9).

[31] Art. 163 (10).

approved the Rules of Procedure of the Legal and Technical Commission in the summer of 2000.[32] Yet the Rules of Procedure of the Council declare that they are also applicable, *mutatis mutandis*, to the subsidiary organs of the Council.[33] The Commissions shall normally function at the seat of the Authority but the Legal and Technical Commission may meet somewhere else as long as the requirement of cost-effectiveness is taken into account.[34] The negotiators at UNCLOS III were not able to reach agreement on the decision-making procedure of the Commissions.[35] The 1994 Implementation Agreement prescribes that, in general, decision-making in the organs of the Authority should take place by consensus.[36] If consensus cannot be reached in the Legal and Technical Commission, voting shall be by simple majority.[37] Together with its recommendation, the Commission shall also send the Council a summary of the divergent views within the Commission, if there are any.[38]

Article 164
The Economic Planning Commission

1. Members of the Economic Planning Commission shall have appropriate qualifications such as those relevant to mining, management of mineral resource activities, international trade or international economics. The Council shall endeavour to ensure that the membership of the Commission reflects all appropriate qualifications. The Commission shall include at least two members from developing States whose exports of the categories of minerals to be derived from the Area have a substantial bearing upon their economies.

2. The Commission shall:

(a) **propose, upon the request of the Council, measures to implement decisions relating to activities in the Area taken in accordance with this Convention;**

(b) **review the trends of and the factors affecting supply, demand and prices of minerals which may be derived from the Area, bearing in mind the interests of both importing and exporting countries, and in particular of the developing States among them;**

(c) **examine any situation likely to lead to the adverse effects referred to in article 150, subparagraph (h), brought to its attention by the State Party or States Parties concerned, and make appropriate recommendations to the Council;**

(d) **propose to the Council for submission to the Assembly, as provided in article 151, paragraph 10, a system of compensation or other measures of economic adjustment assistance for developing States which suffer adverse effects caused by activities in the Area. The Commission shall make the recommendations to the Council that are necessary for the application of the system or other measures adopted by the Assembly in specific cases.**

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984)

[32] ISA Rules of Procedures of the Legal and Technical Commission (note 23).

[33] ISA Rules of Procedures of the Council (note 14), Rule 73.

[34] Art. 163 (12); ISA Rules of Procedures of the Legal and Technical Commission (note 23), Rule 2.

[35] *Paolillo* (note 28), 239. See Art. 163 (11).

[36] 1994 Implementation Agreement, Annex, S. 3, para. 2.

[37] ISA Rules of Procedures of the Legal and Technical Commission (note 23), Rules 44 & 45. See also 1994 Implementation Agreement, Annex, S. 3, para. 13; *Rüdiger Wolfrum*, The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for other International Economic Organisations?, ZaöRV 55 (1995), 310, 323.

[38] Art. 163 (11).

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I. Purpose and Function

The Economic Planning Commission is one of the two subsidiary organs of the Council of the International Seabed Authority (ISA or the Authority) established by the Convention.[1] The negotiators at UNCLOS III made sure that the members of the Commission would have the appropriate qualifications. These need to relate to mining, management of mineral resource activities, international trade and economics. No less than two members should come from developing States whose export of minerals that could also be derived from the Area has a substantial influence on their economies. **1**

None of the actions of the Economic Planning Commission are binding upon the Council. They have a purely recommendatory character.[2] The Commission will conduct many of its tasks only in full swing when exploitation of minerals in the deep sea has actually started. Upon request of the Council, the Commission shall propose measures for the implementation of decisions concerning activities in the seabed beyond national jurisdiction. A more specifically economic task is that of reviewing trends of and the factors that affect supply, demand and prices of mineral resources that may be derived from the deep seabed. In these reviews, interests of both exporting and importing States deserve emphasis, especially the developing States among them. If such a developing State brings the alleged economic disadvantage to the attention of the Economic Planning Commission, the Commission shall examine the situation and make recommendations to the Council concerning the particular case. More proactively, the Commission shall propose a system of compensation, or other economic assistance measures, for these States that suffer due to the production of minerals in the Area. The Commission then makes recommendations to the Council accordingly before the Assembly can adopt any measures in specific cases. **2**

Until the approval of the first plan of work for exploitation, the Legal and Technical Commission performs the duties of the Economic Planning Commission unless the Council decides otherwise.[3] The 1994 Implementation Agreement lists the tasks of the Authority for the time period between the entry into force of the Convention and the approval of the first plan of work for exploitation.[4] Although not explicitly mentioned, it has been suggested that at least two of these tasks might also guide the work of the Economic Planning Commission.[5] These tasks are a mere interpretation of those listed in the Convention, adding the obligation to take into account the work of the Preparatory Commission.[6] **3**

[1] Art. 163(1).

[2] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984), 579.

[3] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 28 July 1994 (entered into force 28 July 1996), 1836 UNTS 3, Annex, S. 1, para. 4.

[4] 1994 Implementation Agreement, Annex, S. 1, para. 5. This period started on 16 November 1994 and had not ended at the time of writing.

[5] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 472.

[6] 1994 Implementation Agreement, Annex, S. 1, para. 5(d) & (e).

II. Historical Background

4 In August 1973, the Seabed Committee consolidated the proposals that States made for a new regime for activities on and in the deep seabed. Many subsidiary organs and commissions surface in this report. The proposed Planning/Price Stabilization Commission reflects best the characteristics of the current Economic Planning Commission.[7] Although many of the tasks of the Planning/Price Stabilization Commission relate directly to the Council, as is the case for the current Art. 164, the Commission is not listed as a subsidiary organ of the Council but rather as a separate commission after all the other organs have been dealt with. Curiously, the proposal lists also a Planning Commission as an advisory body to the Council. This Planning Commission has merely the task that is now laid down in Art. 164 (2)(d).[8]

5 The article on the Economic Planning Commission in the Informal Single Negotiating Text of May 1975 was the subject of critique by the United States.[9] The Revised Single Negotiating Text of the following year accommodated largely for these comments.[10] As a reaction to one of the main points of contention, the 1976 text describes the adverse effects on developing States more precisely in an economic sense. The United States also wanted an equitable balance of representation on the Commission and a membership of eighteen was now included.[11] Most provisions on composition and decision-making were later transferred to Art. 163.[12] The 1994 Implementation Agreement, with its significant overhaul of the production policies, had an inevitable impact on the functioning of the Economic Planning Commission.[13] Its direct link to the provisions in the Law of the Sea Convention on production policies resulted therein that the Legal and Technical Commission fulfils the duties of the Economic Planning Commission until the approval of the first plan of work for exploitation of mineral resources in the Area, unless the Council decides otherwise.[14]

III. Elements

1. Membership Requirements

6 The list of requirements for membership of the Economic Planning Commission should be seen as a qualification of the more general list for both the Economic Planning Commission and the Legal and Technical Commission together in Art. 163. The appropriate qualifications mentioned in Art. 163 (3) include for the Economic Planning Commission 'mining, management of mineral resource activities, international trade or international economics.'[15] It is the task of the States Parties to nominate persons with these qualifications and up to the Council to ensure that the composition of the Commission reflects all of those.[16] Furthermore, the Commission shall have at least two members from developing States whose exports of minerals that are also produced in the Area account for a substantial impact on their

[7] Sea-Bed Committee, Report of Sub-Committee I, Annex III: Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), 130–132, reproduced in: GAOR 28th Sess. Suppl. 21 (A/9021-II). See also Nordquist/Nandan/Rosenne (note 5), 469.

[8] Report of Sub-Committee I (note 7), 51 and 52.

[9] See UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 143–144.

[10] Nordquist/Nandan/Rosenne (note 5), 469.

[11] UNCLOS III, Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8/REV.1/PART I** (1976), OR V, 125, 134.

[12] Nordquist/Nandan/Rosenne (note 5), 470.

[13] *Ibid.*, 472.

[14] 1994 Implementation Agreement, Annex, S. 1, para. 4.

[15] Art. 164 (1).

[16] Arts. 163 (3) and 164 (1).

economies.[17] There is no provision for an adjustment of this minimum if the Council decides to increase the size of the Commission.[18]

2. Functions

Upon the request of the Council, the Economic Planning Commission shall propose measures to implement decisions concerning activities on the seabed beyond national jurisdiction.[19] This is a fairly general duty and it may be the equivalent for the Commission of the task of the Council to supervise and coordinate the implementation of the regime for the deep seabed.[20] It would not be illogical if these proposals were to be of a rather economic nature. If that would be the case, the obligation for the Commission to review trends of and factors that influence the supply, demand and price of materials that potentially can be produced from the deep seabed would certainly help the Council.[21] It appears that this responsibility can be best acted upon when production of deep sea minerals actually happens. Until the approval of the first plan of work for exploitation, the 1994 Implementation Agreement provides the Authority with some focal points to concentrate on. One of them is the analysis of the conditions on the global metal market, metal prices, trends and prospects.[22] The Economic Planning Commission seems very well suited to fulfil this task. 7

Besides reviewing economic trends and factors, the Commission shall specifically examine situations that will likely lead to adverse effects on the economy of a developing State when activities in the Area cause such an effect. This might be a reduction in price or volume of a mineral that could also be derived from the deep seabed. The affected State, or States, however, should bring such a situation to the attention of the Commission.[23] After the Commission sent recommendations to the Council accordingly, the latter shall take appropriate measures.[24] 8

When the Authority establishes that indeed one or more developing States suffer adverse effects from the mere existence of activities in the Area, the Assembly shall establish a compensation system for these States after recommendation of the Council on the basis of advice by the Economic Planning Commission. The Assembly can also take other measures relating to assistance for economic adjustment in specific cases.[25] The 1994 Implementation Agreement contains more detailed instructions regarding the development of the system of compensation.[26] The Authority needs to establish an economic assistance fund for this purpose. The Council shall from time to time determine the amount of money that this fund consists of upon the recommendation of the Finance Committee.[27] How much assistance an adversely affected developing State will receive for a particular amount of time will be decided on a case-by-case basis.[28] 9

[17] Art. 164 (1).
[18] See Art. 163 (2).
[19] See Art. 164 (2)(a).
[20] See Art. 162 (2)(a).
[21] See Art. 164 (2)(b).
[22] 1994 Implementation Agreement, Annex, S. 1, para. 5(d).
[23] Arts. 164 (2)(c) and 150 (h).
[24] See Art. 162 (2)(m).
[25] Arts. 164 (2)(d), 162 (2)(n) and 160(2)(l).
[26] 1994 Implementation Agreement, Annex, S. 1, para. 5(e) and S. 7.
[27] 1994 Implementation Agreement, Annex, S. 7, para. 1(a).
[28] Art. 163 (1); 1994 Agreement, Annex, S. 1, para. 4.

Article 165
The Legal and Technical Commission

1. Members of the Legal and Technical Commission shall have appropriate qualifications such as those relevant to exploration for and exploitation and processing of mineral resources, oceanology, protection of the marine environment, or economic or legal matters relating to ocean mining and related fields of expertise. The Council shall endeavour to ensure that the membership of the Commission reflects all appropriate qualifications.

2. The Commission shall:

(a) make recommendations with regard to the exercise of the Authority's functions upon the request of the Council;

(b) 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;

(c) supervise, upon the request of the Council, activities in the Area, where appropriate, in consultation and collaboration with any entity carrying out such activities or State or States concerned and report to the Council;

(d) prepare assessments of the environmental implications of activities in the Area;

(e) make recommendations to the Council on the protection of the marine environment, taking into account the views of recognized experts in that field;

(f) 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;

(g) 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;

(h) 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, ensure that existing regulations are adequate and are complied with and coordinate the implementation of the monitoring programme approved by the Council;

(i) recommend to the Council that proceedings be instituted on behalf of the Authority before the Seabed Disputes Chamber, in accordance with this Part and the relevant Annexes taking into account particularly article 187;

(j) make recommendations to the Council with respect to measures to be taken, upon a decision by the Seabed Disputes Chamber in proceedings instituted in accordance with subparagraph (i);

(k) make recommendations to the Council to issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area. Such recommendations shall be taken up by the Council on a priority basis;

(l) make recommendations to the Council to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment;

(m) make recommendations to the Council regarding the direction and supervision of a staff of inspectors who shall inspect activities in the Area to determine whether the provisions of 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;

(n) **calculate the production ceiling and issue production authorizations on behalf of the Authority pursuant to article 151, paragraphs 2 to 7, following any necessary selection among applicants for production authorizations by the Council in accordance with Annex III, article 7.**

3. The members of the Commission shall, upon request by any State Party or other party concerned, be accompanied by a representative of such State or other party concerned when carrying out their function of supervision and inspection.

Bibliography: *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001); *Harm Dotinga*, Regulations on polymetallic nodules adopted, Environmental Policy and Law 30 (2000), 174–177; *Michael W. Lodge*, The Deep Seabed, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen G. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 226–253; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135–337; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Kurt Michael Shusterich*, Resource Management and the Oceans. The Political Economy of Deep Seabed Mining (1982); *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999) 173–241; *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984)

Documents: ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (1997); ISA, Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/7/LTC/1/Rev.1 (2002); ISA, Environmental Management Plan for the Clarion-Clipperton Zone, ISA Doc. ISBA/17/LTC/7 (2011); ISA, Decision of the Council Relating to an Environmental Mmanagement Plan for the Clarion-Clipperton Zone, ISBA/18/C/22 (2012); ISA, Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area, ISA Doc. ISBA/19/LTC/8 (2013); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013); ISA, Monopolization of activities in the Area, ISA Doc. ISBA/20/LTC/11 (2014); ISA, Procedures for the Election in 2016 of Members Legal Procedures for the Election in 2016 of Members Legal and Technical Commission in Accordance with Article 163 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/C/6 (2015)

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I. Purpose and Function

The functions of the Legal and Technical Commission of the International Seabed Authority (ISA or the Authority) cover a fairly broad spectrum. First of all, the Commission shall make recommendations regarding the exercise of the functions of the Authority upon the Council's request. This is a very general formulation and it seems to provide a basis for the Council to ask the Commission for recommendations on any topic that falls within the scope of the Authority unless another subsidiary organ would be better qualified to deal with the issue. One of the prime tasks is nevertheless the review of plans of work for activities in 1

the Area. Although the 1994 Implementation Agreement incorporated some changes for the Council's approval of these plans, the role of the Commission did not change.[1] The Rules of Procedure of the Council provide further guidance and requirements for the Commission's review of the plans of work.[2]

2 Furthermore, the Legal and Technical Commission is heavily involved in the regulatory process of the Authority. The Commission shall formulate four sets of rules, regulations and procedures and submit those to the Council. The first set concerns the prospecting, exploration and exploitation of the mineral resources of the seabed beyond national jurisdiction. The second set of regulatory instruments relates to the internal administration and financial management of the Authority.[3] The third set to be submitted to the Council contains the rules, regulations and procedures concerning the equitable sharing of payments and contributions made in regard of mining of the continental shelf beyond 200 NM. The last set deals with the equitable sharing of economic benefits that derive from activities on or in the seabed beyond national jurisdiction.[4] The Commission shall keep the rules, regulations and procedures under review and recommend amendments to the Council if deemed necessary or desirable.

3 The Council has the task to establish mechanisms for the direction and supervision of a staff of inspectors. This staff shall inspect the activities in the Area to determine compliance with the regime for the deep seabed, including the Mining Code, and the terms and conditions of contracts.[5] If non-compliance occurs, the Council may institute proceedings before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) on behalf of the Authority and shall recommend measures to be taken.[6] It is the Legal and Technical Commission that shall make recommendations regarding both the direction and supervision of inspectors, the institution of proceedings and subsequently the measures to be taken.

4 Prominent among the functions of the Legal and Technical Commission are those relating to the marine environment. Almost half of them contain a direct link to it. Generally, the Commission shall make recommendations, preferably expert-based, to the Council concerning the protection of the marine environment. More specifically, the Convention requires the Commission to prepare assessments of environmental implications of activities in the Area and take this into account during the formulation of the four sets of rules, regulations and procedures. Furthermore, the Commission shall recommend to the Council to disapprove certain areas for exploitation, either by contractors or the Enterprise, if substantial evidence points at a risk of serious harm to the marine environment.

5 In addition, the Legal and Technical Commission shall make recommendations to the Council regarding the establishment of a monitoring programme. This programme's responsibility consists of the regular and scientific observation, measurement, evaluation and analysis of the risks and effects of any pollution of the marine environment if activities in the Area cause such pollution. Moreover, the programme shall ensure the adequacy of and compliance with the regulations. The Commission is also responsible for the implementation of the monitoring programme, upon approval by the Council. Finally, the Commission shall recommend to the Council the issuance of emergency measures, for

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[1] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 28 July 1994 (entered into force 28 July 1996), 1836 UNTS 3, Annex, S. 3, paras. 11–12.

[2] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014), Reg. 21; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014), Reg. 23; ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013), Reg. 23.

[3] Art. 162 (2)(o)(ii).

[4] Arts. 82, 140 (2), 160 (2)(f)(i) and 162 (2)(o)(i).

[5] Art. 162 (2)(u).

[6] Art. 162 (2)(v).

example adjustment of operations or suspension, to prevent serious harm to the marine environment caused by activities on and in the deep seabed.

Until the approval of the first plan of work for exploitation or until the Council decides otherwise, the Legal and Technical Commission is the only functioning subsidiary organ of the Council of the Authority. Next to its own responsibilities, the functions of the Economic Planning Commission are until then added to those of the Legal and Technical Commission as a consequence.[7] The competences of the individual members should suffice to do so because one of the relevant qualification listed concerns economic matters relating to ocean mining. Other appropriate qualifications are those relevant to legal matters, oceanology, protection of the marine environment and exploration for and exploitation and processing of mineral resources. There is no minimum amount of members from developing States foreseen as is the case with the Economic Planning Commission.[8] **6**

All in all, the Legal and Technical Commission is arguably the point of departure for many of the crucial responsibilities of the Council. The Council, in turn, is the executive organ of the Authority, which makes the Commission the cradle of much of the Authority's work. In light of this, it comes as no surprise that a deputy Secretary-General of the Authority states that '[i]t may fairly be said therefore that most of the substantive matters that come before the Council, except for financial and budgetary matters, require prior consideration by the Legal and Technical Commission.'[9] **7**

II. Historical Background

The first draft of a mining regime for the deep seabed, submitted by the United States in the Seabed Committee in 1970, contained three commissions.[10] The International Seabed Boundary Review Commission later evolved into the Commission on the Limits of the Continental Shelf.[11] The other two, the Rules and Recommended Practices Commission and the Operations Commission, contained together the first signs of the current Legal and Technical Commission.[12] Three years later, the Seabed Committee published a consolidated report containing many of the proposals made. From that report, the characteristics of the proposed Inspection and Conservation Commission, Legal Commission and Scientific and Technological Commission were later merged into the Legal and Technical Commission.[13] **8**

During UNCLOS III, this evolution into the Legal and Technical Commission occurred step by step. The first step was taken at the Third Session in 1975 when the negotiators allocated the new Technical Commission with the responsibilities of what in early proposals were the Operations Commission and the Scientific and Technological Commission.[14] The list of functions had become much longer during the Sixth Session in 1977 as laid down in the Informal Composite Negotiating Text. Among the more crucial ones were the issuance of emergency orders, the disapproval of certain areas for environmental reasons, the direction and supervision of a staff of inspectors, initiation of proceedings before the Seabed Disputes **9**

[7] 1994 Implementation Agreement, Annex, S. 7, para. 1(d).

[8] Art. 164 (1).

[9] *Michael W. Lodge*, The Deep Seabed, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015), 226, 235.

[10] Sea-Bed Committee, USA: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), cited in: GAOR 25th Sess. Suppl. 21 (A/8021), Art. 42.

[11] *Ibid.*; Arts. 45 and. 76 (8) UNCLOS and Annex II UNCLOS.

[12] USA Draft Convention (note 10), Arts. 43 and 44. See also Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 477.

[13] Sea-Bed Committee, Report of Sub-Committee I, Annex III: Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, UN Doc. A/AC.138/94/Add.1 (1973), 137, 138 and 131–135, reproduced in: GAOR 28th Sess. Suppl. 21 (A/9021-II).

[14] UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 144.

Chamber and last but definitely not least the review of plans of work. The current Art. 165 (3) also surfaced for the first time in 1977.[15]

10 During the resumed Seventh Session in 1978, the responsible Negotiating Group of the First Committee proposed the merger of the Rules and Regulations Commission with the Technical Commission. Some general provisions were moved to what is now Art. 163. On top of that, some powers of the Commission were transferred back to the Council.[16] Already before the adoption of the Convention, one scholar describes that the Legal and Technical Commission 'would become a political, executive entity rather than an advisory, technical body.' This might appear to be the case. In reality, however, it is still the Council that approves the plans of work, for instance.[17] Most of the Commission's tasks are recommendatory by nature.

III. Elements

1. Membership Requirements

11 As for the Economic Planning Commission in Art. 164, Art. 165 (1) specifies the appropriate qualifications that are mentioned in Art. 163 (3). It is, however, no strict obligation to have all appropriate qualifications represented in the Legal and Technical Commission.[18] The Council shall merely endeavour to ensure this. Knowledge of exploration, exploitation and processing of mineral resources as well as oceanology – or oceanography – cover the technical side of the Commission. Protection of the marine environment plays a significant role in the duties of the Legal and Technical Commission and knowledge thereof is listed separately as an appropriate qualification. That the list also includes economic matters appears practical now the Legal and Technical Commission also has to perform the tasks of the Economic Planning Commission.[19] An additional requirement concerning the membership of the Economic Planning Commission is that at least two members represent developing States.[20] This requirement is not included for the Legal and Technical Commission. Nonetheless, the need for equitable geographical distribution with regard to the election of the members will effectively guarantee that at least two members of the Legal and Technical Commission are from developing States, in case this would be a requirement to perform the duties of the Economic Planning Commission.[21]

12 In August 1996, the Council was to elect the first members of the Legal and Technical Commission. Art. 163 prescribes fifteen members for one Commission with the possibility to increase.[22] There were 22 candidates for these fifteen position. Difficult negotiations had accompanied the elections of both the members of the Council as well as those of the Finance Committee. As a consequence, the President of the Council decided to use the possibility of increasing the membership directly and the Council elected all 22 candidates by acclamation. In 2016, the Commission had 24 members.[23]

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[15] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 31.

[16] Nordquist/Nandan/Rosenne (note 12), 479.

[17] *Kurt Michael Shusterich*, Resource Management and the Oceans. The Political Economy of Deep Seabed Mining (1982), 123. See also 1994 Implementation Agreement, Annex, S. 3, para. 11.

[18] Indeed, distribution among different qualifications is not always even. For example, see ISA, Procedures for the Election in 2016 of Members Legal Procedures for the election in 2016 of members Legal and Technical Commission in Accordance with Article 163 of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/C/6 (2015), paras. 10–12.

[19] 1994 Implementation Agreement, Annex, S. 1, para. 4.

[20] Art. 164 (1).

[21] Art. 163 (4).

[22] Art. 163 (2).

[23] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (1997), para. 18; *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 219; ISA Procedures for Election 2016 (note 18), paras. 8–9.

2. Plans of Work

It is the responsibility of the Council to approve the plans of work.[24] The 1994 Implementation Agreement rewrote the procedure in the Convention but the changes do not affect the review of the plans of work by the Legal and Technical Commission.[25] The Commission shall review the plans of work only on the basis of Annex III to the Convention. This Annex contains the basic conditions of prospecting, exploration and exploitation. The provision has been interpreted as to mean, therefore, 13

> 'that the Commission must refrain from including in its recommendations any consideration of a political nature or concerning the general policy of the Authority or otherwise not directly related to the administrative, legal and technical matters referred to in Annex III.'[26]

As soon as the Authority receives a plan of work, the Secretary-General shall notify the members of the Legal and Technical Commission, adding information of a general nature that is not confidential. If this happens at least thirty days before the next meeting of the Commission, the Commission shall consider the plan of work at that particular meeting.[27] This shall happen in the order in which the plans of work are received.[28] Non-discrimination with regard to the application of the regulation for approval is the rule.[29] When the Legal and Technical Commission is of the opinion that a proposed plan of work does not comply with the applicable rules, the applicant may amend the application within 45 days of such a notification. This process may repeat itself once with a new deadline of thirty days.[30] 14

Compliance with the rules and regulations for activities in the Area and acceptance of the control by the Authority constitute important requirements.[31] In addition, the Commission will check if all obligations from previous contracts have been discharged, if the applicant possesses the financial ability to carry out the proposed plan of work and if the applicant provided details on its ability to comply directly with possible emergency orders.[32] On top of that, the plan of work needs to provide for the effective protection of human health, safety and the marine environment.[33] Furthermore, the proposed activity may not include the occurrence of installations that potentially interfere with 'the use of recognized sea lanes essential to international navigation' or intense fishing.[34] Fulfilment of all these requirements will necessarily lead to a recommendation in favour of approval unless there exists overlap with a disapproved area for environmental purposes or with an area included in 15

[24] Arts. 153 (3) and 162 (2)(j).

[25] 1994 Implementation Agreement, S. 3, paras. 11–12.

[26] *Felipe Hector Paolillo*, The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations, RdC 188 (1984), 135, 238.

[27] Reg. 21(1) and 20(c) Polymetallic Nodules Regulations; Reg. 23(1) and 22(c) Polymetallic Sulphides Regulations; Reg. 23(1) and 22(c) Ferromanganese Crusts Regulations.

[28] Reg. 21(2) Polymetallic Nodules Regulations; Reg. 23(2) Polymetallic Sulphides Regulations; Reg. 23(2) and 22(c) Ferromanganese Crusts Regulations; Annex III, Art. 6 (3) UNCLOS.

[29] Reg. 21(11) Polymetallic Nodules Regulations; Reg. 23(12) Polymetallic Sulphides Regulations; Reg. 23(12) Ferromanganese Crusts Regulations.

[30] Reg. 21(8) Polymetallic Nodules Regulations; Reg. 23(9) Polymetallic Sulphides Regulations; Reg. 23(9) Ferromanganese Crusts Regulations.

[31] Annex III, Arts. 4 (6) & 6 (3) UNCLOS; Reg. 21(3)(a)–(b) and 14 Polymetallic Nodules Regulations; Reg. 23(3)(a)–(b) and 15 Polymetallic Sulphides Regulations; Reg. 23(3)(a)–(b) and 15 Ferromanganese Crusts Regulations.

[32] Reg. 21(3)(d)–(c) Polymetallic Nodules Regulations; Reg. 23(3)(d)–(c) Polymetallic Sulphides Regulations; Reg. 23(3)(d)–(c) Ferromanganese Crusts Regulations.

[33] Reg. 21(4)(a) Polymetallic Nodules Regulations; Reg. 23(4)(a)–(b) Polymetallic Sulphides Regulations; Reg. 23(4)(a) & (b) Ferromanganese Crusts Regulations.

[34] Art. 147 (2)(b); Reg. 21(4)(c) Polymetallic Nodules Regulations; Reg. 23(4)(c) Polymetallic Sulphides Regulations; Reg. 23(4)(c) Ferromanganese Crusts Regulations.

an already approved plan of work for the same resource or if the plan of work tends to give the applicant a monopoly.[35]

3. Rules, Regulations and Procedures

16 The Legal and Technical Commission's most influential task is probably the formulation of rules, regulations and procedures on a range of different topics.[36] First and foremost, the Commission is responsible for drafting the Mining Code.[37] In its first two decades, it concentrated on the prospecting and exploration of three kinds of mineral resources. Polymetallic nodules were the subject of the first set of rules. The Commission updated this part of the Mining Code in 2013.[38] At the time of UNCLOS III, the negotiators saw this resource as by far the most significant. The discovery of its value might very well be considered as the cause of the initiation of a new law of the sea at the end of the 1960s in the first place. As a consequence, the Commission could base itself on provisions in the Law of the Sea Convention[39] but also on the work of the Preparatory Commission of the Authority from the decade between the adoption and entry into force of the Convention. This Preparatory Commission drafted already several parts of the Mining Code in that period. The Legal and Technical Commission finished its work on the prospecting and exploration of polymetallic nodules in 1998. It then took the Council three meetings to adopt the rules, regulations and procedures.[40] The second and third part of the Mining Code concerned the prospecting and exploration of cobalt-rich ferromanganese crusts and polymetallic sulphides respectively.[41] These two parts are very similar.

17 Second, the Legal and Technical Commission shall formulate rules, regulations and procedures relating to the internal administration and financial management of the Authority.[42] The third set of rules, regulations and procedures concerns the equitable sharing of payments and contributions made by States in regard of their benefits derived from mining of non-living resources of the continental shelf beyond 200 NM.[43] Although the Area will only be finally geographically determined when the Commission on the Limits of the Continental Shelf has dealt with all claims for an outer continental shelf,[44] some would incorrectly view upon the affirmation of these claims as a deduction of the Area where the common heritage of humankind is applicable.[45] Arguably, this chain of thought led to the drafting of Art. 82 and consequently the task for the Legal and Technical Commission to draft rules, regulations and procedures to share the benefits of mining activities beyond 200 NM equitably. Fourth, and related, the Legal and Technical Commission shall formulate rules, regulations and procedures in regard of the economic benefits derived from activities in the Area itself.[46] At the time of writing, the Commission has not yet fulfilled the latter two tasks concerning equitable sharing. When it does, it should particularly take into account the needs and interests of developing States and 'peoples who have not attained full independence or other self-governing status'.[47]

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[35] Annex III, Arts. 6 (3)–(4) UNCLOS; Reg. 21(5)–(6) Polymetallic Nodules Regulations; Reg. 23(5)–(7) Polymetallic Sulphides Regulations; Reg. 23(5)–(7) Ferromanganese Crusts Regulations. See also ISA, Monopolization of Activities in the Area, ISA Doc. ISBA/20/LTC/11 (2014).

[36] Arts. 82, 140 (2), 160 (2)(f), 162 (2)(o) and 165(2)(f); 1994 Implementation Agreement, S. 1, paras. 15–16.

[37] Arts. 165 (2)(f), 160 (2)(f)(ii) and 162 (2)(o)(ii).

[38] Polymetallic Nodules Regulations.

[39] For example, see Art. 162 (2)(o)(ii) and Annex III, Art. 6 (3).

[40] *Harm Dotinga*, Regulations on Polymetallic Nodules Adopted, Environmental Policy and Law 30 (2000), 174, 175.

[41] Polymetallic Sulphides Regulations; Ferromanganese Crusts Regulations.

[42] Arts. 165 (2)(f) and 162 (2)(o)(ii).

[43] Arts. 165 (2)(f) and 162(2)(o)(i).

[44] Art. 76 (8) & Annex II.

[45] See Arts. 136, 1 (1)(1) and 134 (4).

[46] Arts. 165 (2)(f) and 162 (2)(o)(i).

[47] Art. 162(2)(o)(i).

The Legal and Technical Commission submits these four sets of rules, regulations and procedures to the Council. In turn, the Council recommends these to the Assembly. The latter then considers the drafts and might approve or disapprove them.[48] Interestingly, the Convention requires the Commission to take 'into account all relevant factors including assessments of the environmental implications of activities in the Area'.[49] Apparently, the negotiators were of the opinion that these considerations only needed explicit mentioning at the stage of formulation because none of the related provisions, both in the Convention and its 1994 Implementation Agreement, include this specific environmental note.[50] The Legal and Technical Commission shall keep all these rules, regulations and procedures under review. It may recommend amendments to the Council from time to time, when it deems this necessary or desirable.[51] **18**

4. Compliance

The Council is the Authority's designated organ to establish mechanisms for the direction and supervision of a staff of inspectors. This staff shall inspect compliance of the activities in the Area with the rules in the Convention, the rules of the Authority, the Mining Code, and the contracts.[52] The Legal and Technical Commission shall make recommendations to the Council regarding the direction and supervision of these inspectors.[53] Curiously, the Law of the Sea Convention burdens the Commission itself also with the responsibility to supervise activities in the Area, upon the request of the Council though. This should occur, where appropriate, in consultation and collaboration with the entity or State that is engaged in these activities. The Commission needs to report to the Council on this.[54] The Council itself appears to have this power as well and to provide the Commission with the same power seems to create the possibility for some form of delegation.[55] Wolfrum argues that this curiosity goes back to an oversight in the editing process during UNCLOS III. Early proposals provided the Commission with the power of inspection. Later, this function was moved to the Council and the obligation to cooperate with the entity that carries out the activity was deleted. Nowadays, the Legal and Technical Commission does not have its own inspectors and it is consequently difficult to supervise any activities in the Area.[56] Nevertheless, the Commission may issue administrative or technical recommendations to support contractors in their implementation of the rules, regulations and procedures of the Authority.[57] The Council has to agree with the text of such a recommendation. Otherwise, it may request modification or withdrawal of the recommendation.[58] **19**

The Council is also the organ of the Authority that can institute proceedings before the Seabed Disputes Chamber of the ITLOS in cases of non-compliance.[59] Consequently, the Council shall notify the Assembly of the Authority upon a decision by the Chamber and **20**

[48] Arts. 165 (2)(f), 162 (2)(o) and 160 (2)(f).

[49] Art. 165 (2)(f).

[50] For example, see Arts. 82, 140 (2), 160 (2)(f)(i) and 162(2)(o)(i); 1994 Implementation Agreement, S. 1, paras. 15–16.

[51] Art. 165 (2)(g). The Mining Code specifically mentions the environmental rules, regulations and procedures in this regard; Reg. 31(1) and (3) Polymetallic Nodules Regulations; Reg. 33(1) and (3) Polymetallic Sulphides Regulations; Reg. 33(1) and (3) Ferromanganese Crusts Regulations.

[52] Art. 162 (2)(z).

[53] Art. 165 (2)(m).

[54] Art. 165 (2)(c).

[55] Art. 162 (2)(a) & (z).

[56] *Rüdiger Wolfrum*, Die Internationalisierung staatsfreier Räume: Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden (1984) 580.

[57] Reg. 39(1) Polymetallic Nodules Regulations; Reg. 41(1) Polymetallic Sulphides Regulations; Reg. 41(1) Ferromanganese Crusts Regulations.

[58] Reg. 39(2) Polymetallic Nodules Regulations; Reg. 41(2) Polymetallic Sulphides Regulations; Reg. 41(2) Ferromanganese Crusts Regulations.

[59] Art. 162 (2)(u).

make recommendations for measures to be taken.[60] The role of the Legal and Technical Commission is to recommend the Council to institute proceedings before the Seabed Disputes Chamber in the first place and to make recommendations to the Council about measures to be taken, taking into account the decision of the Chamber.[61]

5. Marine Environment

21 Many of the responsibilities of the Legal and Technical Commission relate to the protection of the marine environment. In general, the Commission shall make recommendations to the Council on this topic, taking into account the views of recognised experts.[62] Among these recommendations are those that ensure the application of a precautionary approach and best environmental practices.[63] The recommendations are also relevant for plans of work for exploration. The applicant has to include in the plan a description of the programme for oceanographic and environmental baseline studies, which would enable an assessment of the potential environmental impact of the proposed activities. Thereby, the applicant needs to take into account the recommendations of the Legal and Technical Commission.[64] The website of the Authority provides much information on technical studies and workshops concerning the environment of the deep sea. The Commission drafted, for example, the Environmental Management Plan for the Clarion-Clipperton Zone. Among other things, this plan proposes guiding principles and nine areas of particular environmental interest in which, for the time being, no mining should take place.[65] The Council adopted the plan one year later, taking into account the drafting function of the Commission in the first recital of the preamble.[66]

22 The Commission shall take into account, among other relevant factors, assessments of environmental impacts of activities in the Area while formulating rules, regulations and procedures.[67] It shall prepare these assessments itself.[68] When substantial evidence indicates the risk of serious environmental harm, the Legal and Technical Commission shall disapprove of the particular area for exploitation by either contractors or the Enterprise.[69] Prospecting will not be allowed either in these disapproved areas.[70] When the activity already started, it might be necessary for the Council to issue an emergency order to prevent, contain or minimise any serious environmental harm. Such an order may include the adjustment or suspension of the operation.[71] The Council will take into account recommendations of the Legal and Technical

[60] Art. 162 (2)(v).

[61] Art. 165 (2)(i)–(j).

[62] Art. 165 (2)(e). For example, see ISA, Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/7/LTC/1/Rev.1 (2002).

[63] Reg. 31(2) and (3) Polymetallic Nodules Regulations; Reg. 33(2) and (3) Polymetallic Sulphides Regulations; Reg. 33(2) and (3) Ferromanganese Crusts Regulations. For the negotiation history of the inclusion of the precautionary approach, see *E. D. Brown*, Sea-bed Energy and Minerals: the International Legal Regime, Volume 2: Sea-bed Mining (2001), 416–419.

[64] 1994 Implementation Agreement, S. 1, para. 7; Reg. 18(b) and 32 Polymetallic Nodules Regulations; Reg. 20(1)(b) and 34(1) Polymetallic Sulphides Regulations; Reg. 20(1)(b) and 34(1) Ferromanganese Crusts Regulations. These recommendation for guidance of the contractors are quite extensive. For the latest version, see ISA, Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area, ISA Doc. ISBA/19/LTC/8 (2013).

[65] ISA, Environmental Management Plan for the Clarion-Clipperton Zone, ISA Doc. ISBA/17/LTC/7 (2011).

[66] ISA, Decision of the Council Relating to an Environmental Management Plan for the Clarion-Clipperton Zone, ISBA/18/C/22 (2012). Rothwell & Stephens suggest that Art. 162 (2)(x) is the basis for the establishment of a network of ecologically-related areas in the Clarion-Clipperton Zone: *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 140.

[67] Art. 165 (2)(f).

[68] Art. 165 (2)(d).

[69] Arts. 165 (2)(l) and 162 (2)(x).

[70] Reg. 2(3) Polymetallic Nodules Regulations; Reg. 2(4) Polymetallic Sulphides Regulations; Reg. 2(3) Ferromanganese Crusts Regulations.

[71] Art. 162 (2)(w); Reg. 33(6) Polymetallic Nodules Regulations; Reg. 35(6) Polymetallic Sulphides Regulations; Reg. 35(6) Ferromanganese Crusts Regulations.

Commission and shall take these up on the basis of priority.[72] The Commission makes its recommendations after the reception of the report by the Secretary-General of the Authority.[73]

Furthermore, the Commission shall make recommendations to the Council regarding the establishment of a monitoring programme. Through recognised scientific methods, this programme is responsible for the regular observation, measurement, evaluation and analysis of the risks and effects of pollution of the marine environment, caused by activities in the Area. In addition, the programme shall ensure the adequacy of and compliance with regulations and coordinate its implementation. The programme needs the Council's approval but this is not listed among the functions and powers of the Council.[74] In other words, it is one of the very few functions of the Legal and Technical Commission where a corresponding power of the Council lacks in the Convention.[75] The choice of words is, however, very similar to the more general provision on the monitoring of risks and effects of pollution.[76] 23

Subsection D
The Secretariat

Article 166
The Secretariat

1. The Secretariat of the Authority shall comprise a Secretary-General and such staff as the Authority may require.

2. The Secretary-General shall be elected for four years by the Assembly from among the candidates proposed by the Council and may be re-elected.

3. The Secretary-General shall be the chief administrative officer of the Authority, and shall act in that capacity in all meetings of the Assembly, of the Council and of any subsidiary organ, and shall perform such other administrative functions as are entrusted to the Secretary-General by these organs.

4. The Secretary-General shall make an annual report to the Assembly on the work of the Authority.

Bibliography: *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Satya Nandan*, Administering the Mineral Resources of the Deep Seabed, in David Freestone/Richard Barnes/David Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 75–92

Documents: ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/20/A/2 (2014); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015); ISA, Rules of Procedures of the Assembly of the International Seabed Authority (1995), reprinted in ISA, Basic Texts (2nd edn., 2012) 4–31; ISA, Rules of

[72] Reg. 33(6) Polymetallic Nodules Regulations; Reg. 35(6) Polymetallic Sulphides Regulations; Reg. 35(6) Ferromanganese Crusts Regulations; Art. 165 (2)(k) UNCLOS.

[73] Reg. 33(4) Polymetallic Nodules Regulations; Reg. 35(4) Polymetallic Sulphides Regulations; Reg. 35(4) Ferromanganese Crusts Regulations.

[74] Art. 165 (2)(h).

[75] The provision might support the exercise of other functions of the Commission, though. For example, see Reg. 31(4) Polymetallic Nodules Regulations; Reg. 33(4) Polymetallic Sulphides Regulations; Reg. 33(4) and 35(6)Ferromanganese Crusts Regulations.

[76] Art. 204 (1).

Procedures of the Council of the International Seabed Authority (1996), reprinted in ISA, Basic Texts (2nd edn., 2012) 32–54; ISA, Rules of Procedures of the Finance Committee of the International Seabed Authority (1999), reprinted in ISA, Basic Texts (2nd edn., 2012) 61–69; ISA, Rules of Procedures of the Legal and Technical Commission (2000), reprinted in ISA, Basic Texts (2nd edn., 2012) 70–84; GA, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind (continued), UN Doc A/C.1/PV.1516 (1967)

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I. Purpose and Function

1 Art. 166 primarily deals with the Secretary-General of the International Seabed Authority (ISA or the Authority). The Article determines the role, functions, and obligations of the Secretary-General as well as the procedure for his or her election. Art. 166 is closely aligned with Arts. 97 and 98 of the Charter of the United Nations. The Secretariat of the Authority is established, as a principal organ of the Authority, by Art. 158[1] and comprises the Secretary-General and such staff as the Authority may require. The Secretary-General is elected for four years by the Assembly from among the candidates proposed by the Council and may be re-elected. As of July 2016, the Secretary-General of the Authority is Mr. Nii Allotey Odunton, who was elected in 2008. He succeeds Mr. Satya N. Nandan, who served three consecutive four-year terms. In July 2016, Michael Lodge was elected as the new Secretary-General, who will assume office on 1 January 2017.

2 Art. 166 (3) specifies the role and functions of the Secretary-General. The Secretary-General is not only part of the Secretariat but also acts as the 'chief administrative officer of the Authority' as a whole.

3 Art. 166 (4) articulates the obligation of the Secretary-General to prepare an annual report to the Assembly on the work of the Authority. These reports typically include an overview of the work of the previous year and the previous session of the Authority; the status of mineral exploration and exploitation; a summary of the progressive development of the regulatory regime for activities in the Area; a summary of administrative and financial matters; an overview of capacity development, training and outreach activities; relevant information regarding developments in related organisations, such as the Commission on the Limits of the Continental Shelf; and an overview of current and future work.[2]

II. Historical Background

4 The need for a Secretariat arose out of the ambition, as formulated by Arvid Pardo, to create 'a special agency with adequate powers to administer in the interest of mankind the oceans and the ocean floor beyond national jurisdiction.'[3] The Secretariat is the permanent body of the Authority and occupies its headquarters.

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[1] See *Schatz* on Art. 158.

[2] See e. g. ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/20/A/2 (2014).

[3] GA, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond the Limits of Present National

The provisions regarding the Secretariat of the Authority (Arts. 166–169) were not controversial and were substantially negotiated early during at UNCLOS III.[4] The proposals submitted by States for the provisions regarding the Secretariat were largely similar, although they differed with respect to who would elect the Secretary-General. A proposal for the Secretary-General to be elected by the Assembly was put forward, for example, by Tanzania[5] as well as Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay, and Venezuela.[6] In contrast, other States, such as Canada[7] and the United States,[8] suggested the Secretary-General to be elected by the Council of the Authority. Malta[9] and the UK[10] suggested the Secretary-General to be appointed by the Assembly on the recommendation of the Council. The difference between these proposals is important in so much as the Assembly follows a one State, one vote system in which developing States hold the majority. 5

The various proposals were compiled by the Sub-Committee I of the Sea-Bed Committee in 1973, illustrating areas of agreement and disagreement.[11] Art. XLV of this draft text set out in detail the rules relating to the Secretariat and the Secretary-General. It still included the option to require the Secretary-General to act in an advisory capacity to the Enterprise[12] and to supervise inspections of activities in the Area.[13] The former was ultimately deleted and the latter was added to the list of functions of the Council of the Authority, as supported by the Legal and Technical Commission.[14] Art. XLV also foresaw a six years term for the Secretary-General with the possibility of being re-elected once. 6

At the Conference, the text was significantly shortened and a provision that was similar to the current Art. 166 was included in Arts. 37 and 38 of the Draft Informal Single Negotiating Text in 1975.[15] The same wording was included in subsequent drafts.[16] However, these provisions did not specify the term of office of the Secretary-General and provided for him or her to be 'appointed by the Assembly upon the recommendation of the Council.' 7

Jurisdiction and the Use of Their Resources in the Interests of Mankind (continued), UN Doc A/C.1/PV.1516 (1967), para. 8.

[4] *Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne* (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 483.

[5] Sea-Bed Committee, Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51 (Art. 31).

[6] Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105 (S. 4).

[7] Sea-Bed Committee, Canada: International Sea-bed Regime and Machinery Working Paper, UN Doc. A/AC.138/59 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 205 (para. 15(c)).

[8] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130 (Arts. 40(f), 61).

[9] Sea-Bed Committee, Malta: Draft Ocean Space Treaty – Working Paper, UN Doc. A/AC.138/53 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105 (Art. 164).

[10] Sea-Bed Committee, United Kingdom: International Sea Bed Regime – United Kingdom Proposals for Elements of a Convention, UN Doc. A/AC.138/46 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 83 (para. 26).

[11] Sea-Bed Committee, Report of Sub-Committee I – Appendix III, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39; see also Nordquist/Nandan/Rosenne (note 4), 487–488.

[12] Report of Sub-Committee I – Appendix III (note 11), Art. XLV(c).

[13] *Ibid.*, Art. XLV(g).

[14] Arts. 162 (2)(z), 165 (2)(m), 165 (3) UNCLOS.

[15] First Committee UNCLOS III, Draft of the Informal Single Negotiating Text (Part I) (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 110, 135–136.

[16] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 145 (Arts. 36 and 37); UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V 125, 137 (Art. 42); UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 31–32 (Art. 165).

8 In 1979, a term of office of four years was specified in Art. 165 of the Revised Suggested Compromise Formula by the Chairman of Negotiating Group 3.[17] The same Article also provided for the Secretary-General to be elected, rather than appointed, and mentioned the possibility of re-election of the Secretary-General. This draft was accepted and included in Art. 166 of the Informal Composite Negotiating Text (Revision 1) of 1979[18] as well as Revisions 2 and 3 of the text.[19] In a final substantial change to the provision, it was decided that the Assembly would elect the Secretary-General not 'upon the recommendation of the Council' but 'from among the candidates proposed by the Council.' The latter wording had been used in Art. 160[20] in relation to the powers and functions of the Assembly and had been included on the insistence of the Group of 77.[21]

III. Elements

1. 'such other administrative functions as are entrusted to the Secretary-General by these organs'

9 The Secretary-General carries out general administrative tasks for the Authority. For example, he receives all applications for activities in the Area[22] and drafts the proposed annual budget of the Authority.[23] He also takes part in the meetings of all organs of the Authority and performs a range of administrative functions for the organs of the Authority. These include: preparing the provisional agenda for meetings of the organs;[24] receiving and circulating proposals and amendments to the delegations or members of the organ;[25] and preparing studies and reports at the request of the Council,[26] the Legal and Technical Commission,[27] or the Finance Committee.[28]

10 Through the Authority's own rules, regulations, and procedures, the Secretary-General was given the power to take emergency measures of a temporary nature to prevent, contain and minimize serious harm or the threat of serious harm to the marine environment.[29] The broad

[17] UNCLOS III, Revised Suggested Compromise Formula by the Chairman of Negotiating Group 3, UN Doc. NG3/6 (1979, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IX (1986), 295, 303; See also *Nordquist/Nandan/Rosenne* (note 4), 488.

[18] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 1.

[19] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 1; UNCLOS III, Informal Composite Negotiating Text (Revision 3), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, i.

[20] ICNT Rev. 1 (note 18), 86 (Art. 160(2)(b)).

[21] *Nordquist/Nandan/Rosenne* (note 4), 488.

[22] Art. 1 (1)(1) defines 'the Area' as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.' Art. 1 (1)(3) defines 'activities in the Area' as 'all activities of exploration for, and exploitation of, the resources of the Area.' See further *Tanaka* on Art. 1 MN 6–7, 11.

[23] Art. 172 UNCLOS.

[24] ISA, Rules of Procedures of the Assembly of the International Seabed Authority (1995), reprinted in ISA, Basic Texts (2nd edn. 2012) 4–31 (Rule 9); ISA, Rules of Procedures of the Council of the International Seabed Authority (1996), reprinted in ISA, Basic Texts (2nd edn. 2012), 32–54 (Rule 11); ISA, Rules of Procedures of the Legal and Technical Commission (2000), reprinted in ISA, Basic Texts (2nd edn. 2012) 70–84 (Rule 7); ISA, Rules of Procedures of the Finance Committee of the International Seabed Authority (1999), reprinted in ISA, Basic Texts (2nd edn. 2012) 61–69 (Rule 6).

[25] ISA, Rules of Procedures of the Assembly of the International Seabed Authority (note 24), Rule 56; ISA, Rules of Procedures of the Council of the International Seabed Authority (note 24), Rule 51; ISA, Rules of Procedures of the Legal and Technical Commission (note 24), Rule 39.

[26] ISA, Rules of Procedures of the Council of the International Seabed Authority (note 24), Rule 15.

[27] ISA, Rules of Procedures of the Legal and Technical Commission (note 24), Rule 21(4).

[28] ISA, Rules of Procedures of the Finance Committee of the International Seabed Authority (note 24), Rule 18(4).

[29] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISBA/19/A/9; ISBA/19/A/12 (2013) and ISBA/20/A/9 (2014), Regulation 33(3); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1

mandate for such measures is derived from Arts. 162(2)(w) and 165(2)(k) of the Convention, which confer the power to take and recommend emergency measures to the Council and the Legal and Technical Commission respectively. Pending action by the Council, the Secretary-General can take such immediate measures, for no longer than 90 days, 'as are practical and reasonable in the circumstances to prevent, contain and minimize serious harm or the threat of serious harm to the marine environment.'[30]

An important function of the Secretariat more generally, is to provide or commission expert papers, such as Technical Studies, for the organs of the Authority. Similarly, the Secretariat organises workshops and technical meetings for scientists, members of the Legal and Technical Commission, and other stakeholders to discuss research and developments relating to activities in the Area.[31] 11

Article 167
The staff of the Authority

1. The staff of the Authority shall consist of such qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Authority.

2. The paramount consideration in the recruitment and employment of the staff and in the determination of their conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Subject to this consideration, due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

3. The staff shall be appointed by the Secretary-General. The terms and conditions on which they shall be appointed, remunerated and dismissed shall be in accordance with the rules, regulations and procedures of the Authority.

Bibliography: *Satya Nandan*, Administering the Mineral Resources of the Deep Seabed, in: David Freestone/Richard Barnes/David Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 75–92; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Michael C. Wood*, 'International Seabed Authority: The First Four Years', MPYBUNL 3 (1999), 173–241; *Michael C. Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47–98

Documents: *Allen L Clark/Jennifer Cook Clark/Sam Pintz*, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, ISA Technical Study No. 11 (2013); ISA, Amendments to the Staff Regulations of the International Seabed Authority, ISA Doc. ISBA/16/C/4 (2010); ISA, Decision of the Council Relating to Participation of the International Seabed Authority in the United Nations Joint Staff Pension Fund, ISA Doc. ISBA/C/8 (1996); ISA, Decision of the Assembly Relating to Participation of the International Seabed Authority in the United Nations Joint Staff Pension Fund, ISA Doc. ISBA/A/15 (1996); ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/6/C/10 (2000); ISA, Decision of the Assembly of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/7/A/5 (2001); ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/16/C/9 (2010); ISA, Decision of the Assembly of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/16/A/9 (2010); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/4/A/11 (1998); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/12/A/2 (2011); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/19/A/2 (2013); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA

(2010), amended by ISBA/19/A/12 (2013) and ISBA/20/A/10 (2014), Regulation 35(3); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013), Regulation 35(3).

[30] *Ibid.*

[31] *Satya Nandan*, Administering the Mineral Resources of the Deep Seabed, in: David Freestone/Richard Barnes/David Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 75–92.

Doc. ISBA/20/A/2 (2014); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015); ISA, Staff Regulations of the Authority (adopted 13 July 2000 by the Council and 10 July 2001 by the Assembly), annexed to: ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/6/C/10 (2000); ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011); ISA, Staff Regulations of the International Seabed Authority, reprinted in: ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011), 5–20; ISA, Staff Rules of the International Seabed Authority, reprinted in ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011), 22–90; Preparatory Commission, Administrative Arrangements, Structure and Financial Implications of the International Sea-Bed Authority, UN Doc. LOS/PCN/WP.51 (1990); Preparatory Commission, Final Draft Agreement Concerning the Relationship Between the United Nations and the International Seabed Authority, UN Doc. LOS/PCN/WP.50/REV.3 (1993)

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I. Purpose and Function

1 Art. 167 addresses the size of the Secretariat of the International Seabed Authority (ISA or the Authority) as well as the qualifications, recruitment, and terms of employment of the staff of the Authority. Art. 167 (1) states that the Authority is to consist of such qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Authority. Given the frontier nature of deep seabed mining and the significant technological and scientific challenges associated with it, Art. 167 specifically provides for the Authority to include scientific and technical personnel.

2 An important aspect of Art. 167 (1) is the question concerning the size of the Secretariat. In this respect, Art. 167 is linked to Art. 166, which also provides for the Secretariat to include 'such staff as the Authority may require.' The 1994 Implementation Agreement requires the Authority and all of its organs to be cost-effective. This overarching objective requires the Authority to limit the number of staff in the Secretariat.

3 Art. 167 (2) stresses the importance of securing the highest standards of efficiency, competence and integrity with respect to the recruitment and employment of staff. As a secondary requirement, staff should be recruited on as wide a geographical basis as possible. Art. 167 (2) is largely identical to Art. 101 of the Charter of the United Nations, with the addition of the word 'recruitment'. However, an important difference is that Art. 167 expressly subjects the geographical element to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Because of the small size of the Secretariat, the Authority does not use a system of 'desirable ranges', as used by the United Nations, whereby each member State receives a range of posts within which it will be represented.[1]

4 Art. 167 (3) provides that the staff of the Secretariat are to be appointed by the Secretary-General and the terms and conditions of their appointment, remuneration, and dismissal are to be subject to rules, regulations, and procedures of the Authority. In line with this provision, the Authority adopted Staff Regulations in 2001,[2] which were revised in 2011.[3]

[1] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 493.

[2] ISA, Staff Regulations of the Authority (adopted 13 July 2000 by the Council and 10 July 2001 by the Assembly) (ISA Staff Regulations 2000), annexed to: ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/6/C/10 (2000).

[3] ISA, Staff Regulations of the International Seabed Authority (ISA Staff Regulations 2010), reprinted in: ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011), 5–20.

II. Historical Background

The development of Art. 167 was not controversial. Many of the early proposals submitted by States to the Sea-Bed Committee included wording taken from Art. 101 of the Charter of the United Nations. In particular, they stressed that the 'paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.' Moreover, they noted the 'importance of recruiting the staff on as wide a geographical basis as possible.'[4] 5

The Draft of the Informal Single Negotiating Text of 1975 contained a provision, in Art. 39, that was largely similar to the present Art. 167.[5] There were three points of difference. First, paragraph 1 referred to 'the objective and functions' of the Authority instead of the 'administrative functions' of the Authority. This was changed only a year later in Art. 43 of the Revised Single Negotiating Text (RSNT) of 1976, which included the term 'administrative functions'.[6] Second, Art. 39 specifically noted that the 'Authority shall be guided by the principle that its permanent staff shall be kept to a minimum.' This sentence was left out of the draft text in 1979 and does not appear in the present Art. 167.[7] Third, paragraph 3 of Art. 39 required the terms and conditions on which staff is appointed, remunerated, and dismissed to be 'in accordance with regulations made by the Council, and to general rules approved by the Assembly on the recommendation of the Council.' In 1980, to ensure consistency with other provisions, this wording was changed to: 'in accordance with the rules, regulations and procedures of the Authority.'[8] 6

III. Elements

1. 'qualified scientific and technical and other personnel as may be required'

The Secretariat of the Authority is still evolving with respect to its size and functions. The 1994 Implementation Agreement provides that: 7

> 'the setting up and the functioning of the organs and subsidiary bodies of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs and

[4] See e. g. Sea-Bed Committee, Report of Sub-Committee I – Appendix III, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39 (Art. XLV(6)); Sea-Bed Committee, Malta: Draft Ocean Space Treaty – Working Paper, UN Doc. A/AC.138/53 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105 (Art. 169); Sea-Bed Committee, Chile *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105 (Art. 45); Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130 (Art. 64).

[5] First Committee UNCLOS III, Draft of the Informal Single Negotiating Text (Part I) (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985), 110, 137 (Art. 41).

[6] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125.

[7] UNCLOS III, Revised Suggested Compromise Formula by the Chairman of Negotiating Group 3, UN Doc. NG3/6 (1979), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. IX (1986), 295, 303; UNCLOS III, Informal Composite Negotiating Text (Revision I), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 93 (Art. 167).

[8] UNCLOS III, Revisions Suggested by the Co-ordinators to the Informal Composite Negotiating Text/Revision 2 Part XI and Annexes III and IV, UN Doc. A/CONF.62/WG.21/3/ADD.2 (1980), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VI (1984), 421; UNCLOS III, Informal Composite Negotiating Text (Revision 3), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 93 (Art. 167); Nordquist/Nandan/Rosenne (note 1), 493.

> subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.'[9]

The rationale for this evolutionary approach was the requirement, enshrined in the 1994 Implementation Agreement, for the Authority to be cost-effective.[10] Moreover, in the 1980s and early 1990s there was a general realisation that deep seabed mining might not become a reality for some years. As a result, the Preparatory Commission suggested the size of the Secretariat to 'relat[e] to the activities which it is "legitimately required to perform under the Convention from time to time".'[11] The wording was borrowed from the speech by Mr. MUMBA S. KAPUMPA, Chairman of the Group of 77, to the plenary session of the Preparatory Commission at the end of the 1989 meeting in New York.[12] Under this evolutionary approach, the Preparatory Commission suggested that the Authority would:

> 'evolv[e] as sea-bed mining industry moves from the slowed-down phase to the "normal" phase of the "feasibility determination" stage, then to the "pre-production" stage and finally to the "production" stage. In each phase, the size of the institution would be no larger or smaller than is required to enable it to carry out its functions efficiently during that phase.'[13]

8 In line with this evolutionary approach, the size of the Secretariat is rather small. In 1998, the then Secretary-General of the Authority, Mr. Satya N. Nandan, noted:

> 'Immediately after taking up office, as Secretary-General I was called upon to establish a small core Secretariat, which assisted in reviewing the future staffing requirements of the Secretariat. Consistent with the principles of cost-effectiveness and the evolutionary approach to the establishment of the Authority in general, it was proposed that the development of the Secretariat should be phased-in over a period of time with the eventual size of the Secretariat numbering some 44 staff members (ISBA/A/9/Add.l). This number is much lower than the Secretariat establishment of 257 suggested in a study presented to the Conference in 1981 (A/CONF.62/L.65) and certainly a far cry from the exaggerated and unrealistic number of 3000 that was mentioned in some unofficial publications and seminars. The Secretariat that is being established aims to be efficient, technically competent and appropriate to the needs of the Authority as they evolve.'[14]

Two decades after its establishment, the Secretariat of the Authority has 37 active posts, including natural scientists, legal professionals, administrative staff, and drivers.[15] The Secretariat is organised into four departments: the Office of the Secretary-General, the Office of Resources and Environmental Monitoring, the Office of Legal Affairs, and the Office of Administration and Management. Each department is organised hierarchically.

9 In practice, the small Secretariat is supported by both external expertise as well as conference services provided by the United Nations.[16] The Authority sources external expertise for example by commissioning consultants to prepare studies. In addition, during the annual meeting of the Authority, interpretation, translation, documentation, and conference services are provided by the United Nations on a reimbursable basis, pursuant to Art. 12 of the Agreement Concerning the Relationship Between the United Nations and the International Seabed Authority.[17]

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[9] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (adopted 28 July 1994, entered into force 28 July 1996) UNTS 1836, 3 (1994 Implementation Agreement), Annex, S 1(3).

[10] 1994 Implementation Agreement Annex, S. 1(2).

[11] Preparatory Commission, Administrative Arrangements, Structure and Financial Implications of the International Sea-Bed Authority, UN Doc. LOS/PCN/WP.51 (1990), para. 11.

[12] *Ibid.*, para. 7.

[13] *Ibid.*, para. 11.

[14] Statement at the Law of the Sea Institute, 31st Annual Conference, Miami, 30–31 March 1998, as quoted in *Michael C Wood*, International Seabed Authority: The First Four Years (1999) MPYBUNL 3, 173, 211.

[15] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015), para. 22.

[16] *Satya Nandan*, Administering the Mineral Resources of the Deep Seabed, in: David Freestone/Richard Barnes/David Ong (eds.), The Law of the Sea: Progress and Prospects (2006) 75–92.

[17] Agreement Concerning the Relationship Between the United Nations and the International Seabed Authority (signed 14 March 1997, entered into force 26 November 1997) UNTS 1165, 255.

2. 'fulfil the administrative functions of the Authority'

10 The administrative functions of the Authority change over time, in line with the evolutionary approach to the establishment and functioning of the Authority, foreseen in Section 1(3) of the Annex to the 1994 Implementation Agreement. As of July 2016, commercial scale seabed mining has not yet started, although exploration activities are underway. The 1994 Implementation Agreement specifies a range of functions that the Authority must prioritise before the commencement of the mineral exploitation phase, including: processing of applications for approval of plans of work for exploration; adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment; and promotion and encouragement of the conduct of marine scientific research with respect to activities in the Area.[18]

11 During UNCLOS III, it was initially suggested for the Authority to have a staff of inspectors that would examine the mining operations conducted in the Area and monitor compliance.[19] While this suggestion still appeared in Art. 41 in the section on the Secretariat of the Draft of the Informal Single Negotiating Text of 1975,[20] the provision was omitted from the section on the Secretariat in the RSNT of 1976.[21] However, the general mandate of the Authority to carry out inspections was retained.[22]

12 Although a staff of inspectors was ultimately left out from the Convention, Part XI nevertheless mandates the ISA to inspect all installations in the Area used in connection with activities in the Area.[23] The Council is tasked to 'exercise control over activities in the Area',[24] including directing and supervising inspections.[25] The LTC has the corresponding mandate to make recommendations to the Council regarding such inspections and may carry out inspections itself.[26]

13 In recent years, the discussion regarding a Mining Inspectorate has been back on the agenda of the Authority. The Authority's Technical Study No. 11 recommends the establishment of a Mining Inspectorate 'with the specific responsibilities of maintaining oversight and compliance with all exploration and exploitation licence activities.'[27] The study suggests the creation of a 'Mining Registry', a 'Compliance Office', a 'Data and Archive Center' and an 'Inspector General's Office'.[28]

3. 'in accordance with the rules, regulations and procedures of the Authority'

14 Art. 167 (3) requires the Authority to determine rules, regulations, and procedures relating to the conditions of service of staff members. The Authority is an independent organisation. However, during the Preparatory Commission, it was decided that, in the interest of uniform standards of international employment, the Authority would apply the common system of salaries, allowances, and conditions of service of the United Nations and its specialized

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[18] 1994 Implementation Agreement, Annex, S. 1(5).

[19] Report of Sub-Committee I – Appendix III (note 4), Arts. XLV(2)(g), XLV(7); Nordquist/Nandan/Rosenne (note 1), 483–484.

[20] UNCLOS III, Draft of the Informal Single Negotiating Text (Part I) (1975, mimeo.), reproduced in: Platzöder (note 5), 110, 137 (Art. 41).

[21] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I(1976), OR V, 125.

[22] *Ibid.*, 135, 141 (Arts. 31(2)(ix), 31(4), Annex I paras. 12(2)(viii) and 12(7)).

[23] Art. 153 (5) UNCLOS.

[24] Art. 162 (2)(l) UNCLOS.

[25] Art. 162(2)(z) UNCLOS.

[26] Arts. 165(2)(m), 165(3) UNCLOS.

[27] *Allen L Clark/Jennifer Cook Clark/Sam Pintz*, Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, ISA Technical Study No. 11 (2013), 78.

[28] *Ibid.*

agencies.[29] In 2013, the Authority subscribed to the Statute of the International Civil Service Commission (ICSC) and, thus, became a full participant in the United Nations common system of salaries, allowances and other conditions of service.[30]

15 Before the development of its own staff regulations, the Authority was applying the Staff Regulations of the United Nations *mutatis mutandis*.[31] In 2000, the Council adopted the Authority's own Staff Regulations provisionally,[32] which received final approval from the Assembly on 10 July 2001.[33] The Regulations of the Authority were based substantially on the Staff Regulations of the United Nations. They elaborated on Art. 167 and stated, for example, that '[u]nder no circumstances shall specific posts come to be identified with any State, region or group of States.'[34] In 2010, the Staff Regulations were revised in light of the changes to the administration of justice within the United Nations and the abolition of the United Nations Administrative Tribunal.[35] These amendments also included: the establishment of a single set of staff rules applicable to all appointments; formal recognition of a right to paternity leave; and formal recognition that sexual exploitation and sexual abuse constitute serious misconduct and thus justify summary dismissal.[36] The Council adopted and applied provisionally the amendments to the Staff Regulations on 3 May 2010.[37] These were approved by the Assembly three days later.[38]

16 In addition to the Staff Regulations, the Secretary-General provides more detailed staff rules, as necessary.[39] He issued Staff Rules on 1 November 2001, modelled after the Staff Rules of the United Nations.[40] The Secretary-General issued revised Staff Rules on 1 December 2006, following changes to the Staff Rules of the United Nations, and again on 12 January 2011, in light of the amendments to the Staff Regulations of the Authority.[41] The Staff Rules elaborate on the Staff Regulations and set out the specific conditions of employment in more detail.[42]

17 The Authority participates in the United Nations Joint Staff Pension Fund,[43] which *inter alia* facilitates the secondment of staff members between the Authority and the United

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[29] Preparatory Commission, Final Draft Agreement Concerning the Relationship Between the United Nations and the International Seabed Authority, UN Doc. LOS/PCN/WP.50/Rev.3 (1993), Art 12; See also Nordquist/Nandan/Rosenne (note 1), 494.

[30] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/19/A/2 (2013), para. 24; ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/20/A/2 (2014), para. 22.

[31] ISA, Decision of the Assembly Relating to Participation of the International Seabed Authority in the United Nations Joint Staff Pension Fund, ISA Doc. ISBA/A/15 (1996); ISA, Decision of the Council Relating to Participation of the International Seabed Authority in the United Nations Joint Staff Pension Fund, ISA Doc. ISBA/C/8 (1996).

[32] ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/6/C/10 (2000).

[33] ISA, Decision of the Assembly of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/7/A/5 (2001).

[34] ISA Staff Regulations 2000 (note 2).

[35] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/12/A/2 (2011), para. 11.

[36] ISA, Amendments to the Staff Regulations of the International Seabed Authority, ISA Doc. ISBA/16/C/4 (2010), para. 14.

[37] ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/16/C/9 (2010).

[38] ISA, Decision of the Assembly of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/16/A/9 (2010).

[39] See also *Michael C Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47, 77.

[40] ISA Staff Regulations 2011 (note 3), 2.

[41] *Ibid.*

[42] ISA, Staff Rules of the International Seabed Authority (ISA Staff Rules 2011), reprinted in ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011), 22–90.

[43] ISA Staff Regulations 2010 (note 3), 5–20 (Regulation 6.1); ISA Staff Rules 2011 (note 42), 22–90 (Rule 6.1); ISA Decision of the Assembly, ISBA/A/15(note 31); ISA Decision of the Council ISBA/C/8 (note 31); Art. 11(3)

Nations.[44] In 1996, following the Assembly's formal decision to participate in the United Nations Joint Staff Pension Fund,[45] an agreement between the Fund and the Authority was executed on 18 June 1998.[46]

18 The Authority has procedures for dealing with administrative disputes. Instances of alleged misconduct are referred to a Joint Disciplinary Committee for advice on what measures, if any, are appropriate.[47] In specific circumstances, the matter can also be referred to conciliation or lead to a summary dismissal by the Secretary-General of the Authority.[48] As set out in the Staff Rules, the Joint Disciplinary Committee is composed of a chairman, appointed by the Secretary-General after consultation with the Staff Committee, one member appointed by the Secretary-General, and one member elected by the staff.[49] The Committee adopts a report with recommendations for the Secretary-General.[50] Appeals regarding disciplinary measures, pursuant to Staff Rules 10.4(c) and 10.4(d), are referred to the United Nations Appeals Tribunal, including those appeals relating to financial responsibility for gross negligence or a summary dismissal.[51]

19 In specific cases, when the misconduct relates to the obligation of staff members to have no financial interests in activities in the Area and to not disclose any confidential information, pursuant to Art. 168(2), the matter is referred to an *ad hoc* tribunal of three qualified persons appointed by the Secretary-General of the United Nations.[52]

20 Other administrative disputes can be addressed through the Authority's two-tier formal system of administrative justice.[53] At first instance, staff members can appeal administrative decisions to the Joint Appeals Board. The Board is composed of a chairman appointed by the Secretary-General after consultation with the Staff Committee, as well as members appointed by the Secretary-General and an equal number of members elected by staff.[54] As a second instance, staff members can access the United Nations Appeals Tribunal.[55] Until 2009, the Authority had accepted the jurisdiction of the Administrative Tribunal of the United Nations, effectively the predecessor of the United Nations Appeals Tribunal.[56]

Agreement Concerning the Relationship Between the United Nations and the International Seabed Authority (signed 14 March 1997, entered into force 26 November 1997) 1165 UNTS, 255.

[44] *Michael C Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173, 211.

[45] ISA Decision of the Assembly ISBA/A/15 (note 31).

[46] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/4/A/11 (1998), para. 26.

[47] ISA Staff Rules 2011 (note 42), 22–90 (Rule 10.4).

[48] *Ibid.*, Rule 10.4.

[49] *Ibid.*, Rule 10.5.

[50] *Ibid.*, Rule 10.6.

[51] *Ibid.*, Rules 10.4, 11.3.

[52] ISA Staff Regulations 2010 (note 3), 5–20 (Regulation 10.3); ISA Staff Rules 2011 (note 42), 22–90 (Rule 10.7). See further *Jaeckel* on Art. 168.

[53] ISA Staff Regulations 2010 (note 3),) 5–20 (Art. XI).

[54] ISA Staff Rules 2011 (note 42), 22–90 (Rule 11.1).

[55] *Ibid.*, Rule 11.3; Agreement between the United Nations and the International Seabed Authority (Extending the competence of the United Nations Appeals Tribunal to the International Seabed Authority with respect to applications alleging non-compliance with the terms of appointment or contracts of employment of staff members of the International Seabed Authority), annexed to ISA Amendments to the Staff Regulations ISBA/16/C/4 (note 36).

[56] For detailed information regarding the changes to the Authority's Staff Regulations, see ISA Amendments to the Staff Regulations ISBA/16/C/4 (note 36).

Article 168
International character of the Secretariat

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other source external to the Authority. They shall refrain from any action which might reflect on their position as international officials responsible only to the Authority. Each State Party undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities. Any violation of responsibilities by a staff member shall be submitted to the appropriate administrative tribunal as provided in the rules, regulations and procedures of the Authority.

2. The Secretary-General and the staff shall have no financial interest in any activity relating to exploration and exploitation in the Area. Subject to their responsibilities to the Authority, they shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their employment with the Authority.

3. Violations of the obligations of a staff member of the Authority set forth in paragraph 2 shall, on the request of a State Party affected by such violation, or a natural or juridical person, sponsored by a State Party as provided in article 153, paragraph 2(b), and affected by such violation, be submitted by the Authority against the staff member concerned to a tribunal designated by the rules, regulations and procedures of the Authority. The Party affected shall have the right to take part in the proceedings. If the tribunal so recommends, the Secretary-General shall dismiss the staff member concerned.

4. The rules, regulations and procedures of the Authority shall contain such provisions as are necessary to implement this article.

Bibliography: *James Harrison*, Making the Law of the Sea: A Study in the Development of International Law (2011), pages 122–146; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002)

Documents: ISA, Amendments to the Staff Regulations of the International Seabed Authority, ISA Doc. ISBA/16/C/4 (2010); ISA, Decision of the Council of the International Seabed Authority Relating to the Summary Report of the Chair of the Legal and Technical Commission, ISA Doc. ISBA/22/C/28 (2016); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISBA/19/A/12 (2013); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISA Doc. ISBA/19/A/9 (2013); ISA Doc. ISBA/19/A/12 (2013) and ISA Doc. ISBA/20/A/9 (2014); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010), amended by ISA Doc. ISBA/19/A/12 (2013) and ISA Doc. ISBA/20/A/10 (2014); ISA, Rules of Procedures of the Legal and Technical Commission (2000), reprinted in ISA, Basic Texts (2nd edn., 2012) 70–84; ISA, Secretary-General's Bulletin: Information Sensitivity, Classification and Handling, ISBA/ST/SGB/2011/03 (2011), available at: http://www.un.org/ga/search/view_doc.asp?symbol=ISBA/ST/SGB/2011/03; ISA, Staff Regulations of the Authority (adopted 13 July 2000 by the Council and 10 July 2001 by the Assembly), annexed to ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/6/C/10 (2000); ISA, Staff Regulations of the International Seabed Authority, reprinted in ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011) 5–20; ISA, Staff Rules of the International Seabed Authority, reprinted in ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011) 22–90

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I. Purpose and Function

The main purpose of Art. 168 is to establish the independence of the Secretariat of the International Seabed Authority (ISA or the Authority). Art. 168 (1) is a common provision found in constituent agreements establishing international organisations.[1] Art. 168 sets out several rules to ensure the independence of the Secretariat and tasks the Authority to develop these further, through its law-making powers under Arts. 137 (2) and 153 (1) of the Convention.[2] In accordance with these powers and Art. 168 (4), the Authority has developed rules, regulations, and procedures to implement Art. 168. In particular, the Authority has adopted Staff Regulations[3] and Staff Rules,[4] both revised in 2011;[5] Regulations on Prospecting and Exploration for three types of mineral deposits;[6] and Rules of Procedures for the organs of the Authority.[7] **1**

Art. 168 (1) obliges the Secretary-General, staff members, as well as the State parties to respect the independence of the Secretariat. State parties are specifically required not to seek to influence the Secretariat. At the same time, the Secretary-General and staff members must act as international officials responsible only to the Authority and must refrain from any activity that might reflect from their position. If a staff member violates this responsibility, the matter is to be submitted to the Authority's Joint Disciplinary Committee with the possibility of appeal.[8] **2**

Art. 168 (2) elaborates on this obligation by requiring that the Secretary-General and staff cannot have financial interests in any activity relating to exploration and exploitation in the Area. This provision is designed to prevent conflict of interests. The same paragraph also sets out the responsibility of the Secretary-General and staff members to not disclose any confidential information, such as industrial secrets or proprietary data. According to Annex III Art. 14 of the Convention, all data that is 'necessary for and relevant to the effective **3**

[1] See e. g. Charter of the United Nations, 26 June 1945, UNCIO 15, 335, Art. 100; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 3 September 1992, UNTS 1974, 45, Art VIII(46)–(47).

[2] For a discussion on the law-making powers of the Authority, see *James Harrison*, Making the Law of the Sea: A Study in the Development of International Law (Cambridge University Press, 2011), 122–146.

[3] ISA, Staff Regulations of the International Seabed Authority, reprinted in ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011) 5–20.

[4] ISA, Staff Rules of the International Seabed Authority, reprinted in ISA, Staff Regulations and Rules of the International Seabed Authority (2nd edn. 2011) 22–90.

[5] See the discussion on the Staff Regulations and Staff Rules in Jaeckel on Art. 167.

[6] ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), amended by ISA Doc. ISBA/19/A/9 (2013); ISA Doc. ISBA/19/A/12 (2013) and ISA Doc. ISBA/20/A/9 (2014); ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012), amended by ISA Doc. ISBA/19/A/12 (2013); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), amended by ISA Doc. ISBA/19/A/12 (2013) and ISA Doc. ISBA/20/A/10 (2014).

[7] See in particular: ISA, Rules of Procedures of the Legal and Technical Commission (2000), reprinted in ISA, Basic Texts (2nd edn., 2012) 70–84.

[8] Staff Rules of the International Seabed Authority 2011 (note 4), Rule 10.4. See *infra*, MN 12.

exercise of the powers and functions of the principal organs of the Authority' must be transferred by the mining operator to the Authority. To safeguard the confidential nature of some of this data, Art. 168 establishes this non-disclosure requirement. A similar provision with respect to the members of the Legal and Technical Commission is contained in Art. 163 (8). In addition, the 1994 Implementation Agreement notes a similar obligation for the members of the Finance Committee.[9] The obligations set out in Art. 168 (2) are underpinned by the possibility of referring violations of these obligations to an *ad hoc* tribunal of three qualified persons appointed by the Secretary-General of the United Nations.[10]

4 The Secretariat is independent from the influence of governments and other stakeholders but it may interact with other international or non-governmental organisations as elaborated in Art. 169. Indeed, Art. 168 illustrates the close working relationship between the Authority and the United Nations, despite the Authority being an independent organisation. One example for the cooperation between both organisations is the Authority's use of the United Nations Appeals Tribunal with respect to violations under Art. 168 (1).

II. Historical Background

5 Several submissions to the Sea-Bed Committee contained provisions addressing the international character of the Secretariat, modelled on Art. 100 of the Charter of the United Nations.[11] Canada's submission noted that '[t]he most important provision to be made with regard to [the Secretary-General] office would be to ensure respect for its international character and freedom from influence from states parties.'[12] The US proposal included a specific clause on conflicts of interests, which covered not only staff members of the Secretariat but also representatives or members on any other organ of the Authority:

> 'No representative to the Assembly or the Council nor any member of the Tribunal, Commissions, subsidiary organs (other than advisory bodies or consultants), or the Secretariat, shall, while serving as such a representative or member, be actively associated with or financially interested in any of the operations of any enterprise concerned with exploration or exploitation of the natural resources of the International Seabed Area.'[13]

6 In 1973, the Sub-Committee I of the Sea-Bed Committee issued a text illustrating areas of agreement and disagreement. The text still contained the following suggestion for a requirement to not have a conflict of interest for five years preceding and following the appointment with the Authority:

> 'Except as the Council shall otherwise decide, neither the Secretary-General nor any [staff member] [person in the service of the Secretariat] shall, [during the [[five]] years preceding his appointment, and] and [five] years following the period of his service, be associated with, or have a [direct] financial interest in, and of the operations of any enterprise concerned with the exploration of [the Area or the exploitation of its resources] [, or trade in, resources capable of being extracted from the Area].'[14]

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[9] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 28 July 1994, UNTS 1836, 3, annex section 9(6).

[10] Staff Regulations of the International Seabed Authority 2011 (note 3), Regulation 10.3; Staff Rules of the International Seabed Authority 2011 (note 4), Rule 10.7.

[11] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130 (Art. 65); Sea-Bed Committee, Chile, *et al.*: Working Paper on the Regime for the Sea Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93 (Art. 41); Sea-Bed Committee, Malta: Draft Ocean Space Treaty – Working Paper, UN Doc. A/AC.138/53 (1971) GAOR 26th Sess. Suppl. 21 (A/8421), 105 (Arts. 168, 170, 171); Sea-Bed Committee, Canada: International Sea-bed Regime and Machinery Working Paper, UN Doc. A/AC.138/59 (1971), 16.

[12] Canada: International Sea-bed Regime and Machinery Working Paper (note 11), 17.

[13] USA: Draft United Nations Convention on the International Seabed Area (note 11), Art. 65.

[14] Seabed Committee, Report of Sub-Committee I – Annex III, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39 (Art. XLV(4)).

In addition, the text identified non-compliance of the confidentiality clause as a 'grave disciplinary offence' and included the option that such a breach should also entail personal liability for damages.[15]

Both the references to 'grave disciplinary offence' and to personal liability for damages were retained in Art. 44 (2) of the Revised Single Negotiating Text (RSNT) of 1976, which read: 7

> 'Any violation of the responsibilities set forth in paragraph 1 of this article shall be considered a grave disciplinary offence and shall, in addition, entail personal liability for damages. Any State Party or natural or juridical person sponsored by a State Party may bring an alleged violation of this article before the Tribunal which may order monetary penalties or the assessment of damages. Upon such order, the Secretary-General shall dismiss the staff member concerned. The elaboration of the provisions of this paragraph shall be included in the staff regulations of the Authority.'[16]

Art. 44 (2) was based on a proposal by the United States.[17] However, both aforementioned references were removed in the Revision I of the Informal Composite Negotiating Text (ICNT).[18]

It was assumed that the Tribunal referred to in Art. 44 (2) of the RSNT was the Tribunal referred to in Art. 33 of the same text,[19] which was to be established as an organ of the Authority.[20] However, the wording changed several times during the negotiations. In the ICNT, the word tribunal was replaced with the 'Sea-Bed Disputes Chamber'.[21] Revision I of the ICNT referred to 'an appropriate tribunal',[22] whereas Revision III of the same text referred to 'a tribunal designated by the rules, regulations and procedures of the Authority.'[23] 8

Revision I of the ICNT also contained a number of other amendments. Most importantly, the reference to monetary penalties was removed and the dismissal of a staff member was made conditional upon recommendation by an appropriate tribunal. 9

III. Elements

1. 'Any violation of responsibilities by a staff member shall be submitted to the appropriate administrative tribunal'

Art. 168 contains two references to tribunals that can hear cases for alleged violations by staff members of two types of obligations. The first type of obligation, under Art. 168 (1), is discussed here, while the second type of obligation, pursuant to Art. 168 (3), is addressed below in Section III.4. The first obligation requires staff members to not seek or receive instructions from external sources and to refrain from any action which might reflect on their position as international officials responsible only to the Authority. Art. 168(1) provides that any such violation is to be submitted to 'the appropriate administrative tribunal as provided in the rules, regulations and procedures of the Authority.' 10

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[15] *Ibid.*, Art. XLV(3).

[16] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Rev.1/PART I (1976), OR V 125, Art. 44(2).

[17] First Committee (informal proposals), Proposed Amendments to the Committee I Single Negotiating Text (December 1975, mimeo.), reprinted in Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VII (1985) 153, 164 (Art. 39(2)).

[18] UNCLOS III, Informal Composite Negotiating Text (Revision I), UN Doc. A/CONF.62/WP.10/Rev.1 (1979), OR VIII, 1, 93 (Art. 168).

[19] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 498.

[20] RSNT Part I (note 16), Art. 24.

[21] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 32 (Art 167 (2)).

[22] ICNT Rev. 1(note 18), Art. 168 (3).

[23] UNCLOS III, Informal Composite Negotiating Text (Revision III), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 73 (Art. 168 (3)).

11 The Authority's Staff Regulations and Staff Rules elaborate on the process. They allow for disciplinary measures in cases of misconduct where a staff member failed to comply e. g. with his or her obligations under the Convention or 'the standards of conduct expected of an international civil servant.'[24] Ordinarily, the matter is referred to a Joint Disciplinary Committee for advice on what measures, if any, are appropriate.[25] In specific circumstances, the matter can also be referred to conciliation or lead to a summary dismissal by the Secretary-General of the Authority.[26] The Joint Disciplinary Committee is composed of a chairman, appointed by the Secretary-General after consultation with the Staff Committee, one member appointed by the Secretary-General, and one member elected by the staff.[27] The Joint Disciplinary Committee adopts a report with recommendations for the Secretary-General.[28]

12 Administrative decisions imposing a disciplinary measure can be appealed, pursuant to Staff Rules 10.4(c) and 10.4(d), by the staff member concerned to the United Nations Appeals Tribunal. This includes appeals relating to financial responsibility for gross negligence or a summary dismissal.[29] Until 2009, the Authority had accepted the jurisdiction of the Administrative Tribunal of the United Nations, effectively the predecessor of the United Nations Appeals Tribunal.[30]

2. 'no financial interest in any activity relating to exploration and exploitation in the Area'

13 The ISA Staff Regulations elaborate on the obligation of staff members, under Art. 168 (2), to not have financial interests in deep seabed mining activities in the Area:

> 'Staff members shall not be associated with the management of, or hold a financial interest in, any profit-making business or other concern if it were possible for the staff member or the profit-making business or other concern to benefit from such association or financial interest by reason of his or her position with the Authority.'[31]

In case a conflict of interest exists, it must be disclosed to the Secretary-General and the staff member must 'either dispose of that financial interest or formally excuse himself or herself from participating with regard to any involvement in that matter which gives rise to the conflict of interest situation.'[32] The Staff Regulations further include specific obligations for the Authority's senior management:

> 'All staff members at the assistant secretary-general level and above shall be required to file financial disclosure statements upon appointment and at intervals as prescribed by the Secretary-General, in respect of themselves and their dependent children, including any substantial transfers of assets and property to spouses and dependent children from the staff member or from any other source that might constitute a conflict of interest, after knowledge of the appointment or during its tenure, to provide certification stating that there is no conflict of interest with regard to the economic activities of spouses and dependent children, and to assist the Secretary-General in verifying the above-mentioned certification on his special request. The financial disclosure statements will remain confidential and will only be used, as prescribed by the Secretary-General, in making determinations pursuant to staff regulation 1.4 (a).'[33]

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[24] Staff Rules of the International Seabed Authority 2011 (note 4), Rules 10.1, 10.3. See also Staff Regulations of the International Seabed Authority 2011 (note 3), Regulation 10.2.

[25] Staff Rules of the International Seabed Authority 2011 (note 4), Rule 10.4.

[26] *Ibid.*

[27] *Ibid.*, Rule 10.5.

[28] *Ibid.*, Rule 10.6.

[29] *Ibid.*, Rules 10.4, 11.3.

[30] For detailed information regarding the changes to the Authority's Staff Regulations, see ISA, Amendments to the Staff Regulations of the International Seabed Authority, ISA Doc. ISBA/16/C/4 (2010).

[31] Staff Regulations of the International Seabed Authority 2011 (note 3), Regulation 1.4(a).

[32] Staff Rules of the International Seabed Authority 2011 (note 4), Rule 1.2(n).

[33] Staff Regulations of the International Seabed Authority 2011 (note 3), Regulation 1.4(c).

3. 'not disclose, even after the termination of their functions, any industrial secret, proprietary data'

14 The confidentiality requirement in Art. 168 (2) is reiterated in the Authority's rules, regulations, and procedures.[34] Pursuant to the Authority's Staff Regulations, staff members must make the following written declaration:

> 'I further solemnly declare and promise that I shall have no financial interest in any activity relating to exploration for and exploitation of the resources of the international seabed area. Subject to my responsibilities to the Authority, I shall not disclose, even after the termination of my appointment with the Authority, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, of the Convention, or any other confidential information coming to my knowledge by reason of my service with the Authority.'[35]

A similar written declaration must be submitted by the members of the Legal and Technical Commission.[36]

15 The three sets of Regulations on Prospecting and Exploration for polymetallic nodules, cobalt-rich ferromanganese crusts, and polymetallic sulphides also develop the confidentiality obligation further by stating:

> 'Confidential data and information may only be used by the Secretary-General and staff of the Secretariat, as authorized by the Secretary-General, and by the members of the Legal and Technical Commission as necessary for and relevant to the effective exercise of their powers and functions. The Secretary-General shall authorize access to such data and information only for limited use in connection with the functions and duties of the staff of the Secretariat and the functions and duties of the Legal and Technical Commission.'[37]

Expressly excluded from proprietary data is 'data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data', as stated in Art. 14 of Annex III and reiterated in the Authority's rules, regulations, and procedures.[38]

16 In a further step to implement Art. 168, the Secretary-General of the Authority issued procedures, in the form of a Secretary-General's Bulletin, to ensure the appropriate classification and secure handling of confidential data and information.[39] These procedures *inter alia* relate to archiving of data and information held by the Authority, classification levels, handling of classified material, and procedures for investigating alleged misconduct. In 2016, the Council decided that these procedures shall apply, *mutatis mutandis*, to the Legal and Technical Commission.[40]

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[34] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (note 6), Regulation 37(4); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (note 6), Regulation 39(4); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (note 6), Regulation 39(4); Staff Regulations of the International Seabed Authority 2011 (note 3), Regulation 1.2(j).

[35] Staff Regulations of the International Seabed Authority 2011 (note 3).Regulation 1.1.

[36] Rules of Procedures of the Legal and Technical Commission (note 7), Rule 11.

[37] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (note 6), Regulation 36(3); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (note 6), Regulation 38(3); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (note 6), Regulation 38(2).

[38] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (note 6), Regulation 36(2); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (note 6), Regulation 38(2); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (note 6), Regulation 38(1).

[39] ISA, Secretary-General's Bulletin: Information Sensitivity, Classification and Handling, ISA Doc. ISBA/ST/SGB/2011/03 (2011), http://www.un.org/ga/search/view_doc.asp?symbol=ISBA/ST/SGB/2011/03.

[40] ISA, Decision of the Council of the International Seabed Authority Relating to the Summary Report of the Chair of the Legal and Technical Commission, ISA Doc. ISBA/22/C/28 (2016), paragraph 8.

4. 'submitted by the Authority against the staff member concerned to a tribunal'

17 Art. 168 (2) requires staff members to have no financial interests in activities in the Area and to not disclose any confidential information. According to Art. 168 (3), violations of these obligations must be submitted 'to a tribunal designated by the rules, regulations and procedures of the Authority.' Any such case must be submitted by the Authority against the staff member, on the request of a State Party or a mining operator affected by such violation.

18 The Authority's Staff Regulations and Staff Rules develop this provision further. They require violations of the obligations set out in Art. 168 (2) to be referred to an *ad hoc* tribunal of three qualified persons appointed by the Secretary-General of the United Nations.[41] A similar provision was already included in the previous Staff Regulations of the Authority adopted by the Council in 2000.[42] The Staff Rules also reiterate the right of the party affected to take part in the proceedings and specify that the party has a right to be represented by counsel, at his or her own expense.[43] The Secretary-General of the Authority is required to dismiss the staff member concerned, if the tribunal recommends it.

19 During the negotiations for the Convention, it was assumed that the Seabed Disputes Chamber would have jurisdiction over these cases.[44] However, the final text of the Convention does not mention such jurisdiction. Indeed, Art. 187 of the Convention only confers jurisdiction of the Seabed Disputes Chamber over 'any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.'

20 In case of damage arising out of a violation by a staff member of his or her obligations to not have financial interests in activities in the Area and to not disclose any confidential information, the Authority can be held liable.[45] Art. 22 of Annex III provides the following

> '[…] the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage.'

However, the regulations on prospecting and exploration for minerals, adopted by the Authority, also provide the following:

> 'Taking into account the responsibility and liability of the Authority pursuant to article 22 of annex III to the Convention, the Authority may take such action as may be appropriate against any person who, by reason of his or her duties for the Authority, has access to any confidential data and information and who is in breach of the obligations relating to confidentiality contained in the Convention and these Regulations.'[46]

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[41] Staff Regulations of the International Seabed Authority 2011 (note 3), Regulation 10.3; Staff Rules of the International Seabed Authority 2011 (note 4), Rule 10.7.

[42] ISA, Staff Regulations of the Authority (adopted 13 July 2000 by the Council and 10 July 2001 by the Assembly), annexed to ISA, Decision of the Council of the International Seabed Authority Concerning the Staff Regulations of the Authority, ISA Doc. ISBA/6/C/10 (2000), Regulation 10.3.

[43] Staff Rules of the International Seabed Authority 2011(note 4), Rule 10.7.

[44] Nordquist/Nandan/Rosenne (note 19), 499–500.

[45] See also clauses 16.3 and 16.4 of the Standard Clauses for Exploration Contract (annex IV to all three sets of the Authority's Regulations on Prospecting and Exploration).

[46] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (note 6), Regulation 37(5); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (note 6), Regulation 39(5); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (note 6), Regulation 39(5).

Article 169
Consultation and cooperation with international and non-governmental organizations

1. The Secretary-General shall, on matters within the competence of the Authority, make suitable arrangements, with the approval of the Council, for consultation and cooperation with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations.

2. Any organization with which the Secretary-General has entered into an arrangement under paragraph 1 may designate representatives to attend meetings of the organs of the Authority as observers in accordance with the rules of procedure of these organs. Procedures shall be established for obtaining the views of such organizations in appropriate cases.

3. The Secretary-General may distribute to States Parties written reports submitted by the non-governmental organizations referred to in paragraph l on subjects in which they have special competence and which are related to the work of the Authority.

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Michael C. Wood*, International Seabed Authority: The First Four Years, MPYBUNL 3 (1999), 173–241; *Michael C. Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006), MPYBUNL 11 (2007), 47–98.

Documents: ISA, Agreement of Cooperation between the International Maritime Organization and the International Seabed Authority, ISA Doc. ISBA/21/C/10 (2015); ISA, Basic Texts (2nd edn. 2012); ISA, Consultations with the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, ISA Doc. ISBA/21/C/9 (2015); ISA, Decision of the Assembly Concerning the Observer Status of the International Seabed Authority at the United Nations, ISA Doc. ISBA/A/13 and CORR. 1 (1996); ISA, Memorandum of Understanding between the International Seabed Authority and the Pacific Community – Note by the Secretariat, ISA Doc. ISBA/21/C/11 (2015); ISA, Press release SB/22/5 (13 July 2016); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (1997); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/10/A/3 (2004); ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015); ISA, Rules of Procedures of the Assembly of the International Seabed Authority (adopted 17 March 1995), reprinted in ISA, Basic Texts (2nd edn. 2012), 4–31; ISA, Rules of Procedures of the Council of the International Seabed Authority (adopted 16 August 1996), reprinted in ISA, Basic Texts (2nd edn. 2012), 32–54; ISA, Statement of the President on the Work of the Assembly During the Resumed Third Session, ISA Doc. ISBA/3/A/11 (1997); ISA, Summary Report of the President of the Council of the International Seabed Authority on the Work of the Council during the Twenty-First Session, ISA Doc. ISBA/21/C/21 (2015); GA, Observer Status for the International Seabed Authority in the General Assembly, GA Res. 51/6 of 24 October 1996

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I. Purpose and Function

The International Seabed Authority (ISA or the Authority) is an autonomous international organisation and not formally part of the United Nations system. Nonetheless, Art. 162 (2)(f) of the Convention specifically mandates the Authority to 'enter into agreements with the **1**

United Nations or other international organizations.' Art. 169 elaborates this mandate by setting out the role of the Secretary-General with respect to arranging the consultation and cooperation with both international and non-governmental organizations (NGOs). Art. 169 (2) and (3) specify the role these organisations may assume during meetings of the organs of the Authority, such as attending meetings as observers and submitting written reports on subjects in which they have special competence. Art. 169 (1) is repeated in Rule 76 of the Rules of Procedures of the Council of the International Seabed Authority.

2 Art. 169 includes a number of noteworthy elements.[1] For example, rather than cooperation and consultation being optional, Art. 169 establishes a mandatory requirement to make such arrangement where suitable and with the approval of the Council. Furthermore, Art. 169 refers to both international organisations and non-governmental organizations, provided they are recognized by the Economic and Social Council of the United Nations. In other words, NGOs, such as Greenpeace International or the International Law Association can be consulted pursuant to Art. 169.[2]

3 The obligation to establish cooperation arrangements in Art. 169 is linked to the broader obligation enshrined in the Convention to cooperate between States and competent international organisations.[3] Examples are the obligations to cooperate in elaborating international rules, standards and recommended practices and procedures for the protection of the marine environment (Art. 197); to immediately notify states and competence international organisations in case of imminent danger to the marine environment (Art. 198); to promote international cooperation in marine scientific research (Art. 242); to cooperate to encourage and facilitate the transfer to developing states of marine technology regarding activities in the Area (Art. 273); and for international organisations to cooperate in the effective discharge of their functions and responsibilities (Art. 278). The Authority's cooperation arrangements under Art. 169 can assist in discharging these substantive responsibilities.

II. Historical Background

4 Early submissions to the Sea-Bed Committee by Tanzania and the US contained provisions addressing the cooperation between the Authority and other organisations, in particular the United Nations. Tanzania's proposal stated:

> 'The Authority shall co-operate with the United Nations, the specialised agencies, and other agencies related to the United Nations, in carrying out its functions, especially in those areas where previously existing agencies are already conducting significant programmes relating to the area and its resources.'[4]

The United States proposed for the Council to have the competence to:

> '[e]stablish procedures for co-ordination between the International Seabed Resource Authority, and the United Nations, its specialized agencies and other international or regional organizations concerned with the marine environment.'[5]

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[1] See also Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 503–505.

[2] The list of non-governmental organisations with consultative status with the Economic and Social Council of the United Nations is available at http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=redefine.

[3] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (1997), para. 22;Nordquist/Nandan/Rosenne (note 1), 504–505.

[4] Sea-Bed Committee, Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51 (Art. 32).

[5] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area – Working Paper, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130(Art. 40 (l)).

Article XXVIII of the text illustrating areas of agreement and disagreement by Sub-Committee I of the Sea-Bed Committee, contained the following proposal:

> 'The Authority [shall] [may] enter into one or more agreements establishing appropriate relationships between the Authority and the United Nations and any other organization the work of which is related to that of the Authority.'[6]

Art. 169 was not included in the early drafts by the First Committee and first appeared as Art. 45 of the Revised Single Negotiating Text in 1976.[7] Art. 45 was not contentious and was not changed substantially after 1976, except for minor drafting changes.[8] 5

III. Elements

1. 'international and non-governmental organizations recognized by the Economic and Social Council of the United Nations'

The Authority has established cooperation arrangements with a number of international organisations, such as the United Nations, the International Tribunal for the Law of the Sea, the Intergovernmental Oceanographic Commission, and the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic. 6

The Authority has an arrangement for cooperation with the United Nations (UN),[9] which is formalised through an agreement concerning the relationship between both organisations.[10] The agreement establishes mechanisms for close cooperation between the secretariats of both organisations to achieve effective coordination of activities and avoid unnecessary duplication of work.[11] Art. 6 of the agreement provides for reciprocal representation at meetings. In this context, the UN General Assembly has granted the ISA observer status[12] and the UN has observer status at the ISA. The agreement also includes cooperation regarding personnel arrangements as well as conference services.[13] In accordance with the arrangement between the UN and the Authority, both institutions cooperate in a number of ways, including regular participation by the Secretary-General of the Authority in meetings of the UN General Assembly and participation of the Authority in the UN-Oceans mechanism.[14] Moreover, the UN Secretary-General's annual report on Oceans and the Law of the Sea includes a section on the Authority and the Secretariat of the Authority closely cooperates with the UN Division for Ocean Affairs and the Law of the Sea.[15] 7

The relationship between the Authority and the International Tribunal for the Law of the Sea is important yet characterised by the need for a degree of independence.[16] The Preparatory 8

[6] Sea-Bed Committee, Report of Sub-Committee I – Appendix III, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 39(Art. XXVIII).

[7] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Rev.1/PART I (1976), OR V 125.

[8] Nordquist/Nandan/Rosenne (note 1), 502.

[9] See also *Jaeckel* on Art. 167.

[10] Agreement Concerning the Relationship Between the United Nations and the International Seabed Authority, signed 14 March 1997, UNTS 1165, 255.

[11] *Ibid.*, Art. 3.

[12] ISA, Decision of the Assembly Concerning the Observer Status of the International Seabed Authority at the United Nations, ISA Doc. ISBA/A/13 and Corr. 1 (1996); GA, Observer Status for the International Seabed Authority in the General Assembly, GA Res. 51/6 of 24 October 1996.

[13] See also *Jaeckel* on Art. 167.

[14] See e. g. ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/21/A/2 (2015), paras. 47–49; *Michael C Wood*, The International Seabed Authority: Fifth to Twelfth Sessions (1999–2006) in MPYBUNL 11 (2007), 47–98.

[15] *Wood* (note 14).

[16] Preparatory Commission, Report on Principles Governing a Relationship Agreement Between the International Tribunal for the Law of the Sea and the International Seabed Authority, UN Doc. LOS/PCN/SCN.4/WP.16/Add.5 (1993).

Committee had made a number of recommendations regarding a relationship agreement between both institutions,[17] which did not go without criticism.[18] During a debate on the issue in 1997, several delegations noted that 'while a good working relationship with the International Tribunal for the Law of the Sea was desirable, it should be borne in mind that the Tribunal was also the court to which the Authority was answerable with regard to any seabed mining dispute.'[19] Subsequently, the Secretariat of the Authority and the Registry of the Tribunal informally discussed the matter. In June 2003, it was decided not to enter into a formal relationship agreement but instead to establish administrative cooperation through an exchange of letters between the Secretary-General of the Authority and the Registrar of the Tribunal.[20] As the Secretary-General summarised in 2004:

> 'The agreement provides for the possibility of cooperation, subject to requirements of confidentiality, in respect of the free exchange of information, publications and reports, provision of conference services and personnel matters. In fact, such cooperation had already been taking place — for example, in the free exchange of publications between the two institutions — and, in that regard, the exchange of letters simply endorses already-existing arrangements.'[21]

Since 2012, both organisations have developed a successful collaboration with respect to library and information services. This includes a partnership for the acquisition of electronic resources through the United Nations System Electronic Information Acquisitions Consortium, which enables financial savings for participating agencies for access to electronic journals and publications.[22]

9 The Authority also has a cooperative arrangement with the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (IOC/UNESCO).[23] In 2000, both organisations signed a Memorandum of Understanding concerning cooperation between the organisations to promote the conduct of marine scientific research in the Area.[24] Under the Memorandum of Understanding, both organisations agree to cooperate in the collection of environmental data and information and consult, where appropriate and practical, on matters of mutual interest in the field of marine scientific research.[25]

10 The Authority has a Memorandum of Understanding with the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic.[26] The Authority has also held consultations with the OSPAR Commission regarding the possibility of participating in a collective arrangement between competent international organizations, including the OSPAR Commission and the North-East Atlantic Fisheries Commission, on cooperation and coordination regarding marine biodiversity in selected areas in areas beyond national jurisdiction in the North-East Atlantic.[27] In addition, in 2015, the Council of the Authority approved[28] an agreement of cooperation with the International Maritime Orga-

[17] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/3/A/4 (31 July 1997), para. 23.

[18] *Wood* (note 14) 221.

[19] ISA, Statement of the President on the Work of the Assembly During the Resumed Third Session, ISA Doc. ISBA/3/A/11 (1997), para 7; see also ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea (note 17), para. 23.

[20] ISA, Report of the Secretary-General of the International Seabed Authority under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea, ISA Doc. ISBA/10/A/3 (2004), para. 78.

[21] *Ibid.*

[22] Report of the Secretary-General of the ISA ISBA/21/A/2 (note 14), para. 37.

[23] Report of the Secretary-General of the ISA ISBA/10/A/3 (note 20), para. 79.

[24] *Ibid.*; ISA, Basic Texts (2nd edn. 2012), 168–169.

[25] *Ibid.*

[26] ISA Basic Texts (note 24), 170–174.

[27] Report of the Secretary-General of the ISA ISBA/21/A/2 (note 14), paras. 54–55; ISA, Consultations with the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, ISA Doc. ISBA/21/C/9 (2015).

[28] ISA, Summary Report of the President of the Council of the International Seabed Authority on the Work of the Council during the Twenty-First Session, ISA Doc. ISBA/21/C/21 (2015), para. 29.

nization[29] and a Memorandum of Understanding with the Pacific Community.[30] In 2016, the Council approved an agreement of cooperation with the International Hydrographic Organization.[31]

The Authority also has cooperation arrangements with NGOs. Examples include the Memorandum of Understanding with the International Cable Protection Committee,[32] as well as the Authority's collaboration with the Sargasso Sea Commission.[33] 11

2. 'attend meetings of the organs of the Authority as observers'

Art. 169 (2) grants observer status to those international and non-governmental organisations with which the Authority has made arrangements for consultation and cooperation pursuant to Art. 169 (1). However, the relationship between the Authority and international and non-governmental organisations established in accordance with Art. 169 differ from the observer status granted under the Authority's rules of procedure.[34] 12

Whilst Art. 169 applies to international and non-governmental organizations recognized by the Economic and Social Council of the United Nations, the Assembly of the Authority can also grant observer status to 'intergovernmental organizations invited by the Assembly' and 'non-governmental organizations invited by the Assembly which have demonstrated their interest in matters under the consideration by the Assembly.'[35] Indeed, the Assembly has granted observer status to several international organisations and NGOs, pursuant to Rule 82 of the Rules of Procedure of the Assembly, without establishing cooperation arrangements with them under Art. 169.[36] A list of all observers of the Authority is available on its website.[37] Different rules apply to international organisations and NGOs. 13

First, the Rules of Procedure specifically grant observer status to the United Nations, its specialised agencies, the International Atomic Energy Agency, as well as other intergovernmental organizations invited by the Assembly.[38] These observers may participate 'in the deliberations of the Assembly upon the invitation of the President on questions within the scope of their competence'[39] If the observers submit written statements, these are distributed by the Secretariat to the members of the Assembly.[40] 14

Second, observer status is granted to NGOs on two grounds: either if the Secretary-General has entered into arrangements with the NGO pursuant to Art. 169 (1) or if the NGO has been invited by the Assembly and has demonstrated its interest in matters under the consideration by the Assembly.[41] NGO observers can attend public meetings of the Assembly 'and upon the invitation of the President and subject to the approval by the Assembly may make oral statements on questions within the scope of their activities.'[42] NGO observers can only submit written statements 'within the scope of their activities which are relevant to the 15

[29] ISA, Agreement of Cooperation between the International Maritime Organization and the International Seabed Authority, ISA Doc. ISBA/21/C/10 (2015); Report of the Secretary-General of the ISA ISBA/21/A/2 (note 14), para 56.

[30] ISA, Memorandum of Understanding between the International Seabed Authority and the Pacific Community – Note by the Secretariat, ISA Doc. ISBA/21/C/11 (2015).

[31] ISA, Press release SB/22/5 (13 July 2016).

[32] ISA Basic Texts ((note 24), 175–178.

[33] Report of the Secretary-General of the ISA ISBA/21/A/2 (note 14), paras 52–53.

[34] ISA Basic Texts (note 24), 151.

[35] ISA, Rules of Procedures of the Assembly of the International Seabed Authority (1995), reprinted in ISA, Basic Texts (2nd edn. 2012) 4–31, Rule 82.

[36] ISA Basic Texts (note 24), 151.

[37] https://www.isa.org.jm/observers.

[38] Rules of Procedures of the Assembly of the International Seabed Authority (note 35), Rule 82(1)(d).

[39] *Ibid*., Rule 82(3).

[40] *Ibid*., Rule 82(4).

[41] *Ibid*., Rule 82(1)(e).

[42] *Ibid*., Rule 82(5).

work of the Assembly.'[43] Moreover, the statements 'should be made available by the Secretariat in the quantities in the languages in which the statements are submitted.'[44]

16 All observers referred to in Rule 82 of the Rules of Procedure of the Assembly can also participate in Council meetings, without the right to vote, 'upon the invitation of the Council, on questions affecting them or within the scope of their activities.'[45]

Subsection E
The Enterprise

Article 170
The Enterprise

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

2. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is provided for in the Statute set forth in Annex IV. 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.

3. The Enterprise shall have its principal place of business at the seat of the Authority.

4. The Enterprise shall, in accordance with article 173, paragraph 2, and Annex IV, article 11, be provided with such funds as it may require to carry out its functions, and shall receive technology as provided in article 144 and other relevant provisions of this Convention.

Bibliography: *Ram. P. Anand*, Legal Regime of Sea-Bed and the Developing States (1976); *Edward D. Brown*, Sea-Bed Energy and Mineral Resources and the Law of the Sea: The Area Beyond the Limits of National Jurisdiction (1986); *Ian Brownlie*, Principles of Public International Law (2003); *Jesper Grolin*, The Seabed: A North-South Perspective, in: Finn Laursen (ed.), Toward a New International Marine Order (1982), 119; *Yuwen Li*, Transfer of Technology for Deep Sea-Bed Mining (1994); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Christopher W. Pinto*, The Developing Countries and the Exploitation of the Deep Seabed, Columbia Journal of World Business XV (1980), 33

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Informal Consultations and Collected Documents (2002); ISA, Staff Regulations and Rules of the International Seabed Authority (2011)

Cases: ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, ICJ Reports (1950), 4; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports (1999), 62; ICJ, *Jurisdictional Immunities of the State* (Germany *v.* Italy; Greece intervening), Preliminary Objections, ICJ Reports (1962), 319; ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174

[43] *Ibid.*, Rule 82(6).

[44] *Ibid.*, Rule 82(6). See also ISA, Rules of Procedures of the Council of the International Seabed Authority (1996), reprinted in ISA, Basic Texts (2nd edn. 2012) 32–54, Rule 32(2).

[45] Rules of Procedures of the Council of the International Seabed Authority (note 44),Rule 75.

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4. Seat: 'The Enterprise shall have its principal place of business at the seat of the Authority.' 11
5. Funding: 'The Enterprise shall […] be provided with such funds as it may require to carry out its functions'. 12
6. Transfer of Technology and Contractual Provisions: 'The Enterprise shall […] receive technology as provided in article 144 and other relevant provisions of this Convention' 14

I. Purpose and Function

Art. 170 of the Convention introduces the nature, personality, purpose, funding, function, seat and connected subjects (rules, immunities, privileges, etc.) of the Enterprise. These subjects are further dealt with in the plexus of interconnected documents that set out the regime of the Area.[1] **1**

The Enterprise is defined in Part XI of the Convention simply as 'organ' of the International Seabed Authority (ISA) (Art. 158 (2) and Art. 170 (1)),[2] without pointing out if it is either 'principal' or 'subsidiary' (Art. 158 (1) and (3)). In this respect, it is possible to assert that its nature is 'functional' *per se*, as it is 'the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1.' Pursuant to the establishment, codification and implementation of the principle of 'common heritage of mankind' for the Area and its mineral resources, Part XI of the Convention configured an ISA controlled 'parallel system' which has been partially refurbished in the 1994 Agreement.[3] Originally, the Authority was meant to retain and exercise its competence and powers to organize and control seabed activities – issuing permits concurring with the regime embodied in the Convention and its annexes, the 1994 Agreement and the consequent rules, regulations and proceedings; the Enterprise was meant to entail the 'operational arm' of the Authority to directly exploit such resources.[4] Nevertheless, four elements in Section 2 of the 1994 Agreement severely weakened **2**

[1] Pursuant to Art. 2 (1)of the Vienna Convention on the Law of Treaties (VCLT), the original wording of the Convention – as well as the purpose strength and functional capacity of the Enterprise – must be 'interpreted and applied' along with the 1994 Agreement, its Annex and pursuant legal texts. In effect, Art. 2 VCLT provides that: '(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Consequently, in order to understand the purpose and function of Art. 170 UNCLOS, see Arts. 1 and 2 of GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994.

[2] See *Schatz* on Art. 158 MN 8–10.

[3] The 'parallel system' divides activities in the Area between States and their companies on the one hand, and the Enterprise on the other. *Ipso facto*, the 'parallel system' gives half the Area to a handful of industrialized States that control deep seabed mining technology and have financial capability to operate on their own. See *Yuwen Li*, Transfer of Technology for Deep Sea-Bed Mining (1994), 62. Regarding the principle of common heritage of mankind see *Vöneky/Höfelmeier* on Art. 136.

[4] *Li* (note 3), 62.

or twisted the Enterprise's operational independence and strength contained in original UNCLOS text: (i) temporal transfer of Enterprise's functions to the Secretariat without deadline certainty;[5] (ii) mandatory funding cuts; (iii) imposition of obligatory joint venture regime; and (iv) dismissal of the mandatory transfer of technology regime (the Enterprise, and developing States wishing to obtain deep seabed mining technology, shall seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements).[6]

II. Historical Background

3 During 1970 and 1971 several States or groups of States submitted a total of 11 working papers to the Sea-Bed Committee relating to a possible new seabed authority. They differed with regard to the nature and powers to be granted to the new seabed authority, and could consequently be divided in four groups according to the level of strength provided to it in relation to that retained by the States.[7] The Latin American group of 13 States put forward a proposal suggesting the creation of an 'International Seabed Enterprise';[8] France emphasized the principle of economic efficiency and indicated the nature of deep seabed mining presupposed considerable financial investments and technical skills;[9] the third framework provided by Tanzania, Malta, Canada and seven land-locked and shelf-locked States supported a strong international system;[10] the proposal introduced by the United States of America, the United Kingdom and Japan leaned towards a licencing system for private companies;[11] lastly, the Soviet Union and Poland submitted a proposal upholding the monopoly of activities by States.[12]

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[5] Functions include: Monitoring and review of trends and developments relating to deep seabed mining activities, including regular analysis of world metal market conditions and metal prices, trends and prospects; assessment of the results of the conduct of marine scientific research with respect to activities in the Area, with particular emphasis on research related to the environmental impact of activities in the Area; assessment of available data relating to prospecting and exploration, including the criteria for such activities; assessment of technological developments relevant to activities in the Area, in particular technology relating to the protection and preservation of the marine environment; evaluation of information and data relating to areas reserved for the Authority; assessment of approaches to joint-venture operations; collection of information on the availability of trained manpower; study of managerial policy options for the administration of the Enterprise at different stages of its operations.

[6] See Section 2, Arts. 1, 3, 2, and Section 5 of the 1994 Agreement.

[7] *Li* (note 3), 62.

[8] Sea-Bed Committee, Chile *et al.*: Working Paper on the Régime for the Sea-Bed and Ocean Floor and its Subsoil Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/49 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 93–101.

[9] Sea-Bed Committee, France: Establishment of a Régime for the Exploration and the Exploitation of the Sea-Bed, UN Doc. A/AC.138/27 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 185–190.

[10] Sea-Bed Committee United Republic of Tanzania: Draft Statute for an International Sea-Bed Authority, UN Doc. A/AC.138/33 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 51–64; Sea-Bed Committee, Malta: Draft Ocean Space Treaty, UN Doc. A/AC.138/53 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105–193; Sea-Bed Committee, Afghanistan *et al.*: Preliminary Working Paper, UN Doc. A/AC.138/55 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 194–196; Sea-Bed Committee, Canada: International Sea-Bed Régime and Machinery Working Paper, UN Doc. A/AC.138/59 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 205–225.

[11] Sea-Bed-Committee, United States of America: Draft United Nations Convention on the International Sea-Bed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130–176; Sea-Bed Committee, United Kingdom: International Régime, Working Paper, UN Doc. A/AC.138/26 (1970), GAOR 25th Sess. Suppl 21 (A/8021), 177–184; Sea-Bed Committee, United Kingdom: International Sea-Bed Régime: Proposals for Elements of a Convention, UN Doc. A/AC.138/46 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 83–91; Sea-Bed-Committee, Japan: Outline of a Convention on the International Seabed Regime and Machinery, UN Doc. A/AC.138/63 (1971), reproduced in *Shigeru Oda*, The International Law of the Ocean Development: Basic Documents (1972), 210.

[12] Sea-Bed Committee, Soviet Union: Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, UN Doc. A/AC.138/43 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 67–95; Sea-Bed Committee, Poland: Working Paper Concerning an International Organization to be Established to Deal with

During the 1974 Caracas session of UNCLOS III, the Group of 77 submitted the first formal agreement reached on the basic conditions for exploitation, emphasizing again the principle of the common heritage of mankind and stipulating that the title to the Area and its resources – as well as all other rights to the resources – would be invested in the Authority on behalf of mankind.[13] As a counterbalance, the United States, the European Economic Community and Japan maintained their private company operator's paradigm,[14] which was firmly rejected by the Group of 77 after the adverse mining experiences in Zaire. At the Third Session in 1975, the chairman of the Working Group for the First Committee – PINTO – led the main negotiations, coming out with the 'Basic Conditions of Exploration and Exploitation', which was a general paper adopting in large the 1974 proposal of the Group of 77 as well as taking into account the concerns of the industrialized countries towards a contractual joint venture model.[15] Eventually, the chairmen of the three main Committees were requested to produce a single negotiating text. Although the industrialized countries accepted the joint venture regime because it would enable the Enterprise to acquire skills, at the end they rejected the text due to the amount of power given to the Authority.[16] A Revised Single Negotiating Text (RSNT) was thus published in New York in 1976; this text envisaged a dual system of activities conducted by the Authority or by States and private companies acting under the control of the Authority.[17] The absence of India, Tanzania and Peru in the debate initially led the Group of 77 to decline the proposal. However, after the positive intervention in 1976 of US Secretary of State, HENRY KISSINGER,[18] a compromise solution became the best possible option: (i) The reality was that only a few industrialized States had technology and capital to perform deep seabed mining; (ii) The United States had passed the Fishery Conservation and Management Act, which indicated that offshore mining was on the Congress agenda; and (iii) North-South relationships cooled down in 1976.[19] Consequently, in 1977 the Informal Composite Negotiating Text (ICNT) was drawn up, setting the basis for UNCLOS definitive 'parallel system'. 4

III. Elements

1. Introduction

The Group of 77 considered the Enterprise 'represents in the highest degree, the principles of cooperation and interdependence upon which the new international economic order is based'.[20] On the other hand, the United States kept proposing that it should be treated on an equal footing with other mining entities, though the technological, managerial, institutional and financial gap was evident. 5

the Problems of the Exploration and Exploitation of the Mineral Resources of the International Area of the Sea-Bed and the Ocean Florr, and the Subsoil Thereof, the Limits of Which are to be Determined, UN Doc. A/AC.138/44 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 76–81.

[13] UNCLOS III, Text on Conditions of Exploration and Exploitation Prepared by the Group of Seventy-Seven, UN Doc. A/CONF.62/C.1/L.7 (1947), OR III, 172–173.

[14] UNCLOS III, United States of America: Draft Appendix to the Law of the Sea Treaty Concerning Mineral Resource Development in the International Sea-Bed Area, UN Doc. A/CONF.62/C.1/L.6 (1974) OR III, 169–172; UNCLOS III, Belgium *et al.*: Working Paper, UN Doc. A/CONF.62/C.1/L.8 (1974),OR III, 173–175; UNCLOS III, Japan: Working Paper on Conditions of Exploration and Exploitation, UN Doc. A/CONF.62/C.1/L.9 (1974), OR III, 175–177.

[15] *Jesper Grolin*, The Seabed: A North-South Perspective, in Finn Laursen (ed.), Toward a New International Marine Order (1982), 119–150.

[16] *Edward D. Brown*, Sea-Bed Energy and Mineral Resources and the Law of the Sea: The Area Beyond the Limits of National Jurisdiction (1986).

[17] UNCLOS III, Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8/REV.1 (1976), OR V, 125.

[18] *Li* (note 3), 72.

[19] *Grolin* (note 12), 130–131.

[20] *Christopher W. Pinto*, The Developing Countries and the Exploitation of the Deep Seabed, Columbia Journal of World Business XV (1980), 33.

6 The synergy of the original Art. 170 was severely modified by the 1994 Agreement, which was at the same time preluded by 1990s Informal Consultation performed by UN Secretary General on the development of deep seabed mining.

7 Originally, the Convention foresaw four core elements to compensate the above-mentioned misbalance: (i) mandatory transference of technology (→ Arts. 144, 273 and 274; and Annex III, Art. 5);[21] (ii) reserved mining sites (→ Annex III, Arts. 8 and 9);[22] (iii) production priority (→ Art. 151 (4) and (5); and Annex III);[23] and compulsory financial support (→ Annex IV, Art. 11 (1) and (3)).[24] The 1994 Agreement severely affected these four elements along with the general functioning of the Enterprise concluded in the Convention and Annexes.[25] In effect, core functions were transferred from the Enterprise to the Secretariat 'until it begins to operate independently';[26] in addition, general functioning regime was 'temporarily' modified, compulsory funding was eliminated, mining activity was modified and mandatory transference of technology regime was eliminated.[27] Consequently, the independence and operative substance provided in the original text to benefit of common heritage of mankind vanished in favour of industrialized States' commercialist paradigm. In the end, it is somehow possible to assert that the 1994 Agreement made pragmatism prevail through flexibility: (i) the entry into force of the Convention would be followed by an 'interim period' that would last 'until commercial production of deep sea bed minerals became feasible', and 'during which the establishment and operation of the Authority and its organs would be based on an evolutionary approach';[28] and (ii) growing global trend in favour of more efficient, market oriented commercial operations was recognized as leading pathway.

2. Nature and Personality: 'The Enterprise shall be the organ of the Authority which […] shall, within the framework of the international legal personality of the Authority, have such legal capacity as is provided for in the Statute set forth in Annex IV.'

8 The Enterprise's legal personality is framed and defined within that of the ISA: it entails 'derived' personality as an organ in the sphere of an international organization.[29] Subsequently, it embraces all legal competences – explicit as well as implicit – necessary to carry on its functions and activities. In particular, 'specific' elements from its legal capacities are stipulated in its Statute (Annex IV, Art. 13):

> '(a) to enter into contracts, joint arrangements or other arrangements, including agreements with States and international organizations;
> (b) to acquire, lease, hold and dispose of immovable and movable property;
> (c) to be a party to legal proceedings.'

9 The privileges and immunities of the Enterprise deserve special note (Annex IV, Art. 13 (3)–(7); ISA, Protocol on the Privileges and Immunities of the International Seabed

[21] See *Vöneky/Beck* on Art. 144; *Hamamoto* on Art. 273 and on Art. 274.
[22] See *Siegfried* on Art. 151.
[23] See *Ferrara* Art. 171.
[24] *Ibid.*
[25] See Section 2, Arts. 1, 3, 2, and Section 5 of the 1994 Agreement.
[26] See *supra*, note 5.
[27] ISA, Informal Consultations and Collected Documents (2002). Also, Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 521.
[28] Nordquist/Nandan/Rosenne (note 27), 519 and 521.
[29] *Ibid.*, 523–524; *Ian Brownlie*, Principles of Public International Law (2003). Also, see ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174; and ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, ICJ Reports (1950), 4. Finally, Agreement Concerning the Relationship between the United Nations and the International Seabed Authority of 14 March 1997, UNTS 1165, 255.

Authority; Agreements between the International Seabed Authority and the Government of Jamaica regarding the headquarters of the ISA; Staff Regulations and Rules of the International Seabed Authority), because such entitlement moves it far away from its 'corporative' substance, leaving it under the 'public' or 'mixed' entity umbrella.[30]

3. Function: 'The Enterprise shall […] carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area [and] 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.'

The definition of 'activities in the Area' (→ Art. 1 (3)) includes 'all activities of exploration for, and exploitation of, the resources of the Area'. In addition, the Enterprise can undertake the linked activities of transporting, processing, and marketing of resources (solid, liquid or gaseous) from the Area soil and sub-soil, whether or not these resources are recovered by the Enterprise or any other formal mining entity.[31] 10

4. Seat: 'The Enterprise shall have its principal place of business at the seat of the Authority.'

The Enterprise is located in Kingston, Jamaica, according to the two agreements between the International Seabed Authority and the Government of Jamaica regarding the headquarters of the ISA.[32] 11

5. Funding: 'The Enterprise shall […] be provided with such funds as it may require to carry out its functions'.

The 1994 Agreement provides that there shall be no obligation on States Parties to finance any of the operations of the Enterprise and specifically provides that the obligation to fund one mine site – first integrated operation – (→ Annex IV, Art. 11 (3) UNCLOS) shall not apply. 12

Accordingly, the Enterprise's funding can be provided from five main sources: (i) the Authority's funds after meeting ISA's budget – except assessed contributions from member States (→ Arts. 160 (2) 173 (2); and Annex IV, Art. 11); and (ii) voluntary contributions by States Parties, direct loans, income from mining operations, and 'other funds made available' (→ Annex IV, Art. 11 (1)).[33] 13

6. Transfer of Technology and Contractual Provisions: 'The Enterprise shall […] receive technology as provided in article 144 and other relevant provisions of this Convention'

Once the interim period and the newly efficient, market oriented functioning of the Enterprise were agreed during the informal consultations to the 1994 Agreement, it was 14

[30] See *Brownlie* (note 29); also, ICJ, *Jurisdictional Immunities of the State* (Germany *v.* Italy; Greece intervening), Preliminary Objections, ICJ Reports (1962), 319; finally ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports (1999), 62.

[31] See *Tanaka* on Art. 1 MN 11.

[32] Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999; Supplementary Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority and the Use of the Jamaica Conference Centre Complex of 17 December 2003.

[33] See *Vöneky* on Art. 144; *Ferrara* on Art. 173.

agreed the Enterprise should begin its operations through commercial joint ventures; these joint ventures would make technology available to the Enterprise 'under fair and reasonable terms and conditions' (→ Art. 144; Annex III, Art. 5 (5); and 1994 Agreement, Annex, Section 4 and Section 5).[34]

15 Regarding contractual terms, in order to avoid favouritism towards the Enterprise, the 1994 Agreement provides a plan of work for the Enterprise shall be in the form of a contract between the Enterprise and the Authority and that all obligations applicable to the contractors shall apply to the Enterprise.[35]

Subsection F
Financial arrangements of the Authority

Article 171
Funds of the Authority

The funds of the Authority shall include:

(a) **assessed contributions made by members of the Authority in accordance with article 160, paragraph 2(e);**
(b) **funds received by the Authority pursuant to Annex III, article13, in connection with activities in the Area;**
(c) **funds transferred from the Enterprise in accordance with Annex IV, article 10;**
(d) **funds borrowed pursuant to article 174;**
(e) **voluntary contributions made by members or other entities; and**
(f) **payments to a compensation fund, in accordance with article 151, paragraph 10, whose sources are to be recommended by the Economic Planning Commission.**

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Ram P. Anand*, Legal Regime of Sea-Bed and the Developing States (1976); *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001); *Yuwen Li*, Transfer of Technology for Deep Sea-Bed Mining (1994); *Malcolm N. Shaw*, International Law (2001)

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Financial Regulations (2000)

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4. Funds borrowed: 'The funds of the Authority shall include: […] (d) funds borrowed pursuant to article 174' 10
5. Voluntary contributions: 'The funds of the Authority shall include: […] (e) voluntary contributions made by members or other entities' 11

[34] See *Siegfried* on Art. 151.
[35] Nordquist/Nandan/Rosenne (note 27), 522.

6. Compensation fund: 'The funds of the Authority shall include: […]
(f) payments to a compensation fund, in accordance with article 151, paragraph 10, whose sources are to be recommended by the Economic Planning Commission.' 12
7. Additional Sources 13

I. Purpose and Function

Art. 171 lists and describes the funding sources of the International Seabed Authority (ISA), comprising: (i) the Authority's funds after meeting ISA's budget, except assessed contributions from member States (→ Art. 160 (2); Art. 173 (2); and Annex IV, Art. 11); and (ii) voluntary contributions by States Parties, direct loans, income from mining operations, and 'other funds made available' (→ Annex IV, Art. 11 (1)).[1] 1

It is important to underline that the article only asserts sources of funding, but it does not create any such sources. This task must be performed according to Art. 151.[2] 2

The 1994 Agreement re-arranged the implementation of the system (→ Art. 151 (10); 1994 Agreement, Annex, Section 7 (1)).[3] 3

II. Historical Background

Art. 171 was drafted by the Chairman of the First Committee during 1975.[4] Further initiatives were provided in the following year from the Soviet Union and Germany, and were included in the subsequent draft texts.[5] The provision was further revised during 1979, when it took its current format. 4

III. Elements

1. General

As previously stated, the implementation and interpretation of ISA funding regime was severely modified by the 1994 Agreement (→ 1994 Agreement, Annex, Section 7). Consequently, sources of funding of the ISA are those listed in Art. 171 – as implemented or modified by 1994 Agreement – as well as 'other funds' as disposed in the Financial Regulations (→ Reg. 6 (1) (f)).[6] Consequently, the funds of the Authority include: assessed contributions made by States that are members of the Authority; agreed contributions, as determined by the Authority, made by international organizations members of the Authority in accordance with annex IX to the Convention; funds received by the Authority pursuant to Annex III, Art. 13 (2) UNCLOS and Section 8 of the Annex to the 1994 Agreement, in connection with activities in the Area; funds transferred from the Enterprise in accordance with Annex IV, Art. 10 UNCLOS; voluntary contributions made by members or other 5

[1] See *Schatz* on Art. 160 MN 6 *et seq.*; *Ferrara* on Art. 173 MN 6–13.
[2] See *Siegfried* on Art. 151.
[3] See *Ferrara* on Art. 170 and *Siegfried* on Art. 151 MN 9–10.
[4] UNCLOS III, Draft of the ISNT/Part I (1976, mimeo), Art. 45. The provision merely established a General Fund stated that: 'All receipts of the Authority arising from activities in the Area, including any excess of revenues of the Enterprise over its expenses and costs in such proportion as the Council shall determine shall be paid into the General Fund.'
[5] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 137–138 (Art. 46); UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 32 (Art. 170).
[6] See *Ferrara* on Art. 170.

entities; and such other funds to which the Authority may become entitled or may receive, including income from investment.[7]

6 Annual contributions and advances to the working capital fund shall be assessed and paid in United States dollars. Contributions and advances shall be considered as due and payable in full within thirty days of the receipt of the communication of the Secretary-General (→ Financial Regulation 6.4), or as of the first day of the calendar year to which they relate, whichever is the later. As of 1 January of the following calendar year, the unpaid balance of such contributions and advances shall be considered to be one year in arrears.[8]

2. Activities in the Area: 'The funds of the Authority shall include: […] (b) funds received by the Authority pursuant to Annex III, article 13, in connection with activities in the Area'

7 This source of funding refers to 'activities of exploration for, and exploitation of, the resources in the Area' (→ Art. 1 (1)(3)).[9] These activities can be performed either with intervention of the Enterprise or solely by independent operators. It must be noticed that in the case of the Enterprise, 'activities' may refer to exploration and exploitation operations performed in any part of the Area, including the 'reserved areas' (→ Annex III, Art. 12 (2); Mining Code, Reg. 17 (1)–(2)). In this sense, the Convention states that the Enterprise shall be given an opportunity to decide whether it intends to carry out activities in each reserved area. This decision may be taken at any time, unless a notification is received by the Authority, in which event the Enterprise shall take its decision within a reasonable time. The Enterprise may decide to exploit such areas in joint ventures with the interested State or entity.[10]

8 Regarding the functions of the Enterprise, its 'activities' were re-arranged by the 1994 Agreement, requiring a 'transition period' or first phase before any sort of direct action can be pursued by the Enterprise (→ 1994 Agreement, Annex, Section 2 (1)). In addition, the 1994 Agreement states that the Council shall take up the issue of the 'independent functioning' of the Enterprise either upon the approval of a plan of work for exploitation for an entity other than the Enterprise, or upon receipt of an application for a joint-venture operation with the Enterprise (→ 1994 Agreement, Annex, Section 2 (2)). However, the directive providing for independent functioning will be issued only after a determination that 'joint-venture operations with the Enterprise accord with sound commercial principles.' The latter is left to consideration and approval of the Council.[11] Once the Enterprise is functioning independently, it must conduct its 'initial' deep seabed mining operations through joint ventures. It is not clear when such operations cease to be 'initial'. The original UNCLOS text referred a maximum of 10-year period (Annex IV, Art. 10 (3)), but the 1994 Agreement provided otherwise, stating '[i]f joint-venture operations with the Enterprise

[7] Financial Regulation 6.2 states: 'The appropriations, subject to the adjustments effected in accordance with the provisions of regulation 6.3, shall be financed by contributions from the States members of the Authority in accordance with an agreed scale of assessment based upon the scale used for the regular budget of the United Nations, including a floor rate and a ceiling rate as determined from time to time by the Authority, and by contributions from international organizations members of the Authority, as determined from time to time by the Authority, until the Authority shall have sufficient income from other sources to meet its administrative expenses. Pending the receipt of such contributions, the appropriations may be financed from the working capital fund.'

[8] Financial Regulation 6.5.

[9] See *Tanaka* on Art. 1 MN 11.

[10] *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001), 326. Annex III, Art. 9, states that '[t]he Enterprise shall be given an opportunity to decide whether it intends to carry out activities in each reserved area. This decision may be taken at any time, unless a notification pursuant is received by the Authority, in which event the Enterprise shall take its decision within a reasonable time. The Enterprise may decide to exploit such areas in joint ventures with the interested State or entity.'

[11] *Brown* (note 10), 325.

accord with sound commercial principles, the Council shall issue a directive pursuant to article 170, paragraph 2, of the Convention providing for such independent functioning.'[12]

3. Funds transferred from the Enterprise: 'The funds of the Authority shall include: […] (c) funds transferred from the Enterprise in accordance with Annex IV, article 10'

9 This funding source is also mentioned in the Financial Regulations (→ Reg. 6 (1) (d)). The funding is made up of monetary 'payments to the Authority under Annex III, article 13, or their equivalent' in species (→Annex III, Art. 13). Funding allocation shall take place after the 10-year initial period. Then, the allocation procedure shall be the following: (i) The ISA Assembly determines the portion of the net income that shall be retained as reserves; and (ii) The remainder shall be transferred to the Authority.

4. Funds borrowed: 'The funds of the Authority shall include: […] (d) funds borrowed pursuant to article 174'

10 The 1994 Agreement limits the borrowing power of the ISA by prescribing that it shall not be exercised to finance its administrative budget (→ 1994 Agreement, Annex, Section 1, Art. 14).[13]

5. Voluntary contributions: 'The funds of the Authority shall include: […] (e) voluntary contributions made by members or other entities'

11 These contributions can be: (i) assessed contributions by member States of the ISA;[14] or (ii) agreed contributions, as determined by ISA, made by international organisations.[15]

6. Compensation fund: 'The funds of the Authority shall include: […] (f) payments to a compensation fund, in accordance with article 151, paragraph 10, whose sources are to be recommended by the Economic Planning Commission'

12 Pursuant to 1994 Agreement, this fund is no longer available. In effect, the 1994 Agreement clearly states

> 'Article 151, paragraph (10), of the Convention shall be implemented by means of measures of economic assistance referred to in paragraph 1. Article 160, paragraph (2) (l), article 162, paragraph (2) (n), article 164, paragraph (2) (d), article 171, subparagraph (f), and article 173, paragraph (2) (c), of the Convention shall be interpreted accordingly.'[16]

Thus, financial independence of ISA was reduced, along with a substantial part of its decision making power.

7. Additional Sources

13 Additional sources of funding that not are mentioned in Art. 171 are such other funds to which the ISA may become entitled or may receive, including incoming from investment (→ Financial Regulations, Reg. 6.1(f)).[17]

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[12] *Ibid.*, 331 and 332. Also, Art. 2, Section 2 of 1994 Agreement (GA, Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994.).

[13] *Brown* (note 10), 326.

[14] It is envisaged that these assessed contributions will be payable only until such time as the ISA has sufficient income from other sources to meet its administrative expenses and this part of the ISA's funds is paid into an special account earmarked for the ISA administrative expenses, the general administrative fund.

[15] The European Union – qualified to become a member of the ISA by virtue of Art. 156 (1) in conjunction with Art. 1 (2), Art. 305, and Annex IX, Art. 1 – would fall into this category.

[16] See the commentaries on Arts. 151, 160, 164, 170, 171 and 173.

[17] *Brown* (note 10), 337.

Article 172
Annual budget of the Authority

The Secretary-General shall draft the proposed annual budget of the Authority and submit it to the Council. The Council shall consider the proposed annual budget and submit it to the Assembly, together with any recommendations thereon. The Assembly shall consider and approve the proposed annual budget in accordance with article 160(2)(h).

Bibliography: *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001)

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Financial Regulations (2000)

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I. Purpose and Function

1 Art. 172 provides for the procedures of preparation and approval of the budget of the International Seabed Authority (Art. 160 and Art. 162; 1994 Agreement, Annex, Section 9 (7)(c); Financial Regulations, Reg. 2.1 and Reg. 3.1).

2 The Secretary General shall draft the annual budget and submit it to the Council along with any recommendations. The Assembly is responsible for adopting the budget upon the recommendations of the Council (Arts. 172 and 160 (2)(h)).[1]

II. Historical Background

3 The duty of the Secretary General to prepare the budget appeared in article XLV of the texts illustrating areas of agreement and disagreement prepared by Sub-Committee I of the Sea-Bed Committee,[2] whilst the Assembly and Council obligations were originated elsewhere in the document.[3] Similar provisions appeared in the Draft Open Space Sea Treaty proposed by Malta in 1971.[4] Art. 172 was prepared by Chairman of the First Committee during 1975, passing through provisional changes until it was definitively formatted in 1981.[5]

4 The 1994 Agreement re-arranged the implementation of the system of compensation (*cf.* Art. 151 (10); 1994 Agreement, Annex, Section 7 (1)). The 1994 Agreement also included measures for the transitional period of its implementation and the full application and implementation of the Convention in its original format. Section 1 (14) states

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[1] See *Schatz* on Art. 160 MN 17.

[2] Sea-Bed Committee, Report of Sub-Committee I, Appendix III, UN Doc. A/AC.138/94/ADD.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021), 39.

[3] Sea-Bed Committee, Draft Ocean Space Treaty, Working Paper Submitted by Malta, UN Doc. A/AC.138/53 (1971), Arts. 134 and Art. 172.

[4] *Ibid.*, Arts.134 and 172.

[5] UNCLOS III, Draft of the ISNT/Part I (1975, mimeo).

'The Authority shall have its own budget. Until the end of the year following the year during which this Agreement enters into force, the administrative expenses of the Authority shall be met through the budget of the United Nations. Thereafter, the administrative expenses of the Authority shall be met by assessed contributions of its members, including any members on a provisional basis, in accordance with articles 171, subparagraph (a), and 173 of the Convention and this Agreement, until the Authority has sufficient funds from other sources to meet those expenses.'

III. Elements

1. Transitional Period

Pursuant to the necessity to create the administrative, regulatory and operational corpus stated in the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISA's 1995 and 1996 budget was prepared by the Secretary General and adopted by the General Assembly; 1997 budget was prepared within the ISA, but reviewed through UN procedures (performed by the Advisory Committee on Administrative and Budgetary Questions); only since 1998 has the Secretary General submitted the draft budget to the Finance Committee.[6] **5**

2. Implementation

The Secretary General elaborates the budget and submits it with its considerations to the Financial Committee and to the Council. The budget is revised by the Financial Committee and is submitted to the Council and the Assembly with a report, and considerations. The Council considers the Financial Committee's submission and forwards it to the Assembly with further recommendations, if any. The Assembly has the final decision to approve the budget, taking into considerations the recommendations of the Financial Committee and the Council (→ Arts. 172, 178 and 162(2)(r); 1994 Agreement, Annex, Section 9 (7)(c); Financial Regulations, Reg. 3.4 and Reg. 3.6). Between 1997 and 2002, the Assembly adopted the revised budget, as recommended by the Finance Committee, without change.[7] **6**

It is worth mentioning that, although UNCLOS and the 1994 Agreement foresee an annual budget, the Financial Regulations provide for a biannual budgetary period (→ Art. 172; 1994 Agreement, Annex, Section 9 (7)(c); Financial Regulations, Reg. 3.6). **7**

[6] *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001), 338. GA, Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994, Art. 14, Section 1, states: 'The Authority shall have its own budget. Until the end of the year following the year during which this Agreement enters into force, the administrative expenses of the Authority shall be met through the budget of the United Nations. Thereafter, the administrative expenses of the Authority shall be met by assessed contributions of its members, including any members on a provisional basis, in accordance with articles 171, subparagraph (a), and 173 of the Convention and this Agreement, until the Authority has sufficient funds from other sources to meet those expenses. The Authority shall not exercise the power referred to in article 174, paragraph 1, of the Convention to borrow funds to finance its administrative budget.'

[7] *Brown* (note 6), 338.

Article 173
Expenses of the Authority

1. The contributions referred to in article 171, subparagraph (a), shall be paid into a special account to meet the administrative expenses of the Authority until the Authority has sufficient funds from other sources to meet those expenses.

2. The administrative expenses of the Authority shall be a first call upon the funds of the Authority. Except for the assessed contributions referred to in article 171, subparagraph (a), the funds which remain after payment of administrative expenses may, inter alia:

(a) **be shared in accordance with article 140 and article 160, paragraph 2(g);**

(b) **be used to provide the Enterprise with funds in accordance with article 170, paragraph 4;**

(c) **be used to compensate developing States in accordance with article 151, paragraph 10, and article 160, paragraph 2(l).**

Bibliography; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Ram P. Anand*, Legal Regime of Sea-Bed and the Developing States (1976); *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001); *Yuwen Li*, Transfer of Technology for Deep Sea-Bed Mining (1994); *Malcolm N. Shaw*, International Law (2001); *Michael C. Wood*, The International Seabed Authority: The First Four Years, MPYUNL 3 (1999), 173

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; GA Res. 67/238 of 24 December 2012; ISA, Financial Regulations (2000)

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I. Purpose and Function

1 Art. 173 – as modified by 1994 Agreement[1] (→ 1994 Agreement, Annex, S. 7 (1)) – refers to utilization and disbursement of International Seabed Authority (ISA) funds, that is, to the proceeding employed by the ISA to incorporate the budgetary funds required to operate and to the employment of those funds. Provision for disbursement of ISA funds was made originally in Art. 173, but it was significantly affected by the changes introduced by the 1994 Agreement in relation to the obligation of States Parties to provide the Enterprise with funds and in relation to the scheme to compensate developing countries for the adverse effect on their economies resulting from seabed mining.[2]

2 Art. 173 (1) requires that the assessed contributions of members of the Authority to be paid into a special account to meet the administrative expenses of the Authority until it has sufficient funds from other sources to meet those expenses. Art. 173 (2) sets out the ways in which the surplus funds of the Authority shall be used (→ Art. 140 (2); Art. 160 (2)).[3]

[1] GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994.

[2] *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001), 338.

[3] See *Vöneky/Höfelmeier* on Art. 140 MN 11–12; also, *Schatz* on Art. 160 MN 16.

II. Historical Background

The first text referring to utilization and disbursement was drafted including two articles dealing with the expenses of the ISA and the allocation of those expenses.[4] Subsequent proposals were made – by the United States of America in 1975, and by the Soviet Union and Germany in 1976; neither of these proposals were taken into account in the following draft, nor were further changes made in the following draft texts. Finally, some minor modifications were included until the final format was accomplished in 1982.[5] 3

III. Elements

1. Transitional Period

Until the ISA had self-capacity funding, expenses were to be met through assessed contributions of members (→ 1994 Agreement, Annex, S. 1 (14)). The Assembly established a scale used for the regular budget of the United Nations (→ Art. 160 (2)). The ISA used the UN scale for the 'transitional period' until 1997, adjusted to take account of the differences in membership.[6] 4

2. Implementation

Since 1997, the rules governing disbursement of ISA funds are as follows: (i) Assessed contributions paid into the special account earmarked for administrative expenses set up in the Financial Regulations (→ Art. 173 (2); Financial Regulations, Reg. 5.1),[7] and any shortfall would be a charge on other Authority funds (→ Art. 173 (2) (a); Financial Regulations, Reg. 5.7); (ii) Funds remaining after payment of administrative expenses, with the exception of assessed contributions by States and international organisations (→ Financial Regulations, Reg. 5.7). 5

Annual contributions and advances to the working capital fund shall be assessed and paid in United States dollars. The Secretary General shall designate the bank or banks in which the funds of the Authority shall be kept. The Secretary-General shall from time to time report to the Council on the designation of such bank or banks. 6

[4] .Sea-Bed Committee, Report of Sub-Committee I, Appendix III, UN Doc. A/AC.138/94/ADD.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021), 39.

[5] UNCLOS III, Changes Suggested by the Delegation of the United States of Ameica, UN Doc. WG.21/ Informal Paper 18 (1982, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. VI (1984), 278.

[6] See *Michael C. Wood*, The International Seabed Authority: The First Four Years, MPYUNL 3 (1999), 173, 216. Art. 17 (2) of the Charter of the United Nations states: 'The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.' By its Resolution 67/238 of 24 December 2012, the General Assembly adopted the scale of assessments for the contributions of Member States to the regular budget of the United Nations for 2013, 2014 and 2015 (GA Res. 67/238 of 24 December 2012). For detail on the contribution percentage, see: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/238&referer=http://www.un.org/en/ga/contributions/assessments.shtml&Lang=E.

[7] Asserted contributions include: assessed contributions made by States members of the Authority; agreed contributions, as determined by the Authority, made by international organizations members of the Authority in accordance with annex IX to the Convention; funds received by the Authority pursuant to Annex III, Art. 13 (2) UNCLOS and S. 8 of the Annex to the 1994 Agreement, in connection with activities in the Area; funds transferred from the Enterprise in accordance with Annex IV, Art. 10 UNCLOS; voluntary contributions made by members or other entities; and such other funds to which the Authority may become entitled or may receive, including income from investment. Except for the contributions referred to in Financial Regulation 6.1 (a) and (b), the funds which remain after payment of administrative expenses may: be shared in accordance with Arts. 140 and 160 (2) (g); be used to provide the Enterprise with funds in accordance with Art. 170 (4); and be set aside for the purposes of the economic assistance fund referred to in S. 7 of the 1994 Agreement.

7 Contributions and advances shall be considered as due and payable in full within thirty days of the receipt of the communication of the Secretary General referred to in Financial Regulation 6.4, or as of the first day of the calendar year to which they relate, whichever is the later. As of 1 January of the following calendar year, the unpaid balance of such contributions and advances shall be considered to be one year in arrears.

8 Payments made by a member of the Authority shall be credited first to the working capital fund and then to the contributions due, in the order in which the member was assessed.

9 The Secretary General shall submit to each regular session of the Assembly, the Council and the Finance Committee a report on the collection of contributions and advances to the working capital fund.

10 New members shall be required to make a contribution for the year in which they become members of the ISA and to provide their proportion of the total advances to the working capital fund at rates to be determined by the Assembly.

11 States and entities referred to in Art. 305 which are not members of the ISA but which participate in its activities shall contribute to the expenses of the ISA at rates to be determined by the Assembly, unless the Assembly decides with respect to any such State or entity to exempt it from the requirement of so contributing. Such contributions shall be taken into account as miscellaneous income (→ Financial Regulations, Reg. 6).

12 The Secretary General may make short-term investments of a non-speculative nature, of money not needed for immediate requirements and shall inform the Finance Committee periodically of such investments which have been made. Also, the Secretary General may, after consultations with an investment counsellor appointed on the recommendation of the Finance Committee, make long-term investments of moneys standing to the credit of trust funds, reserve and special accounts, except as may be otherwise provided by the appropriate authority in respect of each such fund or account and having regard to the particular requirements as to the liquidity of funds in each case. Income derived from investments shall be credited as provided in the rules relating to each fund or account (→ Financial Regulations, Reg. 9).

Article 174
Borrowing power of the Authority

1. The Authority shall have the power to borrow funds.

2. The Assembly shall prescribe the limits on the borrowing power of the Authority in the financial regulations adopted pursuant to article 160, paragraph 2(f).

3. The Council shall exercise the borrowing power of the Authority.

4. States Parties shall not be liable for the debts of the Authority.

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Ram P. Anand*, Legal Regime of Sea-Bed and the Developing States (1976); *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001); *Yuwen Li*, Transfer of Technology for Deep Sea-Bed Mining (1994); *Malcolm N. Shaw*, International Law (2001)

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Financial Regulations (2000)

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I. Purpose and Function

Art. 174 originally had four purposes: (i) conferring the International Seabed Authority (ISA) the capacity to borrow funds; (ii) providing that the Assembly shall prescribe limits to the ISA borrowing power when designing its financial regulations; (iii) providing the Council shall be the ISA organ which shall exercise borrowing; and (iv) splitting debts liability and responsibility from States Parties. 1

This financial norm was also substantially modified by 1994 Agreement,[1] which revokes ISA's borrowing power to finance its administrative budget (→ Annex, Section 1 (14)). 2

II. Historical Background

Sub-Committee I of the Sea-Bed Committee included a provision in the texts illustrating areas of agreement and disagreement.[2] The 1974 draft text included provisions relating to funds borrowing which embraced the same provisions included in Art. 174.[3] During 1976, the Soviet Union proposed its deletion, but it was incorporated in the draft text. No further discussion was taken during 1975 and the same wording followed in the draft text, taking its current, definitive, format in 1979.[4] No further changes were made until 1982, except for minor wording. 3

III. Elements

1. General

The ISA borrowing capacity is intended to provide for additional funds sources in order to achieve its goals and objectives.[5] 4

2. Implementation

Borrowing capacity is not inherent to the personality of the ISA, being expressly recognized in Art. 174 within the limits thereto prescribed. In this sense, a procedure provision ('The Council shall exercise the borrowing power of the Authority') and a responsibility provision ('States Parties shall not be liable for the debts of the Authority') are explicitly included in Art. 174. 5

Regarding the use of borrowed funds, the 1994 Agreement only affected the ISA borrowing capacity including a foreclosure prescription to use borrowing in order to cover ISA administrative expenses; however, this foreclosure does not foreclose any other uses for the borrowed amounts (→ 1994 Agreement, Annex, S. 1 (14)).[6] 6

Although Art. 174 clearly states the Assembly shall prescribe the limits on the borrowing power of the Authority in the financial regulations adopted pursuant to Art. 160 (2)(f), 7

[1] GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994.

[2] Sea-Bed Committee, Report of Sub-Committee I, Appendix III, UN Doc. A/AC.138/94/ADD.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021), 39, 86.

[3] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 146 (Art. 46).

[4] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 96 (Art. 174).

[5] For details see *Ferrara* on Art. 170.

[6] Art. 14 states: 'The Authority shall not exercise the power referred to in article 174, paragraph 1, of the Convention to borrow funds to finance its administrative budget.'

borrowing is not included among the sources of the ISA listed in the Financial Regulations (→ Financial Regulations, Reg. 6.1). Until now, the borrowing capacity has not been utilized.

Article 175
Annual audit

The records, books and accounts of the Authority, including its annual financial statements, shall be audited annually by an independent auditor appointed by the Assembly.

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Financial Regulations (2000); ISA, Appointment of an Auditor. Report of the Secretary-General, ISA Doc. ISBA/5/A/6 (1999); ISA, Selected Decisions 4, ISA Doc. ISA/99/01 (1999); ISA, Proposed Budget of the International Seabed Authority for 2000 and Related Matters, ISA Doc. ISBA/5/A/8 (1999); ISA, Report of the Finance Committee, ISA Doc. ISBA/5/C/7 (1999); ISA, Proposed Budget of the International Seabed Authority for the Financial Period 2001 to 2002, ISA Doc. ISBA/6/A/13 (2000);; ISA, Report of the Finance Committee, ISA Doc. ISBA/6/C/6 (2000); ISA, Selected Decisions of the Sixth Session, ISA Doc. ISA/00/02.E (2000)

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I. Purpose and Function

1 Art. 175 is the International Seabed Authority (ISA) financial control clause, requiring that the records, books, accounts, and financial statements of the ISA shall be audited annually by an independent auditor appointed by the Assembly. The financial control clause is a common standard in most international organizations.

2 According to the Financial Regulations, the Assembly appoints an 'internationally recognized independent auditor with experience in the audit of international organizations', which shall be appointed for a period of four years and may be reappointed for one term in order to perform an audit in conformity with generally accepted common auditing standards and, subject to any special directions of the Assembly, in accordance with the additional terms of reference set out in the annex to the present Regulations (Financial Regulations, Reg. 12).

II. Historical Background

3 The financial control clause was introduced in the discussions and texts of the Sea-Bed Committee in 1970; it was treated during 1975 with minor differences from the definitive format brought up in 1979.[1]

[1] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130; Sea-Bed Committee, Malta: Draft Ocean Space Treaty (1971), UN Doc. A/AC.138/53, GAOR 26th Sess. Suppl. 21 (A/8421), 105; Sea-Bed Committee, Report of Sub-Committee I, Appendix III, UN Doc. A/AC.138/94/Add.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021), 39; UNCLOS III, Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Part I (1975), OR IV, 137 (Art. 175); UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10/Rev.1 (1977), OR VIII, 96 (Art. 175).

III. Elements

1. Implementation

The Financial Regulations of the ISA include detailed terms of reference for audit, which are similar in nature to that of the UN (Financial Regulations, Reg. 12). Art. 175 provides for an annual audit, but as with the budgetary stipulation, the Financial Regulations refer to a two-year financial period. According to the Financial Regulations, the auditor, who shall be completely independent and solely responsible for the conduct of the audit, shall make observations with respect to the efficiency of the financial procedures, the accounting system, the internal financial controls and, in general, the administration and management of the ISA. The Finance Committee may request the Auditor to perform certain specific examinations and issue separate reports on the results; the Secretary-General shall provide the Auditor with the facilities he or she may require in the performance of the audit. The auditor shall issue a report on the audit of the financial statements and relevant schedules relating to the accounts for the financial period, which shall include such information as the Auditor deems necessary with regard to matters referred to in Regulation 12.3 and in the additional terms of reference. To conclude with the auditing, the Finance Committee shall examine the financial statements and the audit reports and shall forward them to the Council and the Assembly, with such comments as it deems appropriate.[2] 4

Until 1998, a UN External Auditor audited the ISA. Pursuant to the Audit of the Authority for 1998, the Financial Committee noted that 5

> 'the United Nations external auditors appointed to audit the Authority for 1998 had audited the financial statements of the Authority comprising statements I to IV and the supporting notes and had expressed the opinion that the financial statements presented fairly, in all respects, the financial position of the Authority as at 31 December 1998 and the results of operations and cash flows for the period in accordance with the Authority's stated accounting policies set out in note 2 of the financial statements, which were applied on a basis consistent with that of the preceding financial period.'

The Committee further noted that the auditors recommended that: The Administration should obligate amounts only on the basis of contracts, purchase orders, agreements or other forms of undertaking or recognized liability, as provided in Art. XIV of the Financial Regulations of the United Nations; The Authority should conclude expeditiously the issue relating to plans of work for exploration for polymetallic nodules as requested by the Council. The external auditors also recommended that ex post facto approval by the Secretary-General be sought to regularize the amount borrowed from the pioneer investment fund, that the Administration ensure that its procurement plan is comprehensive and that the procedures for confirming receipt of goods are followed more closely. The Finance Committee recommended that the Assembly concur with the recommendations of the Board of Auditors. Finally, the Secretary-General provided the Committee with a report on the appointment of auditors, both government and private, and recommending, on a cost-effective basis, the appointment of a locally based international accountancy firm.[3] After a careful evaluation of the proposals by the four international accountancy firms that responded to the Secretariat's request, the Committee decided to recommend to the Assembly that, for 1999, and without prejudice to possible extension, the firm KPMG Peat Marwick be appointed as auditor.[4]

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[2] ISA, Financial Regulations (2000).

[3] ISA, Appointment of an Auditor. Report of the Secretary-General, ISA Doc. ISBA/5/A/6 (1999).

[4] See ISA, Selected Decisions 4, ISA Doc. ISA/99/01 (1999), ISA, Selected Decisions of the Sixth Session, ISA Doc. ISA/00/02.E (2000).

6 Since 1998, a private auditor has performed the provided financial control: Deloitte & Touche (2003, 2004, 2005, 2006, 2007), PriceWaterhouseCoopers (2009 and 2010), KPMG Peat Marwick (1999, 2000, 2001, 2002, 2013–2014 and 2015–2016).[5]

7 It is worth highlighting that during the resumed Sixth Session of the Authority on 6 and 7 July 2000, the Finance Committee analysed the audit for 1999. The Committee noted that KPMG Peat Marwick, appointed to audit the Authority for 1999, had audited the financial statements of the Authority. It also noted with appreciation the opinion expressed by KPMG that proper accounting records have been maintained and that the financial statements, which are in agreement therewith, had been prepared in accordance with generally accepted accounting principles, and give a true and fair view of the state of the Authority's affairs as at 31 December 1999 and its operations and its cash flows for the year. The Committee was informed by the Secretariat that, as a result of the audit, the following changes were being implemented: Before a payment for overtime is made, the Authority would ensure that prior approval had been granted, and where the hours worked are in excess of the amount approved, suitable explanations will be provided; the Authority would fully adopted the United Nations Accounting Standards; the Authority would, in accordance with Regulation 11.3 of the Financial Regulations, maintain separate accounts for trust funds, reserves and special accounts; the Authority would make the necessary adjustment to regularize the shortfall in the Working Capital Fund resulting from the changes in its membership in 1999; and the Authority would continue to maintain a comprehensive fixed asset register, which includes description, cost, location, date of purchase or disposal and disposal proceeds, commonly referred to as the non-expendable property records of the Authority.[6]

Subsection G
Legal status, privileges and immunities

Article 176
Legal status

The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Bibliography: *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001); *Malcolm N. Shaw*, International Law (2001); *Ian Brownlie*, Principles of Public International Law (1999); *Jeffrey L. Dunoff/Steven R. Ratner/David Wippman*, International Law (2010); *P. Chandrasekhara Rao/Rahmatullah Khan*, The International Tribunal for the Law of the Sea: Law and Practice (2001)

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Decision of the Council Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/C/12 (2000); ISA, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010); ISA, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010); ISA, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012); ISA, Decision of the Council Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters, ISA Doc. ISBA/19/C/17 (2013); ISA, Decision of the Assembly Concerning Overhead Charges for the Administration and Supervision of Exploration Contracts, ISA Doc. ISBA/19/A/12 (2013); ISA, Decision of the Assembly Regarding the Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/A/9 (2013); ISA, Functions of the

[5] ISA, Proposed Budget of the International Seabed Authority for 2000 and Related Matters ISA Doc. ISBA/5/A/8 (1999); ISA, Report of the Finance Committee, ISA Doc. ISBA/5/C/7 (1999).

[6] ISA, Proposed Budget of the International Seabed Authority for the Financial Period 2001 to 2002, ISA Doc. ISBA/6/A/13 (2000); ISA, Report of the Finance Committee, ISA Doc. ISBA/6/C/6 (2000).

International Seabed Authority in the First Year of its Full Functional Phase, Report of the Secretary-General, ISA Doc. ISBA/A/10 (1996); ISA, Protocol on the Privileges and Immunities of the International Seabed Authority (1998)

Cases: ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174

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I. Purpose and Function

Art. 176 provides for two milestone norms: (i) it confers international personality on the International Seabed Authority (ISA/the Authority), becoming a member of the international community different from its constituent States and other legal persons; and (ii) it endows ISA with legal capacity 'as may be necessary for the exercise of its functions and the fulfilment of its purposes.'[1] **1**

The provision of legal personality and capacity to the ISA are essential to the accomplishments of its goals and duties, making it 'an autonomous international organization whose ultimate objective is to administer the Area for commercial purposes and to benefit mankind from the eventual exploitation of the mineral resources of the Area.'[2] **2**

II. Historical Background

The original text of Art. 176 was drafted in 1975. During the 1976 session of UNCLOS III, the United Kingdom proposed several changes to the original draft, but the draft text kept repeating the original with word changes until the Drafting Committee adopted it in 1982.[3] **3**

III. Elements

1. 'international legal personality […] as may be necessary for the exercise of its functions and the fulfilment of its purposes'

Constituent instruments of international organizations are usually silent on legal personality, but customarily they can possess such international personality either explicitly or implicitly, withholding the consequent rights and duties.[4] Nevertheless, this is not case **4**

[1] See generally *Jeffrey L. Dunoff/Steven R. Ratner/David Wippman*, International Law (2010), 168; in addition, *Malcolm N. Shaw*, International Law (2001), 614.

[2] See ISA, Functions of the International Seabed Authority in the First Year of its Full Functional Phase, Including Matters Pending from the Work of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, Report of the Secretary-General, ISA Doc. ISBA/A/10 (1996); also, see *Shaw* (note 1), 614–615.

[3] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[4] *Shaw* (note 1), 614–615; also, *Ian Brownlie*, Principles of Public International Law (1999), 678.

regarding the due to the explicit statement in Art. 176. In effect, this article is based on Art. 104 of the Charter of the United Nations (UNC) and it clearly states: 'The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'. This statement is different from the UNC, which prescribes: 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes'. It is evident that Art. 1 explicitly grants the ISA with international personality, rendering it with the legal capability and subsequent faculties necessary for fundamental purposes and objectives.[5] In this sense, the wording employed avoids the necessity to bring up any subsequent clarification.[6]

5 The legal personality of the ISA is different from the Enterprise's.[7] In this sense, the Enterprise legal personality – and legal capacity – is confined to its restrained purposes as specific organ of the ISA; consequently, the ISA and the Enterprise act and are legally obliged independently.[8]

2. 'legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes'

6 In the practice, the ISA's legal capacity includes: (i) capacity to contract; (ii) capacity to acquire and dispose of immovable and movable property; (iii) capacity to institute, or to be party to, legal proceedings; and (iv) capacity to adopt regulations.[9]

7 The ISA capacity to contract aims at the exploration and exploitation of the Area. By 27 December 2015, the International Seabed Authority has entered into 15-year contracts for exploration for polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts in the deep seabed with twenty three contractors. Fourteen of these contracts are for exploration for polymetallic nodules in the Clarion-Clipperton Fracture Zone (13) and Central Indian Ocean Basin (1). There are five contracts for exploration for polymetallic sulphides in the South West Indian Ridge, Central Indian Ridge and the Mid-Atlantic Ridge and four contracts for exploration for cobalt-rich crusts in the Western Pacific Ocean. The conclusion of contracts allow these contractors to explore specified parts of the deep oceans outside national jurisdiction. Under the Regulations, each contractor has the exclusive right to explore an initial area of up to 150,000 square kilometers. Over the first eight years of the contract, half of this area is to be relinquished. Each contractor is required to propose a programme for the training of nationals of developing States. The training programme, as agreed with the ISA, is incorporated into the contract as Schedule 3. Each contractor is also required to submit an annual report on its programme of activities. Prior to the commencement of its programme of activities under the contract, each contractor is also required to submit to the Secretary-General a contingency plan to respond effectively to incidents arising from its activities in the exploration area. The signature of these exploration contracts gives practical and real effect to the single regime for the Area established by the 1982 Convention and the 1994 Agreement and as such represents a significant step forward for the international community.[10]

8 The ISA has capacity to acquire and dispose of immovable and movable property according to the necessities of its purposes and duties. Regarding its headquarters, the ISA

[5] For details on subjectivity, see *Brownlie* (note 4), 57.

[6] *See* ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949), 174. Also, *Brownlie* (note 4), 678.

[7] Arts. 3 and 18 Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999.

[8] *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001), 322 and 338.

[9] Arts. 5 (1) and 4 Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority; Art. 3, Protocol on the Privileges and Immunities of the International Seabed Authority.

[10] For further information as well as a detail on the contracts, see https://www.isa.org.jm/deep-seabed-minerals-contractors/overview.

has entered into an agreement and a protocol with Jamaica, establishing its address in 14–20 Port Royal Street, Kingston, Jamaica.[11]

9 The ISA capacity to adopt regulations implies the adoption of rules, regulations and procedures necessary for the conduct of activities in the Area as they progress as well as the adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment.[12] In this sense, the 'Mining Code' refers to the whole of the comprehensive set of rules, regulations and procedures issued by the ISA to regulate prospecting, exploration and exploitation of marine minerals in the international seabed Area (defined as the seabed and subsoil beyond the limits of national jurisdiction). To date, the Authority has issued Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (adopted 13 July 2000) which was later updated and adopted 22 July 2013; the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted 7 May 2010) and the Regulations on Prospecting and Exploration for Cobalt-Rich Crusts (adopted 27 July 2012).[13] These regulations include the forms necessary to apply for exploration rights as well as standard terms of exploration contracts; the complete set of these regulations form part of the Mining Code together with recommendations by the Authority's Legal and Technical Commission for the guidance of contractors on the assessment of the environmental impacts of exploration for polymetallic nodules.[14] In addition, the ISA has signed three Memoranda of Understanding: one with the Intergovernmental Oceanographic Commission UNESCO,[15] one with the International Cable Protection Committee,[16] and one with the OSPAR Commission.[17]

10 Regarding the ISA judicial capacity, the Seabed Disputes Chamber of the International Tribunal for the Law od the Sea (ITLOS) has jurisdiction over any disputes between States

[11] See Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999; Supplementary Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority and the Use of the Jamaica Conference Centre Complex of 17 December 2003.

[12] Notwithstanding the provisions of Annex III, Art. 17 (2)(b) and (c) UNCLOS, such rules, regulations and procedures was meant to take into account the terms of the Interim Agreement, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area. See Art. 3 of ISA Report of the Secretary General (note 2).

[13] ISA, Decision of the Council Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/C/12 (2000); ISA, Decision of the Council Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters, ISA Doc. ISBA/19/C/17 (2013); ISA, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010); ISA, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012).

[14] ISA, Decision of the Assembly Concerning Overhead Charges for the Administration and Supervision of Exploration Contracts, ISA Doc. ISBA/19/A/12 (2013); ISA, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/A/11 (2012); ISA, Decision of the Assembly relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/Rev.1 (2010); ISA, Decision of the Council Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters, ISA Doc. ISBA/19/C/17 (2013); ISA, Decision of the Assembly Regarding the Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/A/9 (2013), all of them available at https://www.isa.org.jm/mining-code/Regulations.

[15] Memorandum of Understanding to Specify the Scope of Co-operation between the Intergovernmental Oceanographic Commission of UNESCO and the International Seabed Authority in Promoting the Development and Conduct of Marine Scientific Research in the International Seabed Area and in Publication and Dissemination of Research and Analysis Results for the Mutual Benefit of Member States and in the Light of the Relevant Provisions of the United Nations Convention on the Law of the Sea of 10 December of 1982.

[16] Memorandum of Understanding between the International Cable Protection Committee and the International Seabed Authority of 25 February 2010.

[17] Memorandum of Understanding between the OSPAR Commission and the International Seabed Authority to Specify the Scope of Cooperation between the Commission Established by the Convention for the Protection of the Marine Environment of the North-East Atlantic, signed in Paris on 22 September 1992, and the International Seabed Authority established by the United Nations Convention on the Law of the Sea ("the Convention") signed in Montego Bay on 10 December 1982.

Parties and ISA (Arts. 186–191; Annex VI, Arts. 35–40). According to Art. 187, compulsory jurisdiction falls under the 11-member ITLOS Seabed Disputes Chamber: (i) disputes between a State Party and the ISA; (ii) disputes between parties to a contract, which may be States Parties, the ISA or the Enterprise, State enterprises and natural or juridical persons; (iii) disputes of a pre-contractual nature between the ISA and a prospective contractor; and (iv) disputes concerning liability between the ISA and a State Party, a State enterprise or a natural or juridical person.[18]

Article 177
Privileges and immunities

To enable the Authority to exercise its functions, it shall enjoy in the territory of each State Party the privileges and immunities set forth in this subsection. The privileges and immunities relating to the Enterprise shall be those set forth in Annex IV, article 13.

Bibliography: *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001); *Malcom N. Shaw*, International Law (2001); *Ian Brownlie*, Principles of Public International Law (1999); *Hazel Fox*, The Law of State Immunity (2002)

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Staff Regulations and Rules of the International Seabed Authority (2011); ISA, Protocol on the Privileges and Immunities of the International Seabed Authority, ISA Doc. ISBA/4/A/8 (1998)

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I. Purpose and Function

1 In order to provide for the effective functioning of the International Seabed Authority (ISA), Art. 177 sets forth a group of legal privileges and immunities within the States Parties' territory. These legal privileges and immunities are further developed in Arts. 178–183, and they are exclusively designed to enable the ISA to fulfil its objectives and purposes.[1]

2 ISA privileges and immunities are, first, an analogical result of those recognized for States and diplomats, and secondly, a result of the inherent and implied powers and faculties due to the legal interpretation of its constituent instrument.[2] It is relevant to underline that the scope given to the privileges and immunities of the ISA (→ Subsection G) does not apply to the Enterprise: even though it enjoys legal capacity and acts 'within the framework of the international legal personality' of the latter, their conducts are divided (→ Annex IV, Art. 13; Art. 2 Protocol on the Privileges and Immunities of the International Seabed Authority).[3] In

[18] See *P. Chandrasekhara Rao/Rahmatullah Khan*, The International Tribunal for the Law of the Sea: Law and Practice (2001), 12.

[1] *Malcom N. Shaw*, International Law (2001), 618 and 619.

[2] *Ian Brownlie*, Principles of Public International Law (1999), 689.

[3] *Edward D. Brown*, Sea-Bed Energy and Minerals: The International Legal Regime (2001). 339.

fact, according to the Protocol, States Parties can provide more privileges and immunities than those foreseen in the Convention.[4]

II. Historical Background

The original text of Art. 177 was drafted in 1975 UNCLOS III session. The text was revised and amended times until it achieved its final format in 1982.[5] 3

In considering the detailed provisions included in Annex IV, the Preparatory Commission took the view that there was a need for an additional Protocol on Privileges and Immunities of the Authority, which would both set out the conventional provisions and, in addition, deal with aspects not covered by UNCLOS. A working group was set up in August 1996 to consider the Preparatory Commission's draft and, following its review, the Secretariat of the ISA was instructed to undertake further work on the basis of the earlier text. Since then, negotiations and draft texts followed up until a final draft was presented to the Assembly in March 1998. The Assembly adopted the final version on 26 March 1998.[6] 4

III. Elements

1. General

Unlike States, international organizations have no territory or population of their own and can only perform their functions on territory over which a State exercises jurisdiction and through persons who are linked to a State by bond of nationality. As a result, they are peculiarly vulnerable to interference, particularly from the State where their headquarters are based. The immunities and privileges accorded to international organizations are shaped by these conditions which differentiate them from those enjoyed by States.[7] 5

In effect, international organizations derive their existence and their immunities from treaties; chief among these are the constituent treaty of the respective organization, the headquarters agreement made between the organization and the host State, and special multilateral conventions such as the 1945 Convention on the Privileges and Immunities of the United Nations. Immunities and privileges are commonly specified in the constituent treaty of the organization, not by customary international law, and the definitions in such treaties of the functions of the organizations sets the limits of their immunities, and those of their representatives and officers.[8] 6

Arts. 177–183 provide for a wide range of privileges and immunities designed to enable the ISA and the Enterprise to fulfil their functions.[9] It is expressly stated in Art. 177 that privileges and immunities of the ISA are different from those of the Enterprise. In addition, this assertion is further emphasised in the detailed treatment received in the special agreements.[10] 7

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[4] ISA, Protocol on the Privileges and Immunities of the International Seabed Authority, UN Doc. ISBA/4/A/8 (1998), Art. 13.

[5] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[6] *Brown* (note 3), 339–340.

[7] *Hazel Fox*, The Law of State Immunity (2002), 468.

[8] *Ibid.*, 469.

[9] *Shaw* (note 1), 618–619.

[10] See Arts. 3–5, 10–16, 18–20, and 23–25 Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999; Art. 3 of Supplementary Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority and the Use of the Jamaica Conference Centre Complex of 17 December 2003.

2. 'To enable the Authority to exercise its functions, it shall enjoy in the territory of each State Party the privileges and immunities set forth in this subsection.'

8 In general terms, 'privileges' and 'immunities' have reference to the inviolability of the international organization – the ISA. The reasons why these privileges and immunities must be granted are that the ISA could not exercise its functions perfectly unless it enjoyed such, for it is obvious that, were it liable to ordinary legal and political interference like other individuals and thus more or less dependent on the good-will of the host government, it might be influenced by external considerations of safety. It is also clear that interference with its free intercourse with States parties would nullify its *raison d'être*.

9 In order to function effectively, international organizations such as the ISA require a certain minimum standard of freedom and legal security for their assets, headquarters, and other establishments and for their personnel and representatives of member States accredited to the organizations. By analogy with the privileges and immunities accorded to diplomats, the requisite privileges and immunities in respect of the territorial jurisdiction of host states are generally recognized in customary law, particularly recognized in Art. 177, and they are specifically regulated in ISA subsequent documents as well as in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. As in the case of diplomatic immunities, international immunities are subject to waiver.[11]

10 The general provision regarding privileges and immunities is dealt with in Art. 2 of the Protocol on Privileges and Immunities of the ISA. As the Protocol adds to the Convention in a number of respects, the privileges and immunities accorded to the ISA by States Parties to the Protocol may be more extensive than the privileges and immunities accorded to the ISA by States Parties to the Convention. The premises of the Authority shall be inviolable; the Authority shall be entitled to display its flag and emblem at its premises and on vehicles used for official purposes. The representatives of members of the Authority attending meetings convened by the Authority shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities: immunity from legal process in respect of words spoken or written, and all acts performed by them in the exercise of their functions, except to the extent that the member which they represent expressly waives this immunity in a particular case; immunity from personal arrest or detention and the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys; inviolability for all papers and documents; the right to use codes and to receive papers or correspondence by courier or in sealed bags; exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions; the same facilities as regards exchange restrictions as are accorded to representatives of foreign Governments of comparable rank on temporary official missions. In addition, representatives of members of the Authority shall have insurance coverage against third-party risks in respect of vehicles owned or operated by them, as required by the laws and regulations of the State in which the vehicle is operated. Officials of the Authority, regardless of nationality, shall: be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; be immune from personal arrest or detention

[11] *Brownlie* (note 2), 683; also, Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999; Supplementary Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority and the Use of the Jamaica Conference Centre Complex of 17 December 2003; and ISA, Protocol on the Privileges and Immunities of the International Seabed Authority (note 4). Finally, see Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character signed in Vienna on 14 March, 1975 (Doc. A/CONF.67/16); this convention is not yet in force, as it was ratified only by 34 of the 35 required States.

in relation to acts performed by them in their official capacity; be exempt from tax in respect of salaries and emoluments paid or any other form of payment made by the Authority; be immune from national service obligations provided that, in relation to States of which they are national, such immunity shall be confined to officials of the Authority whose names have, by reason of their duties, been placed upon a list compiled by the Secretary-General and approved by the State concerned; should other officials of the Authority be called up for national service, the State concerned shall, at the request of the Secretary-General, grant such temporary deferments in the call-up of such officials as may be necessary to avoid interruption in the continuation of essential work; be exempt, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration; be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Governments concerned; have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question; be exempt from inspection of personal baggage, unless there are serious grounds for believing that the baggage contains articles not for personal use or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the Party concerned; and inspection in such a case shall be conducted in the presence of the official concerned, and in the case of official baggage, in the presence of the Secretary-General or his or her authorized representative; be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as are accorded to diplomatic agents. The Authority shall cooperate at all times with the appropriate authorities of members of the Authority to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities. Pursuant to the laws and regulations of the State concerned, the officials of the ISA shall be required to have insurance coverage against third-party risks in respect of vehicles owned or operated by them. Experts performing missions for the ISA shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded: immunity from personal arrest or detention and from seizure of their personal baggage; in respect of words spoken or written and acts done by them in the exercise of their functions, immunity from legal process of every kind. This immunity shall continue notwithstanding that the persons concerned are no longer employed on missions for the ISA; inviolability for all papers and documents; for the purposes of their communications with the Authority, the right to use codes and to receive papers or correspondence by courier or in sealed bags; exemption from tax in respect of salaries and emoluments paid or any other form of payment made by the Authority. This provision is not applicable as between an expert and the member of the Authority of which he or she is a national; the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions. Privileges and immunities are accorded to experts, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the Authority. The Secretary-General shall have the right and the duty to waive the immunity of any expert where, in the opinion of the Secretary-General, the immunity would impede the course of justice, and it can be waived without prejudice to the interests of the Authority.[12]

[12] See Arts. 2 and 13, Protocol on the Privileges and Immunities of the International Seabed Authority (note 4). The provisions of the Agreement concerning the relationship between the United Nations and the International Seabed Authority of 14 March 1997 and the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 shall be complementary to the provisions of the Headquarters Agreement. Insofar as any provision of this Protocol relates to the same subject matter, the two provisions shall, wherever possible, be treated as complementary, so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of conflict, the provisions of that Agreement shall prevail.

11 The first part of Art. 177 is modelled on Art. 105 (1) of the UN Charter Treaty. The Protocol's provisions are intended to be complementary to those of the Headquarters Agreement.[13] Regarding the ISA function, Art. 157 states it is to 'organize and control activities in the Area', having 'such incidental powers […] as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area'.[14] The functions and activities of the ISA are prescribed in the Convention, the 1994 Agreement and subsequent documents, and they are performed by its main and subsidiary organs: (i) the Assembly;[15] (ii) the Council;[16] (iii) the Secretariat;[17] (iv) the Enterprise;[18] (v) subsidiary organs;[19] and (vi) the Finance Committee.[20]

3. 'The privileges and immunities relating to the Enterprise shall be those set forth in Annex IV, article 13.'

12 Though similar in implementation and exercise, the privileges and immunities of the Enterprise are split from the ISA's due to their distinct legal personality. In this sense, the Protocol on Immunities is clear when stating that 'each State party to this Protocol shall accord to the Authority and its organs, the representatives of members of the Authority, officials of the Authority and experts on mission for the Authority such privileges and immunities as are specified in this Protocol' (→ Art. 2).

Article 178
Immunity from legal process

The Authority, its property and assets, shall enjoy immunity from legal process except to the extent that the Authority expressly waives this immunity in a particular case.

Bibliography: *Hazel Fox*, The Law of State Immunity (2002); *P. Chandrasekhara Rao/Rahmatullah Khan*, The International Tribunal for the Law of the Sea: Law and Practice (2001); *Malcolm N. Shaw*, International Law (2001); *Xiaodong Yang*, State Immunity in International Law (2012)

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[13] *Brown* (note 3), 340.
[14] See *Schatz* on Art. 157 MN 3–8.
[15] See *Schatz* on Art. 158 MN 4–7 and on Art. 160; S. 1 and 3, Annex of the 1994 Agreement (GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994); ISA, Staff Regulations and Rules of the International Seabed Authority (2011).
[16] See *Schatz* on Art. 158 MN 6; *van Doorn* on Art. 162; S. 1 and 3, Annex of the 1994 Agreement; ISA Staff Regulations (note 15).
[17] See *Schatz* on Art. 158 MN 7; *Jaeckel* on Art. 167; S. 7, Annex of the 1994 Agreement; ISA Staff Regulations (note 15).
[18] See *Schatz* on Art. 158 MN 8–10; *Ferrara* on Art. 170 and on Art. 174 MN 7; also, see S. 2, 5 and 6, Annex of the 1994 Agreement; ISA Staff Regulations (note 15).
[19] See *Schatz* on Art. 158 MN 11–12; also, see S. 7, Annex of the 1994 Agreement; ISA Staff Regulations (note 15).
[20] See S. 9, Annex of the 1994 Agreement.

I. Purpose and Function

Art. 178 addresses one of the immunities of the International Seabed Authority (ISA) in the territory of its member States: the immunity of legal process. This immunity comprises the impossibility to sue the ISA, its organs and the Enterprise at a State party national court jurisdiction without waive from its head.[1] On the other hand, UNCLOS provides the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) has jurisdiction over any disputes between States Parties and the ISA (→ Arts. 186–191; Annex VI, Arts. 35–40). 1

The ISA can waive its immunity of legal process on a case by case basis and to the extent that it is so waived. 2

II. Historical Background

Art. 178 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee. The draft text of Art. 178 was steadily treated between 1976 and 1982 sessions, though no substantial amendment was made.[2] 3

III. Elements

1. 'The Authority […] shall enjoy immunity from legal process except to the extent that the Authority expressly waives this immunity in a particular case'

Immunities of international organizations are shaped by their functions and may comprise immunity from jurisdiction and execution of national courts, inviolability of its premises, archives and documents, currency and fiscal privileges, and freedom of communication as regards correspondence, censorship, operation of telecommunication equipment, and distribution of publications.[3] 4

Immunities may be expressly waived by the head or other chief administrative officer of the organization; as with State immunity, waiver of immunity from jurisdiction does not imply waiver of immunity from execution. The claim to immunity of the head of an international organization creates a presumption in favour of such immunity but an international or national court is unlikely to treat it as conclusive evidence.[4] 5

The distinction between public and private acts has little direct relevance in determining the scope of immunities of an organization. It is the rather functional approach which applies.[5] 6

2. 'its property and assets, shall enjoy immunity from legal process except to the extent that the Authority expressly waives this immunity in a particular case.'

Regarding the ISA's property and assets, immunity of search and seizure is particularly addressed in Art. 5 (1) of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority: 7

[1] *Malcolm N. Shaw*, International Law (2001), 618 and 619.

[2] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[3] Arts. 5, 10–14, 19 and 20 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999.

[4] *Hazel Fox*, The Law of State Immunity (2002), 469.

[5] *Ibid.*, 470; *Xiaodong Yang*, State Immunity in International Law (2012), 347.

> 'the Headquarters The Headquarters shall be inviolable. No officer or official of Jamaica, or other person exercising any public authority within Jamaica, shall enter the Headquarters to perform any duties therein except with the express consent of, or at the request of, the Secretary-General, and under conditions approved by him.'

Waiver to the general principle is treated in Art. 5 (2), when stating that 'the service of legal process, including the seizure of private property, shall not take place within the Headquarters except with the express consent of, and under conditions approved by, the Secretary-General'.

8 Provisions similar to Art. 178 are found in many agreements on privileges and immunities of international organizations.[6]

9 To date, there has been no practice under this norm.

Article 179
Immunity from search and any form of seizure

The property and assets of the Authority, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

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I. Purpose and Function

1 Art. 179 sets forth immunity from search and any form of seizure of the International Seabed Authority (ISA) property and assets. The objective is not only to allow the normal performance of the organ officer's duties, but also to protect industrial, technological and research information which is essential to deep seabed mining industry and related activities. This rule is consonant with the general protection of ISA archives and communications set forth in Art. 181.[1]

2 Property and assets mentioned in Art. 179 are not restricted to those held at the seat of the ISA. If the property or assets are located elsewhere, the ISA must inform the competent authorities.

II. Historical Background

3 Art. 179 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee. The draft text of Art. 179 was steadily dicussed between 1976 and 1982 sessions, though no substantial amendment was made.[2]

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[6] See Convention on the Privileges and Immunities of the United Nations, 13 February 1946, UNTS 1, 15; also, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947,UNTS 33, 261.

[1] See *Ferrara* on Art. 181.

[2] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Part I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the

III. Elements

1. 'The property and assets of the Authority […] shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.'

ISA property and assets immunity are particularly addressed in Art. 5 (1) of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority: 4

> 'the Headquarters The Headquarters shall be inviolable. No officer or official of Jamaica, or other person exercising any public authority within Jamaica, shall enter the Headquarters to perform any duties therein except with the express consent of, or at the request of, the Secretary-General, and under conditions approved by him.'

Waiver to the general principle is addressed in Art. 5 (2), when stating that 'the service of legal process, including the seizure of private property, shall not take place within the Headquarters except with the express consent of, and under conditions approved by, the Secretary-General'.

Property and assets immunities of the ISA and the Enterprise are addressed in the special agreement along with the other ISA privileges and immunities (immunity from jurisdiction and execution of national courts, inviolability of its premises, public services favoured treatment, archives and documents, currency and fiscal privileges, freedom of assembly, and freedom of communication as regards correspondence, censorship, operation of telecommunication equipment, and distribution of publications).[3] As previously mentioned, immunities may be expressly waived by the head or other chief administrative officer of the organization. Provisions similar to Art. 179 are found in many agreements on privileges and immunities of international organizations.[4] 5

2. 'wherever located and by whomsoever held'

According to Art. 2 (3) of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999: 6

> 'Any building or buildings in Jamaica outside the Headquarters which may, with the concurrence of the Government, be temporarily used for meetings convened by the Authority shall be considered as included in the Headquarters. Requests by the Authority requiring the concurrence of the Government shall not be unreasonably withheld.'

Consequently, ISA immunity of search and seizure is extended to any building where a meeting is held in relation to its function or activity.

Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[3] See Arts. 5, 10–14, 19 and 20 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999.

[4] See Convention on the Privileges and Immunities of the United Nations, 13 February 1946, UNTS 1, 15; also, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947,UNTS 33, 261.

Article 180
Exemption from restrictions, regulations, controls and moratoria

The property and assets of the Authority shall be exempt from restrictions, regulations, controls and moratoria of any nature.

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994

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I. Purpose and Function

1 Art. 180 implements an exemption to the International Seabed Authority's (ISA) property and assets from any kind of restrictions, regulations, controls, and moratoria (usually financial, but not restrained to) that the Government of member States may adopt.[1] The goal of this norm is to restrain any governmental agency or power from interfering with the activities of the ISA and its organs.

2 Art. 180 functions as a general privilege or immunity, that is, no State party agent may implement restrictions, regulations, controls or moratoria over the ISA's property and assets unless there is a waiver from its head.

II. Historical Background

3 Art. 180 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee. The draft text of Art. 180 was steadily treated between 1976 and 1982 sessions, though no substantial amendment was made.[2]

III. Elements

1. Implementation

4 Art. 14 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 clearly states that the ISA, its property and assets shall enjoy immunity from legal process except to the extent that the Authority expressly waives this immunity in a particular case. The property and assets of the ISA, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form

[1] Similar provisions are included for the UN and Special Agencies. See Art. II (5) of Convention on the Privileges and Immunities of the United Nations, 13 February 1946, UNTS 1, 15; also, Art. III (7) of Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, UNTS 33, 261.

[2] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Part I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

of seizure by executive or legislative action. Finally, and most relevant to Art. 180, it states that 'the property and assets of the Authority shall be exempt from restrictions, regulations, controls and moratoria of any nature.'

Considering the split of legal personality between the ISA and the Enterprise, Art. 20 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 states: 5

> '1. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.
> 2. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be free from discriminatory restrictions, regulations, controls and moratoria of any nature.'

2. Relevant Practice

To date there has been no relevant practice under this provision. 6

Article 181
Archives and official communications of the Authority

1. The archives of the Authority, wherever located, shall be inviolable.

2. Proprietary data, industrial secrets or similar information and personnel records shall not be placed in archives which are open to public inspection.

3. With regard to its official communications, the Authority shall be accorded by each State Party treatment no less favourable than that accorded by that State to other international organizations.

Documents: GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994; ISA, Protocol on the Privileges and Immunities of the International Seabed Authority, ISA Doc. ISBA/4/A/8 (1998)

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5. 'With regard to its official communications, the Authority shall be accorded by each State Party treatment no less favourable than that accorded by that State to other international organizations.' 9

I. Purpose and Function

Art. 181 provides for the protection of International Seabed Authority's (ISA) existent, incoming and outgoing information. The radical importance of such protection lays on the core activities related to ISA, that is, marine research and deep seabed mining. Both activities strongly rely on the value of exclusiveness of knowledge as well as technology. 1

2 Art. 181 is consonant with other parts of UNCLOS regulating information and technology transfer, particularly: Art. 143 and Part XIII,[1] Art. 144 and Part XIV,[2] and with S. 5 of the 1994 Agreement.[3]

II. Historical Background

3 Art. 181 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee. The draft text of Art. 181 was steadily treated between 1976 and 1982 sessions, though no substantial amendment was made.

III. Elements

1. General

4 Provisions similar to Art. 181 (1) and (3) can be found in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies.[4]

2. 'The archives of the Authority […] shall be inviolable.'

5 Art. 181 (1) sets forth inviolability of ISA archives, which is to be respected by the authorities of States Parties; for this purpose, Art. 1 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999. States that 'archives' includes records and correspondence, documents, manuscripts, maps, still and moving pictures, films, computer-based communications and sound recordings belonging to or held by the Authority in Jamaica.[5] It is also relevant to note that location of the archives of the Authority shall be made known to the competent authorities if it is at a place other than in the Headquarters.

6 Seat facilities and archives inviolability of the ISA are specifically treated in Arts. 5 and 13 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999. Art. 5 (1) reads as follows:

> 'the Headquarters The Headquarters shall be inviolable. No officer or official of Jamaica, or other person exercising any public authority within Jamaica, shall enter the Headquarters to perform any duties therein except with the express consent of, or at the request of, the Secretary-General, and under conditions approved by him.'

Waiver to the general principle is treated in Art. 5 (2), when stating that 'the service of legal process, including the seizure of private property, shall not take place within the Headquarters except with the express consent of, and under conditions approved by, the Secretary-General'.

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[1] See *Vöneky/Beck* on Art. 143.

[2] See *Vöneky/Beck* on Art. 144.

[3] GA, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. A 48/263 (XLVIII) of 17 August 1994.

[4] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Part I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[5] ISA, Protocol on the Privileges and Immunities of the International Seabed Authority, ISA Doc. ISBA/4/A/8 (1998).

3. 'wherever located'

As stated in the commentary to Art. 179, pursuant to Art. 2 (3) of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999: 7

> 'Any building or buildings in Jamaica outside the Headquarters which may, with the concurrence of the Government, be temporarily used for meetings convened by the Authority shall be considered as included in the Headquarters. Requests by the Authority requiring the concurrence of the Government shall not be unreasonably withheld.'

Consequently, the protection of ISA's archives is prorogued to any place where such archives are located.

4. 'Proprietary data, industrial secrets or similar information and personnel records shall not be placed in archives which are open to public inspection.'

This assertion is included in order to avoid misplacement or disclosure of confidential information. In this sense, it is crucial to bear in mind that location of the archives of the Authority shall be made known to the competent authorities if it is at a place other than in the Headquarters. On the other hand, the general rule of Art. 5 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 seems to assert that every document within the ISA headquarters is presumably an 'archive' unless otherwise proven. 8

5. 'With regard to its official communications, the Authority shall be accorded by each State Party treatment no less favourable than that accorded by that State to other international organizations.'

This provision inserts a most favourable clause in the treatment regarding official communications. This is a minimum standard provision detailed in Art. 10 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999, which states that: 9

> 'for the purposes of its official communications, the ISA shall enjoy as far as is compatible with international agreements, regulations and arrangements to which Jamaica is a party, treatment at least as favourable as that which is accorded to diplomatic missions in Jamaica and to international organizations in the matter, inter alia, of priorities, rates and taxes applicable to mail and different forms of telecommunications'.

In addition, the provision states that

> 'the competent authorities shall secure the inviolability of all communications and correspondence directed to the Authority, or to any of the officials of the Authority in the Headquarters, as well as all outgoing communications and correspondence of the Authority, by whatever means or in whatever form transmitted, and they shall be immune from censorship and from any other form of interception or interference with their privacy. Such inviolability shall extend, without limitation by reason of this enumeration, to publications, still and moving pictures, films, computer-based communications and sound or videotape recordings dispatched to or by the Authority'.

Article 182
Privileges and immunities of certain persons connected with the Authority

Representatives of States Parties attending meetings of the Assembly, the Council or organs of the Assembly or the Council, and the Secretary-General and staff of the Authority, shall enjoy in the territory of each State Party:

(a) **immunity from legal process with respect to acts performed by them in the exercise of their functions, except to the extent that the State which they represent or the Authority, as appropriate, expressly waives this immunity in a particular case;**

(b) **if they are not nationals of that State Party, the same exemptions from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by that State to the representatives, officials and employees of comparable rank of other States Parties.**

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4. 'except to the extent that the State which they represent or the Authority, as appropriate, expressly waives this immunity in a particular case' 8

I. Purpose and Function

1 Art. 182 differentiates between the International Seabed Authority's (ISA) privileges and immunities and ISA's related persons. These persons include the representatives attending ISA meetings, the Secretary General and staff. Provisions similar to Art. 182 can be found in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. The Protocol on the Privileges and Immunities of the ISA elaborates upon the provisions of Art. 182.

2 Art. 182 is general provision on privileges and immunities which include: (i) Immunity from legal process with respect to acts performed by them in the exercise of their functions; and (ii) If they are not nationals of the States Party concerned, the same exemptions from immigration restrictions, alien registration, traveling facilities. Waiver of immunity is applicable on a case by case basis. Further details on the officer's and staff privileges and immunities can be found in Arts. 28 and 32 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 and the Protocol on the Privileges and Immunities of the ISA.

II. Historical Background

Art. 182 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee. The draft text of Art. 182 was substantially modified in 1977 and 1979 UNCLOS III sessions, receiving final formatting in 1982.[1] 3

III. Elements

1. 'Representatives of States Parties […] and staff of the Authority'

Art. 28 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 states the general rule that 'the permanent mission or the permanent observer mission shall enjoy the same privileges and immunities as are accorded to a diplomatic mission in Jamaica.' In addition, the following article provides that 'members of the permanent mission or of the permanent observer mission shall be entitled to the same privileges and immunities as the Government accords to the members, having comparable rank, of a diplomatic mission in Jamaica.'[2] 4

Regarding privileges and immunities of the officials of the ISA, Art. 32 of that Agreement sets forth the general rule: 5

> 'Regardless of their nationality and rank, shall enjoy in the territory of Jamaica the following privileges and immunities:
> (a) Immunity from legal process in respect of words spoken and written, and of acts performed by them in their official capacity; such immunity to continue notwithstanding that the persons concerned may have ceased to be officials of the Authority;
> (b) Immunity from personal arrest or detention in relation to acts performed by them in their official capacity;
> (c) Immunity from inspection and seizure of personal and official baggage, except in case of flagrante delicto. In such cases the competent authorities shall immediately inform the Secretary-General. Inspections shall, in the case of personal baggage, be conducted only in the presence of the official concerned or his authorized representative, and in the case of official baggage, in the presence of the Secretary-General or his authorized representative;
> […]
> (g) Exemption from immigration restrictions and alien registration procedures;
> (h) Exemption from national service obligations'.

2. 'attending meetings of the Assembly, the Council or organs of the Assembly or the Council, and the Secretary-General'

ISA meetings can be held either at the seat of the organs – Jamaica – or elsewhere. According to Art. 12 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999: 6

> '1. The Government recognizes the right of the Authority to convene meetings within the Headquarters or, with the concurrence of the Government, elsewhere in Jamaica.
> 2. To ensure full freedom of assembly and discussion, the Government shall take all proper steps to guarantee that no impediment is placed in the way of conducting the proceedings of any meeting convened by the Authority.'

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[1] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Part I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[2] Art. 29 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999.

3. 'immunity from legal process with respect to acts performed by them in the exercise of their functions'

7 When exposing the reference to subjects of this rule, it was made evident that the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999 broadens immunities and privileges in relation to UNCLOS Art. 182.

4. 'except to the extent that the State which they represent or the Authority, as appropriate, expressly waives this immunity in a particular case'

8 This provision reflects the general rule of public international law system that every State has the right to waive its immunities as well as the immunities of its representatives – diplomats and consular representatives.

Article 183
Exemption from taxes and customs duties

1. Within the scope of its official activities, the Authority, its assets and property, its income, and its operations and transactions, authorized by this Convention, shall be exempt from all direct taxation and goods imported or exported for its official use shall be exempt from all customs duties. The Authority shall not claim exemption from taxes which are no more than charges for services rendered.

2. When purchases of goods or services of substantial value necessary for the official activities of the Authority are made by or on behalf of the Authority, and when the price of such goods or services includes taxes or duties, appropriate measures shall, to the extent practicable, be taken by States Parties to grant exemption from such taxes or duties or provide for their reimbursement. Goods imported or purchased under an exemption provided for in this article shall not be sold or otherwise disposed of in the territory of the State Party which granted the exemption, except under conditions agreed with that State Party.

3. No tax shall be levied by States Parties on or in respect of salaries and emoluments paid or any other form of payment made by the Authority to the Secretary-General and staff of the Authority, as well as experts performing missions for the Authority, who are not their nationals.

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I. Purpose and Function

1 In order to accomplish the objectives of the International Seabed Authority (ISA), Art. 183 provides for exemption from its direct taxation (not rendered services) and custom duties within the scope of its official activities as authorized by UNCLOS. This is a standard clause in international organizations law, which originated in the Charter of the United Nations.[1]

[1] See Arts. 104, 105, Charter of the United Nations.

The on ISA is restricted by Art. 183 (2) regarding the disposal of acquired goods. In addition, levying taxes is prohibited for States Parties in relation to the Secretary General, the staff, missions and experts. 2

II. Historical Background

Art. 183 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee. The draft text of Art. 183 was periodically modified until its final formatting in 1982.[2] 3

III. Elements

1. General

Art. 183 has its origin in the Agreement Establishing the Common Fund for Commodities.[3] 4

2. Implementation

Art. 182 (1) provides for certain cases of tax exemption (general principle) as well as the exceptional case of services rendered to ISA, which are normally taxable. 5

Art 182 (2) provides for tax exemption or monetary reimbursement of certain goods of 'substantial value' and necessity to the ISA. Disposal or re-selling of these goods is not allowed. 6

Art. 182 (3) exempts salaries and other payments performed by the ISA from taxation. 7

Tax and customs exemptions and privileges of the ISA and the Enterprise are treated in Arts. 15 and 23 of the Agreement Between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority of 26 August 1999. Within the scope of its official activities, the ISA, its assets and property, its income, and its operations and transactions, authorized by the Convention, shall be exempt from all direct taxation, and goods imported or exported for its official use shall be exempt from all customs duties. The ISA shall not claim exemption from taxes which are no more than charges for services rendered. When purchases of goods or services of substantial value necessary for the official activities of the ISA are made by or on behalf of the ISA and when the price of such goods or services includes taxes or duties, appropriate measures shall, to the extent practicable, be taken by the Government to grant exemption from such taxes or duties or provide for their reimbursement. With respect to such taxes or duties, the Authority shall at all times enjoy at least the same exemptions as are granted to the heads of diplomatic missions in Jamaica. Goods imported or purchased under an exemption provided for in this article shall not be sold or otherwise disposed of in the territory of Jamaica, except under conditions agreed with the Government. 8

3. Relevant Practice

Until now, there has been no relevant practice to underline regarding this norm. 9

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[2] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[3] Art. 48 Agreement Establishing the Common Fund for Commodities, 27 June 1980, UNTS 1538, 3.

Subsection H
Suspension of the exercise of rights and privileges of members

Article 184
Suspension of the exercise of voting rights

A State Party which is in arrears in the payment of its financial contributions to the Authority shall have no vote if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

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I. Purpose and Function

1 One of the core obligations of International Seabed Authority (ISA) members is the financial support of its administrative expenses according to Art. 160 (2)(c) of the United Nations budgetary scale.

2 Art. 184 lays down the penalty to be imposed on a State Party in case it doesn't fulfil the obligation to contribute financially to the administrative expenses of the ISA. Consequently, a State that owes an amount equal or over two full years cannot vote in the Assembly's meetings, unless the Assembly is satisfied that the failure to pay is caused by conditions beyond the member's control.

II. Historical Background

3 Art. 184 was first drafted in 1975 UNCLOS III session by the Chairman of the First Committee, being slightly modified until it received its final formatting in 1982.[1] Although it deals with suspension of rights, its discussion did not give rise to controversies during the content debate.

III. Elements

1. General

4 Art. 184 was modelled on Art. 19 of the Charter of the United Nations, which refers to the General Assembly:

> 'A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or

[1] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.'

2. Implementation

Art. 184 refers to financial contributions and not to contributions in kind, such as those envisaged under Art. 82.[2] On the other hand, Art. 184. doesn't distinguish between the obligation to make financial contributions to the administrative budget of the ISA and any other form of financial levy imposed upon a member State, which may include payments under Art. 82 (as an alternative to contributions in kind). **5**

Unlike Art. 185, Art. 184. provides for the automatic suspension of the right to vote, unless the Assembly decides otherwise. This infers, for example, that a member that is suspended from voting may still be counted towards the quorum of the Assembly. The provision is different, both procedurally and substantively, from the provisions of Art. 185. **6**

Until now, there has been no relevant practice to underline regarding this norm. **7**

Article 185
Suspension of exercise of rights and privileges of membership

1. A State Party which has grossly and persistently violated the provisions of this Part may be suspended from the exercise of the rights and privileges of membership by the Assembly upon the recommendation of the Council.

2. No action may be taken under paragraph 1 until the Seabed Disputes Chamber has found that a State Party has grossly and persistently violated the provisions of this Part.

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I. Purpose and Function

Art. 185 was crafted in order to ensure full and permanent respect of Part XI through a procedure of suspension of rights and privileges. **1**

Art. 185 provides for the suspension of the exercise of rights and privileges of membership in the ISA. Unlike the suspension of voting rights under Art. 184, which in principle occurs automatically upon fulfilment of certain conditions, the penalty under Art. 185 may be imposed only by a decision of the Assembly upon the recommendation of the Council. Such decision may be taken against a State Party, which has 'grossly and persistently violated' the provisions of Part XI of the Convention. **2**

[2] See *Chircop* on Art. 82.

II. Historical Background

3 Art. 185 was first drafted at the 1975 session of UNCLOS III by the Chairman of the First Committee, being slightly modified until it received its final formatting in 1982.[1] Although Art. 185 deals with suspension of rights and privileges, its discussion did not give rise to controversies during the content debate.

III. Elements

1. General

4 Art. 185 was modelled upon Art. 5 of the Charter of the United Nations, which refers to the General Assembly:

> 'A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.'

2. Implementation

5 Art. 185 (1) stresses that rights and privileges may be suspended pursuant to 'gross' and 'persistent' violations of Part XI, on a two-thirds majority vote by the Assembly (→ Arts. 159 (8) and 160 (2)(m)), acting on recommendation of the Council (→ Art. 162 (2)(t)).[2]

6 Art. 185 (2) states that no action regarding suspension of the exercise of the rights and privileges of membership may be taken by the Assembly (or the Council) until the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) has determined that gross and persistent violations have occurred. This may be brought to the ITLOS Chamber *via* Art. 162 (2)(v), having jurisdiction pursuant Art. 187 (b)(i).[3] An alternative to avoid legal procedure and speed up the Tribunal opinion is the request of an advisory opinion under Art. 191. However, the binding force of the opinion may be barred later on.

7 To date, there is no relevant practice to underline regarding this norm.

Section 5
Settlement of disputes and advisory opinions

Article 186
Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea

The establishment of the Sea-Bed Disputes Chamber and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of this section, of Part XV and of Annex VI.

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[1] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/Part I (1975), OR IV, 137; UNCLOS III, Report to the Plenary Conference on the Recommendations of the Drafting Committee by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.90 (1982), OR XVI, 204.

[2] See *Schatz* on Art. 159 MN 13 and on Art. 160 MN 23–24; *van Doorn* on Art. 162 MN 13–14.

[3] See *Burke* on Art. 187 MN 13.

Bibliography: *Bin Cheng*, General Principles of Law as applied by International Courts and Tribunals (1953); *Markus Kotzur*, Good Faith (Bona fide), MPEPIL, available at: http://www.mpepil.com

Documents: GA Res. 2749 (XXV) of 17 December 1970; ISA, Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/C/L.2 (2000); ISA, Staff Regulations of the International Seabed Authority (2nd edn. 2011); ISA, Staff Regulations of the International Seabed Authority, ISA Doc. ISBA/6/C/L.2 (2000); United States Department Of State Bulletin 69 (1973)

Cases: *Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels During the War* (Finland *v.* Great Britain), Award of May 9 1934 by Mr. Algot Bagge, 3 RIAA 1479; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011

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I. Purpose and Function

Art. 186 opens Section 5 of Part XI and introduces the provisions on the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS). The article responds to the wish of the negotiating parties to create an international tribunal to deal with controversies on the interpretation or application of the law of the sea. In so doing, it also connects Part XI, Part XV and Annex VI of UNCLOS, thereby imposing a series of specific obligations, as well as the general obligation to act in good faith on the State Parties involved in controversies on the interpretation or application of the law of the sea. **1**

Art. 186 establishes a link between Parts XI and XV, as well as Annex VI, of UNCLOS. Art. 285 provides that Part XV, Section 1 is applicable to any dispute which, pursuant to Part XI, Section 5, is to be settled via procedures outlined in Part XV. In cases where an entity other than a State is party to a dispute arising under these circumstances, Section 1 applies *mutatis mutandis*. This entails that parties to a dispute governed by Section 5 of Part XI are bound by Arts. 279–284, and particularly by the following rights and obligations: **2**

> '1. to settle any dispute between them by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations. To this end, they should seek a solution by the means indicated in Article 33, paragraph 1, of the Charter, that is, by negotiation, conciliation, arbitration, judicial settlement, via regional agencies, or by peaceful means of their own choosing;[1]
>
> 2. to agree at any time to settle a dispute between by any peaceful means of their own choice, thereby departing by mutual accord from the provisions of Section 5 of Part XI;[2]
>
> 3. to submit their dispute to a procedure provided for under Section 5 of Part XI if their chosen procedure did not lead to a settlement, unless their agreement on the procedure in question expressly excluded such an eventuality, or if the time-limit for the exhaustion of such a procedure has yet to expire;[3]
>
> 4. to submit the dispute, at the request of either party to a procedure of dispute settlement accepted by the parties, if and in such cases when, the parties to a dispute have agreed on such a provision, to have reference to a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision. In such cases, that procedure shall apply in lieu of the procedures provided for in Section 5 of Part XI, unless the parties to the dispute otherwise agree;[4]

[1] See Art. 279.
[2] See Art. 280.
[3] See Art. 281.
[4] See Art. 282.

> 5. to proceed expeditiously to an exchange of views regarding the dispute's settlement by negotiation or other peaceful means. A similar obligation shall apply in circumstances where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement; and[5]
>
> 6. to consider inviting the other party to submit the dispute to conciliation, and if the offer is accepted, to submit the dispute to conciliation in accordance with the procedure provided for under Annex V, Section 1 of the Convention, or via another procedure.'[6]

3 Although it is clear that the procedures provided for in Section 5 of Part XI – and the obligations that flow from them – are subject to change by the agreement of the parties to a particular dispute, there is a general obligation to make use of the procedures obtaining under this section to the greatest extent possible. Further, one should highlight the general obligation incumbent on the parties to negotiate and consult in good faith. This is a general principle of law,[7] and is also provided for by Art. 300 of the Convention, which makes the application of this provision and the prohibition of *abus de droit* doubly explicit in relation to the Convention's provisions.

4 Section 5 of Part XI is not the only section of Part XI that refers to the settlement of disputes. A number of further articles are related to and connected with the articles of Section 5, and must thus be considered when applying its provisions. As an example, the obligation, incumbent by virtue of Art. 283, to consult, which is incorporated into Section 5 via Art. 285 (applying *mutatis mutandis*) is subject, per Art. 142, to the additional requirement of 'prior notification' concerning any activities in the Area that may infringe the rights or interests of the coastal State. As a further example, one may refer to the fact that when the Seabed Disputes Chamber of ITLOS is obliged to decide a dispute which concerns the potential liability of a State Party relating to damage caused by its failure to carry out its responsibilities under Part XI, per Art. 187 of the Convention, the Chamber is bound to take into account those provisions of Art. 139 that relate to this liability.

II. Historical Background

5 The history of the provision – and of the entirety of Section 5 – goes back as far as 1969, and specifically to a report of the Secretary General to the Sea-Bed Committee, examining the possibility to establish a 'suitable body'[8] to deal with disputes arising between States or between a State and an international body, and to the first report of the Sea-Bed Committee reaffirming such priority. Following this first inputs, in 1970 the Sea-Bed Committee discussed several drafts containing references to the mechanism for dispute settlement. For example, a working paper entitled 'Draft United Nations Convention on the international Sea-Bed Area' was submitted to the Sea-Bed Committee, providing a specific chapter on the establishment of a Tribunal.[9] Despite the rejection of that specific proposal, the 1970 Declaration of Principles affirmed[10]:

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[5] See Art. 283.

[6] See Art. 284.

[7] *Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels During the War* (Finland *v.* Great Britain), Award of May 9 1934 by Mr. Algot Bagge, 3 RIAA 1479, 1501; *Markus Kotzur*, Good Faith (Bona fide), MPEPIL, para. 22, available at: http://www.mpepil.com; *Bin Cheng*, General Principles of Law as applied by International Courts and Tribunals (1953), 105.

[8] Sea-Bed Committee, Study on the Question of Establishing in Due Time Appropriate International Machinery for the Promotion of the Exploration and Exploitation of the Resources of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, and the Use of these Resources in the Interests of Mankind, UN Doc. A/AC.138/12 (1969), GAOR 24th Sess. Suppl. 22 (A/7622), 81–161.

[9] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Sea-Bed Area: Working Paper, UN Doc. A/AC/138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130.

[10] GA Res. 2749 (XXV) of 17 December 1970, para. 15.

> '[t]he parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international regime to be established'.

Several working papers were later discussed within Sub-Committee I (e. g. those submitted by Malta, Canada, etc.) until the last meeting of the Sea-Bed Committee of August 1973, where the United Sates submitted a comprehensive text based on the idea of 'dispute settlement by general, regional, or special agreement but with a law of the sea tribunal which would be available in cases where states do not agree to settle the disputes through other procedures'[11]. No synthesis of the proposals elaborated was included in the 1973 Sub-Committee I report.

The discussion continued during UNCLOS III, and at the Second Session of the con- 6
ference, in 1974, the debate on the institution of a dispute settlement mechanism brought about the creation of an informal group under the co-chairmanship of Australia, El Salvador and Kenya. The work of the informal group generated a first draft of the Statute of the Law of the Sea Tribunal. The President of the Conference later developed a proposal based on this draft, suggesting the establishment of a single tribunal with jurisdiction over all disputes arising under the Convention, while keeping open the option of dispute settlement before the International Court of Justice or other alternative bodies.[12] The Fourth Session of UNCLOS discussed the President's proposal, and recommended that he should produce a second draft. This document then served as a basis for an informal composite negotiating text. This became the main basis for the final draft that was included in the Convention. Arts. 187 and 189 dealt with the principle jurisdictional issues relating to the Seabed Disputes chamber. Art. 188 dealt with reference of disputes to arbitration, Art. 190 with advisory opinions, and Art. 191 with the limits of jurisdiction of the Chamber with respect to decisions of the Assembly or the Council and the right of a State to intervene in a dispute to which a national of that State is a party. The remaining controversial issues were dealt by various negotiating groups created in 1978. In 1979, a Group of Legal Experts presented a report to the Conference on 'Dispute settlement provisions relating to exploration and exploitation of the area beyond national jurisdiction'. The proposal was re-elaborated and amended during the following years until 1982.

III. Elements

1. 'The establishment of the Sea-Bed Disputes Chamber […]'

The Seabed Disputes Chamber is a separate judicial body within ITLOS entrusted with the 7
exclusive function of interpreting Part XI of UNCLOS and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area (meaning the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, Art. 1 (1)).[13]

The Chamber's main purpose is to ensure that the provisions of Part XI and the 1994 8
Agreement on Part XI are implemented properly and the regime for deep seabed mining as a whole is properly interpreted and applied.[14]

The Chamber is composed of eleven judges, and requires a quorum of seven to constitute 9
it (Annex VI Art. 35(1)). Members of the Chamber are selected by the members of the Tribunal every three years and may be selected for a second term (Annex VI Art. 35 (3)). The

[11] United States Department Of State Bulletin 69 (1973), 412, 416.

[12] UNCLOS III, Informal Single Negotiating Text (Part IV), UN Doc. A/CONF. 62/WP.9 (1975), OR V, 111–122.

[13] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 25, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-17/.

[14] *Ibid*., para. 29.

selection process ensures the representation of the principal legal systems of the world and equitable geographical distribution (Annex VI Art. 35 (2)). The Chamber elects its President from among its members (Annex VI Art. 35 (4)).

2. '[…] and the manner in which it shall exercise its jurisdiction […]'

10 The Seabed Disputes Chamber has jurisdiction in disputes with respect to activities in the International Seabed Area. Any party to a dispute over which the Seabed Disputes Chamber has jurisdiction may request the Seabed Disputes Chamber to form an ad hoc chamber composed of three members (Annex VI Art. 36 (1)).

3. '[…] shall be governed by the provisions of this section, of Part XV, and of Annex VI.'

11 It is further clear that the settlement of disputes and the dispensation of advisory opinions under this section are to be conducted in accordance with the general rules pertaining thereto under Part XV, and with the rules prescribed by the ITLOS Statute. By virtue of this provision Art. 285 applies, ensuring the applicability of Section 1 of Part XV to the establishment of the Seabed Disputes Chamber. Of note is the fact that the tribunal referred to in Art. 168 (3) is not identical with the Seabed Disputes Chamber.[15]

4. Links to other provisions dealing with dispute settlement

12 Section 5 of Part XI is not the only section of Part XI that refers to the settlement of disputes. A number of further articles are related to and connected with the articles of Section 5, and must thus be considered when applying its provisions. As an example, the obligation, incumbent by virtue of Art. 283, to consult, which is incorporated into Section 5 via Art. 285 (applying *mutatis mutandis*) is subject, per Art. 142, to the additional requirement of 'prior notification' concerning any activities in the Area that may infringe the rights or interests of the coastal State. As a further example, one may refer to the fact that when the Seabed Disputes Chamber is obliged to decide a dispute which concerns the potential liability of a State Party relating to damage caused by its failure to carry out its responsibilities under Part XI, per Art. 187 of the Convention, the Chamber is bound to take into account those provisions of Art. 139 that relate to this liability.

Article 187
Jurisdiction of the Seabed Disputes Chamber

The Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories:

(a) **disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto;**

[15] It would seem that this procedure has thus far never been employed. The pertaining provision is ISA Staff Regulation 10.3 (ISA, Staff Regulations of the International Seabed Authority (2nd edn. 2011), available at: https://www.isa.org.jm/sites/default/files/documents/EN/Regs/SR2011/index.html#/20/); the ISA said in 2000: '[…] it is clear that article 168, paragraph 3, envisages the use of a tribunal distinct from the usual administrative machinery established for the purposes of disciplinary matters', ISA, Staff Regulations of the International Seabed Authority, ISA Doc. ISBA/6/C/L.2 (2000), 2 (para. 7), available at: http://www.isa.org.jm/sites/default/files/files/documents/isba-6c-l2_1.pdf.

(b) **disputes between a State Party and the Authority concerning:**
  (i) **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; or**
  (ii) **acts of the Authority alleged to be in excess of jurisdiction or a misuse of power;**
(c) **disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in article 153, paragraph 2(b), concerning:**
  (i) **the interpretation or application of a relevant contract or a plan of work; or**
  (ii) **acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests;**
(d) **disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153, paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;**
(e) **disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, article 22;**
(f) **any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.**

Bibliography: *A. O. Adede*, The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention, ODIL 11 (1982), 125–148; *Vladimir Golitsyn*, President of the Seabed Disputes Chamber, Statement at a Special Session of the International Seabed Authority, 22 July 2014, transcript available at: http://www.isa.org.jm/files/documents/EN/20Sess/SpecialSess/Golitsyn.pdf; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); *Louis B. Sohn*, Toward a Tribunal for the Oceans, in: Daniel Vignes/Djamchid Momtaz (eds.): Le nouveau droit de la mer, Revue iranienne des relations internationales 5–6 (1975–1976), 247–260

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10

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I. Purpose and Function

1 Art. 187 is concerned with the contentious jurisdiction of the Seabed Disputes Chamber (SBDC), and the extent thereof. It concerns disputes between States Parties pertaining to the interpretation or application of the provisions of Part XI and its Annexes, as well as those involving the International Seabed Authority, the Enterprise, state enterprises, and 'natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.'[1] The article enumerates the different categories of disputes over which the SBDC has jurisdiction: disputes between States (Art. 87 (a)); disputes between States and the International Seabed Authority (Art. 87 (b)); contract disputes between States and the ISA or the Enterprise (Art. 87 (c)); contractual disputes between the ISA and a prospective contractor sponsored by a State (Art. 87 (d)); disputed over the liability of the ISA (Art. 87 (e)); any other disputes over which UNCLOS allocates jurisdiction to the SBDC (Art. 87 (f)).

II. Historical Background

2 The Draft Convention on the International Seabed Area,[2] presented by the United States to the 1970 session of the Sea-Bed Committee represents the genome of Art. 187. The Draft Convention set out a procedure in Art. 50 under which the Operations Commission would undertake an initial consideration of any problems, which would then be referred, if necessary, to the Tribunal. The supervision of any and all exploration and exploitation activities thus fell within the purview of the Operations Commission, which was entrusted with a number of roles concerning dispute settlement and with initiating proceedings for alleged breaches of the Convention. The dissatisfied State could also, in any case, bring the matter in question before the Tribunal, which could order that the party in breach should pay a fine, or, in cases of gross and persistent violation, could even order that the licence for the exploitation of resources be revoked. The US Draft was influential in a great number of respects, though some States were reluctant to engage with the idea proposed in Art. 1 (2) that coastal States should exercise trusteeship over an intermediate zone of continental shelf between the 200 metre isobath and the outer edge of the continental slope.

3 In 1974, the US proposed a further, though 'less ambitious'[3] proposal for the settlement of disputes.[4] This proposal included, *inter alia*, proposals for technical assessors (Art. 5), and for broadening the Tribunal's jurisdiction to disputes under 'any other international agreement, public or private, which confers jurisdiction on the Tribunal with respect to a dispute relating to the interpretation or application of the Convention.' (Art. 6)

4 At the Second Session of UNCLOS III, in 1974, the First Committee discussed the need to settle upon a system of dispute settlement concerning the Area.[5] The Informal Single

[1] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 198 (Art. 153(2)(b)). See also Art. 139 of the Draft Convention, *ibid*., 195. Per Art. 139, States Parties are responsible for the activities conducted in the Area by state enterprises and all of the persons listed above.

[2] Sea-Bed Committee, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, GAOR 25th Sess. Suppl. 21 (A/8021), 130–176 (Annex V).

[3] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 610 (MN. 187.3).

[4] Sea-Bed Committee, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, GAOR 28th Sess. Suppl. 21 (A/9021-II), 20–23 (Annex VI).

[5] UNCLOS III, Organization of the Second Session of the Conference and Allocation of Items: Report of the General Committee, UN Doc. A/CONF.62/28 (1974), OR III, 57; UNCLOS III: Australia *et al*.: Working Paper on the Settlement of Law of the Sea Disputes, UN Doc. A/CONF.62/L.7 (1974), OR III, 85–92.

Negotiating Text (ISNT) Part I[6] thus provided for the creation of a specialised tribunal, the principal judicial organ of the proposed International Seabed Authority, dealing with the interpretation or application of those provisions of the Convention that related to activities in the Area. Among the most relevant provisions of the ISNT, it is worth highlighting:

> 'a. Article 33, on the competences of the Tribunal in deciding over disputes and dispensing advisory opinions;
> b. Article 34 on the faculty of the Members of the authority to settle their disputes by any other means prescribed by Article 57 of the Convention (i. e. consultation, negotiation, conciliation or other such means of their own choice);
> c. Article 57 that lists the possible parties to a dispute (i. e. States Parties to this Convention, or a State Party and a national of another State Party, or nationals of different States Parties, a State Party or a national of a State Party and the Authority or the Enterprise) and the possible means of solution of the dispute (i. e. consultation, negotiation, conciliation or other such means of their own choice, and finally the recourse to the Tribunal, unless the parties agree to submit the dispute to arbitration pursuant to Article 63 of the Convention);
> d. Article 58, on the possibility of State Parties to question the legality of measures taken by the Council, or of any organ of the Council or the Assembly (on the grounds of a violation of the Convention, lack of jurisdiction, infringement of any fundamental rule of procedure or misuse of power) to bring the matter before the Tribunal.'

In addition to the above, the ISNT included provisions relating to the enforcement of the Tribunal's judgments and orders, to provisional measures, and to advisory opinions.

Subsequent to the completion of the Third Session, in 1975, the President was authorised to draft a single negotiating text dealing with the subject of dispute settlement, which would enjoy the same status and character as Parts I, II and III of the ISNT.[7] In light of the existing proposals of the First Committee, the President elected to delegate to the Conference the question as to 'whether there should be separate provision for the settlement of disputes relating to matters within the International Sea-bed Authority's jurisdiction.'[8] The draft presented by the President provided for a single tribunal with jurisdiction over all matters arising under the Convention, with the option for the parties, in the alternative, to submit disputes to the International Court of Justice or an arbitral tribunal, in cases where both parties had submitted declarations providing for such dispute settlement mechanisms to apply. Moreover, the Draft Convention contained a number of annexes, providing for conciliation, arbitration, fisheries, scientific research, and the International Tribunal for the Law of the Sea, as well as measures to minimise the occurrence of disputes through the exchange of information and consultation.[9] 5

Discussions concerning the settlement of disputes were to continue throughout 1976 in the First Committee, and the Revised Single Negotiating Text (RSNT) contained provisions concerning the composition of a Tribunal in both Part I and the new Part IV.[10] The text of Part I was substantially revised, and incorporated various tenets of the jurisdictional provisions of earlier drafts. 6

Art. 33 RSNT dealt again with the definition of the limits of the jurisdiction of the Tribunal, specifically with regard to the possible parties to a controversy before the Tribunal and the means to find a solution to any dispute. The article also introduced the rules regarding the composition of the Tribunal, including the cases of removal of a member of the Tribunal and vacancy; and it included references to Arts. 35, 36, 38, 39, 44 and 62. Art. 34 RSNT introduced the possibility for the Tribunal to render advisory opinions. Art. 35 RSNT 7

[6] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 137, 144, 147.

[7] UNCLOS III, Informal Single Negotiating Text (Part IV), UN Doc. A/CONF. 62/WP.9 (1975), OR V, 111.

[8] *Ibid*., 112.

[9] *Ibid*., 115–122. For a more detailed analysis, see *Louis B. Sohn*: Toward a Tribunal for the Oceans, in: Daniel Vignes/Djamchid Momtaz (eds.), Le nouveau droit de la mer, Revue iranienne des relations internationales 5–6 (1975–1976), 247–260.

[10] UNCLOS III, Revised Single Negotiating Text (Part IV), UN Doc. A/CONF.62/WP.9/REV.2 (1976), OR VI, 144.

prescribed that when a natural or judicial person of a State Party is involved in a controversy, its sponsoring State shall be required to intervene. Art. 36 RSNT included a reference to several procedural issues, such as the possibility for State Parties to question before the Tribunal the legality of measures taken by any organ of the Council or of the Assembly, the consequences of a well-founded complaint in this case, and the opportunity to participate in the proceedings for persons other than the sponsoring States Parties. Further, Annex III contained a number of additional provisions relating to the Tribunal's jurisdiction:

8 The Informal Composite Negotiating Text (ICNT) included the existing materials concerning dispute settlement that had been prepared by the First Committee.[11] However, the majority of these materials had been significantly amended and redistribution had taken place between the new Part XI, dealing with the Area, the new Part XV, dealing with dispute settlement, and Annexes IV, V, VI and VII. Several provisions were taken wholesale from previous drafts and were thus included into the new Arts. 187–192 of Section 6 of Part XI, which ultimately constituted the principal basis for the final draft that was included in the Convention. Arts. 187 and 189 treated issues of jurisdiction with a specific reference to the Sea-Bed Disputes Chamber of the Law of the Sea Tribunal.

> '1. The Sea-Bed Disputes Chamber of the Law of the Sea Tribunal shall have jurisdiction pursuant to articles 187 to 192. The establishment of the Chamber, and the manner in which it shall exercise its jurisdiction shall be governed by the provisions of Part XV of the present Convention.
>
> 2. The Chamber shall have jurisdiction with respect to:
>
> (a) Disputes between a State Party and the Authority concerning an allegation that a decision or measure taken by the Assembly, the Council or any of its organs is in violation of this Part of the present Convention, rules, regulations or procedures promulgated in accordance therewith, or that the Assembly, the Council or such organ lacks jurisdiction in respect of such decision or measure, or has misused its power.
>
> (b) Disputes arising out of any of the grounds stated in subparagraph (a) above between a national of a State Party and the Authority relating to a decision or measure directed specifically to that person, or, in the case of a person referred to in subparagraph (ii) of paragraph 2 of article 151 conducting activities in the Area or seeking a contract to do so, a decision or measure which is of direct concern to him though in form not directed to him.
>
> (c) Disputes, other than those referred to in subparagraphs (a) and (b) above, between the Authority and a State Party or between the Authority and a national of a State Party relating to the interpretation or application of any contract concerning activities in the Area.
>
> (d) Disputes between the Authority and a State Party concerning alleged violations by the State Party of the provisions of this Part of the present Convention relating to activities in the Area.
>
> (e) Disputes arising out of matters referred to in articles 167 and 186.
>
> […]'
>
> '1. The Sea-Bed Disputes Chamber of the Law of the Sea Tribunal shall also have jurisdiction with regard to:
>
> (i) Disputes between States Parties concerning the interpretation or application of this Part of the present Convention in respect of activities in the Area;
>
> (ii) Disputes brought by a State Party against a national of another State Party, or between nationals of different States Parties, regarding the interpretation or application of any contract between them, or in respect of their activities in the Area.
>
> 2. Where a respondent party so elects within one month of receiving notice of the referral of a dispute to the Chamber under paragraph 1 above, the dispute shall instead be submitted to arbitration in accordance with the provisions of annex VI to the present Convention.'

9 In 1978, during the eighth session, the President and Chairman of the First Committee referred the issue of dispute settlement related to activities on the sea bed to a Group of Legal Experts, chaired by Professor Wünsche of the German Democratic Republic, and established to 'examine legal questions insofar as they related to Part XI of the informal composite negotiating text.'[12] This group presented a detailed report to the Conference on the subject of dispute settlement provisions relating to exploration and exploitation of the area beyond

[11] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 34.
[12] UNCLOS III, Report of the Chairman of the First Committee, UN Doc. A/CONF.62/L.36 (1979), OR XI, 96.

national jurisdiction.'[13] On the basis of discussions held in this group, it was decided to divide paragraph 1 of Art. 187 of the ICNT, which became a new Art. 187 (and ultimately Art. 186 of the final text of UNCLOS) and an Art. 8 *bis* (which ultimately became Art. 187 of the final text). This version of the article (187 *bis*) innovated the previous ones affirming the jurisdiction of the Sea-Bed Disputes Chamber over (i) disputes between State Parties concerning the interpretation or application of the Convention, (ii) disputes between a State Party and the Authority, and (iii) disputes between parties to a contract, being State Parties, the Authority, the Enterprise, state entities or natural or juridical persons (the two cases included in the final version of the Arts. 187(c)(i) and 187(c)(ii), were also included). When the Eighth Session resumed, only a few alterations were enacted to Arts. 187 and 187 *bis*. Art. 187 thus became Art. 186, and Art. 187 *bis* became Art. 187. The jurisdiction of the Chamber was extended to the relevant annexes, and a new paragraph (e) was appended.[14] This text was included, unchanged, in the ICNT/Rev.2.[15]

During the proceedings of the Ninth Session, in 1980, the meaning of the phrase 'juridical persons' was discussed, with the question being raised as to whether arrangements such as joint ventures might be included within its ambit. The Chairman of the Group of Legal Experts argued that such arrangements might only be considered to come within the definition provided when the arrangements themselves enjoyed legal personality, and that additional specificity in this regard was thus unnecessary.[16] **10**

No further changes were enacted during the Third Revision of the ICNT.[17] The Drafting Committee suggested, however, that the words 'state entities' be replaced by 'state enterprises' in subparagraphs (c) and (e).[18] A number of final minor changes were made to Art. 187 of the Draft Convention.[19] No further changes were enacted thereafter. **11**

III. Elements

1. 'disputes between States Parties […]'

Per Art. 187 (a), the Seabed Disputes Chamber has jurisdiction with respect to disputes between States Parties in relation to the interpretation and application of Part XI and the Annexes thereto. In this sense, the jurisdiction of the Chamber co-exists with the general provisions relating to dispute settlement contained in Part XV. Art. 285 stipulates that the general provisions of Part XV apply to any dispute, which pursuant to Section 5 of Part XI is to be settled in accordance with the provisions of Part XV, and that in cases where an entity other than a State Party is party to such a dispute, the relevant provisions shall apply *mutatis mutandis*. Art. 287 (2) stipulates that a declaration stating a preferred choice of dispute settlement procedure shall not affect, or be affected by, the obligation of a State Party to accept the Sea-Bed Disputes Chamber's jurisdiction, as provided for in Section 5 of Part XI. **12**

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[13] UNCLOS III, Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text, UN Doc. A/CONF.62/C.1/L.25 and ADD.1 (1979), 109, 111 (Annexes I-V).

[14] UNCLOS III, Report of the Chairman of the First Committee on the Negotiations in the First Committee, UN Doc. A/CONF.62/L.43 (1979), OR XII, 72, 89 (Appendix A).

[15] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 102.

[16] UNCLOS III, Report of the Coordinators of the Working Group of 21 to the First Committee, UN Doc. A/CONF.62/C.1/L.27 and ADD. 1 (1980), OR XIII, 113, 136 (Part V, para. 14(b)).

[17] UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 87.

[18] UNCLOS III, Report of the Drafting Committee, UN Doc. A/CONF.62/L.63/REV.1 (1980), OR XIV, 139, 140 (S. 4).

[19] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 206.

2. 'disputes between a State Party and the Authority […]'

13 Disputes between a State Party and the Authority are covered by Art. 187 (b). In this respect, Art. 187 (b)(i) refers to disputes concerning acts or omissions by the Authority or of a State Party that are alleged to be in contravention of Part XI or the Annexes thereto, as well as disputes relating to a violation of the rules, regulations and procedures of the Authority adopted in accordance with Part XI and its related annexes. Such infringements can be committed by the Authority itself, or by States Parties, and the party who feels aggrieved may bring an action before the Seabed Disputes Chamber.[20] Per Art. 187 (b)(ii), a State Party may also make a complaint in circumstances when an act of the Authority was 'in excess of jurisdiction or a misuse of power.' However, Art. 189 limits this jurisdiction in cases when the act fell within the discretionary powers of the Authority. More particularly, the Seabed Disputes Chamber may not 'pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with the Convention.' Further, the Chamber may not declare that such rules, regulations and procedures are, in and of themselves, invalid. However, it bears mentioning that there is a further exception to this exception.[21]

3. 'disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons […] concerning […] the interpretation or application of a relevant contract or a plan of work'

14 Per Art. 187 (c)(i), the Chamber also enjoys jurisdiction over disputes relating to the interpretation and application of a contract or a plan of work, if such a contract is between the Authority or the Enterprise on one side, and States parties, state enterprises, and/or natural or juridical persons entitled to conclude contracts in accordance with Art. 153 (2)(b). However, at the request of any party to a dispute, and in the absence of an express agreement between the parties to the contrary, a dispute concerning the interpretation or application of a contract shall be submitted to commercial arbitration, which may issue a binding ruling.[22] The disjunctive 'or', concerning the Authority or the Enterprise as contractors, is significant, as it was intended to underline that both entities could not be opposing parties to a dispute submitted for settlement – it was maintained that, the Enterprise being an arm of the Authority,[23] other internal, non-judicial forums would be more appropriate.[24]

4. 'disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons […] concerning […] acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests'

15 Art. 187 (c)(ii) provides for a different procedure for disputes between the parties that concern 'acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests.' Disputes of this kind

[20] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10, para. 230; *A. O. Adede*, The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention, ODIL 11 (1982), 125, 142.

[21] See further *Burke* on Art. 189.

[22] See *Burke* on Art. 188 MN 18.

[23] *Vladimir Golitsyn*, President of the Seabed Disputes Chamber, Statement at a Special Session of the International Seabed Authority, 22 July 2014, 2, transcript available at: http://www.isa.org.jm/files/documents/EN/20Sess/SpecialSess/Golitsyn.pdf.

[24] *Adede* (note 20), 142; see also *Burke* on Art. 188.

may be referred to the Seabed Disputes Chamber; however, the jurisdiction of the Chamber in this regard is restricted, insofar as it may only settle three varieties of claims: firstly, those that posit that the application of any rules, regulations and procedures of the Authority in the claimant's case would be in conflict with the contractual obligations of the parties to the dispute or their obligations as provided for by the Convention; secondly, those concerning misuse of power or excess of jurisdiction; and thirdly, those that request that damages be paid or any other remedy be awarded, due to the failure of the other party to fulfil the obligations incumbent upon him, either by virtue of the contract, or by virtue of the Convention.[25]

5. 'disputes between the Authority and a prospective contractor who has been sponsored by a State […] concerning the refusal of a contract or a legal issue arising in the negotiation of the contract'

Per Art. 187 (d), the Chamber disposes of jurisdiction over disputes between the Authority and a prospective contractor, in cases where the latter: claims that has been properly sponsored by a State Party, and has duly fulfilled the conditions stipulated in Annex III, but was refused a contract; or claims that a legal issue arose during the course of negotiations, which is now in need of clarification. **16**

The Authority is currently engaged with 22 contractors for the purpose of deep seabed mineral exploitation, who are thus authorized to explore specified parts of the deep oceans outside national jurisdiction.[26] No disputes between prospective contractors and the Authority have arisen to date. **17**

6. 'disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party […] where it is alleged that the Authority has incurred liability […]'

Art. 187 (e) provides for the jurisdiction of the Chamber in circumstances when a State Party, a state enterprise, or a natural or juridical person properly sponsored by a State, alleges that the Authority has incurred liability for damage arising out of its wrongful acts in the exercise of its powers and functions, which may include cases involving the disclosure of either proprietary data or industrial secrets by a member of the staff of the Authority. **18**

7. 'any other disputes […]'

In this context, note should be made of Art. 290 (5), which provides or the jurisdiction of the Seabed Disputes Chamber over provisional measures in matters concerning activities in the Area. **19**

Article 188
Submission of disputes to a special chamber of the International Tribunal for the Law of the Sea or an ad hoc chamber of the Seabed Disputes Chamber or to binding commercial arbitration

1. Disputes between States Parties referred to in article 187, subparagraph (a), may be submitted:

(a) at the request of the parties to the dispute, to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17; or

[25] See *Burke* on Art. 189.

[26] https://www.isa.org.jm/deep-seabed-minerals-contractors.

(b) **at the request of any party to the dispute, to an ad hoc chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, article 36.**

2. (a) **Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree. A commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of this Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling.**

(b) **If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or proprio motu, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber.**

(c) **In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree.**

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002)

Documents: ISA, Decision of the Assembly on the Regulations for Exploration and Exploitation for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000)

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I. Purpose and Function

1 Art. 188 (1) prescribes that disputes between States Parties relating to the interpretation or application of Part XI and the Annexes related thereto may be submitted, either at the request of the parties to a special chamber of the Tribunal, or, at the request of any individual party to the dispute, to an *ad hoc* chamber of the Seabed Disputes Chamber. Art. 188 (2) prescribes the procedure for the settlement of disputes concerning the interpretation or application of a contract, whether the parties thereto are States Parties, state enterprises, the Authority or the Enterprise, or natural or juridical persons. At the request of any party concerned, and unless convened upon otherwise by all parties, such a dispute may be submitted to commercial arbitration, which may issue a binding ruling. However, such a commercial arbitral tribunal shall have no power to interpret the Convention, and if it is the determination of such a tribunal that its decision is dependent upon such an interpretation,

the tribunal shall refer the question to the Seabed Disputes Chamber for a ruling on this matter. Unless provided for otherwise in the contract itself, or unless the parties otherwise agree, the arbitration must be conducted in accordance with UNCITRAL Arbitration Rules, or other rules as may be prescribed by the Authority.

II. Historical Background

The First Committee, when discussing seabed mining and the settlement of disputes relating thereto, had proposed that the parties concerned should initially seek to settle the dispute via mediation, consultation, negotiation or other means of their choosing. If such means did not produce an agreement within one month, either party could bring proceedings before the proposed Tribunal, unless the parties had agreed to arbitration as an alternative.[1] The Informal Single Negotiating Text Part 1 thus contained a provision in Art. 63 allowing for disputes to be referred to a three member arbitral commission. In such cases, this commission would have the same jurisdiction and power to settle the dispute as the Tribunal. 2

The provision was slightly revised in the Revised Single Negotiating Text (RSNT), where it was inserted into Art. 40.[2] While the composition of the commission remained unaltered, the revised text allowed for an appeal on matters of law to the Tribunal, thus rendering the jurisdiction of the two legally distinct. Further, Annex III of the RSNT provided for the establishment of special chambers of the Tribunal, which would 'exercise the contentious jurisdiction of the Tribunal in any case in which either party requests that a Special Chamber shall be established and exercise such jurisdiction.'[3] 3

Subsequent to the conclusion of the Sixth Session in 1977, when it was agreed to delete the annex of the RSNT dealing with the statute of the sea-bed dispute settlement tribunal, later revisions by the First Committee of what ultimately became Art. 188 dealt exclusively with procedural matters. The draft of Art. 188 in the Informal Composite Negotiating Text (ICNT) contemplated the submission of disputes to arbitration via a special agreement or under a contract. Arbitration would have to comply with the procedures provided for in Annex VI, unless otherwise agreed.[4] 4

During the Seventh Session in 1978, little attention was paid to dispute settlement provisions, though a revised text of Art. 188 was presented by the Group of Legal Experts at the resumed Eighth Session in 1979:[5] 5

> '1. Disputes between States Parties referred to in article 187 bis, paragraph 1, shall be submitted to an ad hoc chamber of the Sea-Bed Disputes Chamber, as provided in article…of annex V, at the request of any party to the dispute.
>
> 2. Disputes referred to in article 187 bis, paragraph 3, shall be submitted to binding commercial or other arbitration in so far as provided in any contract between the parties to the dispute at the request of any party thereto. Failing agreement of the parties, the procedure in accordance with…, shall apply.'

Professor Wünsche, chairman of the group, justified the revised text, explaining that the new Art. 188 (1), provided that *ad hoc* chambers of the Chamber could be utilized as a substitute for arbitration, while maintaining the exclusive jurisdiction and the unity of jurisprudence of the Chamber in all sea-bed matters. He also explained that the new Art. 188, paragraph 2 respected

[1] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 147 (Art. 63).

[2] UNCLOS III, Revised Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/REV.1/PART I (1976), OR V, 125, 145–146 (Annex II, para. 7).

[3] *Ibid*., 146 (Annex III).

[4] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 34 (Art. 188).

[5] UNCLOS III, Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text, UN Doc. A/CONF.62/C.1/L.25 and ADD.1 (1979), 109, 119–120 (Annex V, Art. 188).

the principle of freedom of contract and allowed for commercial arbitration procedures to be applicable when provided for in a contract.[6]

6 The revised Art. 188 was included in the first revision of the ICNT, though amendments were made to reflect the changes that had been made with regard to Arts. 187 and 187 *bis*, with references to the latter replaced by Art. 187. Further, the text of the final phrase in the second paragraph was amended to 'the procedure in accordance with commercial arbitration rules to be applied shall apply.'[7]

7 The ensuing discussions in the Group of Legal Experts raised a good number of issues which significantly influenced the amendments made to Art. 188. The relevant portions of the deliberations concerned two topics: (i) the formation of special and *ad hoc* chambers of the Sea-Bed disputes Chamber, and (ii) commercial arbitration in cases of contractual disputes.

8 Regarding the first issue, some advocated the availability of choice of procedures, some the unity of jurisdiction of the Chamber. Within the debate on the structure of the *ad hoc* chamber, the issues discussed encompassed: the size of the *ad hoc* chamber, the question of whether to allow the selection of judges who were of the same nationality as a State party, and the question of whether the judges should be selected from among the members of the Chamber or of the Tribunal.[8] Two possibilities emerged: the first provided 'that on the agreement of the parties, a special chamber could be established on the lines set out in annex V, articles 15 and 17, which provide for the inclusion of national members and the selection from among the 21 members of the Tribunal',[9] the second permitted one party 'to request an ad hoc chamber which consists only of three members to be selected from among the members of the Chamber, excluding nationals of the parties'.[10]

9 Regarding the second issue '[a] lengthy discussion ensued. Some felt that commercial arbitration might be appropriate for disputes of a purely commercial and technical nature, provided that the parties had agreed thereto, and that in no case should the commercial arbitration tribunal be empowered to determine questions of the interpretation or application of the convention'.[11]

10 In the meantime, 'there appeared to be agreement that standard-form arbitration rules, such as the UNCITRAL rules, could apply. As an alternative, or in addition, the Authority could specify other rules in its rules, regulations and procedures'.[12] No conclusions were reached on this specific issue.

11 The revised text of Art. 188 proposed by the group read thus:[13]

> '1. Disputes between States Parties referred to in article 187, paragraph 1, may be submitted:
> (a) To a special chamber of the Law of the Sea Tribunal to be established in accordance with articles 15 and 17 of annex V, upon the request of the parties to the dispute; or
> (b) To an ad hoc chamber of the Sea-Bed Disputes Chamber to be established in accordance with article 36 bis of annex V, upon the request of any party to the dispute.
> 2. Disputes referred to in article 187, paragraph 3, shall be submitted to binding commercial or other arbitration, in so far as this is provided for in any contract between the parties to the dispute, at the request of any party thereto. Failing agreement of the parties, the procedure in accordance with commercial arbitration rules to be specified shall apply.'

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[6] *Ibid*., 110 (para. 10).

[7] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 99 (Art. 188).

[8] UNCLOS III, Report of the Chairman of the First Committee on the Negotiations in the First Committee, UN Doc. A/CONF.62/L.43 (1979), OR XII, 90, 91 (Appendix B, S. 2 and 4).

[9] *Ibid*.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*, 84, 89 (Appendix A, Art. 188).

During the Ninth Session, in 1980, the Group made a further attempt to resolve the remaining problems related to Art. 188: 12

> '[A] majority of delegations was clearly unwilling to permit a departure from the principle, stressed by them, that any issue of interpretation or application of the convention could only be resolved by the sea-bed disputes chamber. […] This group of delegations held the view that where parties to a contract had agreed, within the contract itself, on a method of settling purely commercial or technical disputes, then that method could be resorted to'.[14]

The Chairman's proposal provided that commercial arbitration would be suitable for technical or commercial disputes, but also ensured that the interpretation of the provisions of Part XI would remain constant and unchallenged, by according the Seabed Disputes Chamber exclusive jurisdiction in respect of interpretation of its provisions. In this regard, it was provided that contractual disputes could be submitted to commercial arbitration at the request of a party, in cases where neither the contract in question, nor the parties themselves, had provided for an alternative mechanism to apply. However, a commercial or arbitral tribunal would not be competent to settle a question relating to the interpretation of the Convention itself, and where such questions arise, the task of interpretation must be referred to the Seabed Disputes Chamber for a ruling in this regard. A ruling may also be sought, at the request of either party or *propriu moto*, in any case where the tribunal in question is of the opinion that its decision in the case at hand depends on such a ruling. 13

In implementing the above principles, it was held that, should the arbitral tribunal find, at any interval, that its decision would depend on an opinion of the Seabed Disputes Chamber, then it is obliged to refer the matter to the latter. Further, when the arbitral tribunal is making its award, the award must be in accordance with the interpretation of the Chamber. It was also held that in the course of the arbitration, the UNCITRAL rules should apply, unless and to the extent that the parties had convened upon an alternative procedure. However, in cases where the tribunal in question might find the UNCITRAL rules to be inadequate, it was empowered to prescribe any additional arbitral rules in adopting its rules, regulations and procedures. 14

A new version of paragraph 2 was elaborated, identical to the final version with respect to its substance. Only minor changes were made to Art. 188 – upon the Drafting Committee's recommendation – after these significant alterations.[15] These were reflected in the revised text of the ICNT[16] and in the Draft Convention.[17] 15

III. Elements

1. 'Disputes between States Parties referred to in article 187'

Art. 188 (1) establishes a mechanism for moving a dispute to a chamber of the International Tribunal for the Law of the Sea (ITLOS) (Art. 188 (1)(a)) or the Seabed Disputes Chamber (SBCD) (Art. 188 (1) (b)). The formation of the chamber is governed by the respective rules of Annex VI (ITLOS Statute). While submission to a separate ITLOS chamber requires the consent of all parties to a dispute ('at the request of the parties'), an *ad hoc* chamber of the SBDC may be formed solely by request of one party ('at the request of any party'). 16

[14] UNCLOS III, Report of the Coordinators of the Working Group of 21 to the First Committee, UN Doc. A/CONF.62/C.1/L.27 and ADD. 1 (1980), OR XIII, 113, 135.

[15] UNCLOS III, UN Doc. A/CONF.62/L.75/ADD.4 (1981, mimeo.), 2–27; UNCLOS III, UN Doc. A/CONF.62/L.152/Add.24 (1982, mimeo.), 41.

[16] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 206; (Art. 188).

[17] UN Doc. A/CONF.62/L.75/ADD.4 (note 15).

17 ITLOS has made active use of the power conferred upon it by Art. 15 Annex VI to create special chambers as it considers necessary,[18] however, use of this power was not yet made in the context of a dispute referred to in Art. 187. Regarding the SBCD, no *ad hoc* chamber has been created to date.

2. 'Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted […] to binding commercial arbitration'

18 Art. 188 (2) is in sync with Art. 187 (c), which envisages dispute settlement between the Enterprise and the Authority by non-judicial means.[19] The Authority is currently engaged with 22 contractors for the purpose of deep seabed mineral exploitation, who are thus authorized to explore specified parts of the deep oceans outside national jurisdiction.[20] No disputes between prospective contractors and the Authority have arisen to date.

3. 'If […] its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber'

19 This provision evokes images of a very rudimentary mechanism of preliminary rulings akin to Art. 267 of the Treaty for the Functioning of the European Union. The paucity of arbitral practice in this respect makes it difficult to assess the practical relevance of this rule. The most likely reason for referral to the SBDC is the possibility of a dispute submitted to an arbitral tribunal touching on issues that are within the jurisdiction of the SBDC according to Art. 187.

4. 'the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules'

20 The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority in July 2000[21] contain standard clauses covering exploration contracts, in Annex 4. However, the provisions contained therein merely stipulate that the procedures provided for in Section 5 of Part XI shall apply in matters concerning the application or interpretation of contracts. As a result, the UNCITRAL rules would presumably continue to apply.[22]

Article 189
Limitation on jurisdiction with regard to decisions of the Authority

The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules,

[18] See https://www.itlos.org/en/the-tribunal/chambers/.
[19] See *Burke* on Art. 187 MN 14–15.
[20] https://www.isa.org.jm/deep-seabed-minerals-contractors.
[21] ISA, Decision of the Assembly on the Regulations for Exploration and Exploitation for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), available at: https://www.isa.org.jm/sites/default/files/files/documents/isba-6a-18_1.pdf.
[22] Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 629 (MN. 188.10).

regulations and procedures. Its jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.

Bibliography: *A. O. Adede*, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea (1987); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011

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4. Exception: 'claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention' 14

I. Purpose and Function

Art. 189 prescribes limitations upon the jurisdiction of the Seabed Disputes Chamber with regard to the exercise of discretionary powers by the International Seabed Authority (ISA or the Authority).[1] It provides that the Tribunal may in no circumstances substitute its discretion for that of the Authority. Also, without prejudice to the power of the Chamber to dispense advisory opinions, the Chamber shall not pronounce itself on the question as to whether any rules, regulations and procedures of the Authority are in conformity with the Convention, nor declare any of the former invalid. The article also prescribes that the Chamber's jurisdiction under Art. 187 is confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations if the parties to the dispute or their obligations under the Convention, claims relating to misuse of power or excess of jurisdiction, and to claims for damages to be awarded or other remedies to be conferred to one party on the basis of the failure of the other party to comply with his obligations as prescribed by the Convention. **1**

The article strikes a balance between those parties who wished to limit the Chamber's jurisdiction and protect the prerogatives of the Authority, and those who wished to ensure that the rights and interests of those parties who engaged in mining of the deep sea bed received adequate protection.[2] While the provisions of Art. 188 ensure that only the Chamber may interpret Part XI of the Convention, Art. 189 adds an additional layer of protection, providing that even the Chamber will be precluded from interfering with certain prerogatives **2**

[1] A number of similar limitations on the Tribunal's jurisdiction are prescribed by Art. 297 (2) and (3).

[2] In this regard, see Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 631 (MN. 189.1).

of the Authority. Without this provision, the Chamber's competence would encroach on that of the Authority in areas in which the Authority may exercise discretion.[3]

II. Historical Background

3 The initial draft of the Informal Single Negotiating Text (ISNT), Part IV, which was presented by the President of the Conference in 1975 included a provision providing for a limitation on the power of the proposed Law of the Sea Tribunal to consider claims that binding decisions rendered as a result of special procedures under the Convention could be declared invalid. The grounds for such jurisdiction were limited to: lack (excess) of jurisdiction; infringement of rules of procedure; abuse or misuse of power; or gross violation of the Convention. The ISNT, Part I Art. 58 refers to the possibility for State Parties to bring before the tribunal questions on the legality of measures taken by the Council, or by any organ of the Council or the Assembly, and to the possibility for the Tribunal to declare such measures void in case of well-founded complaints.

4 In the course of the Fourth Session, in 1976, the First Committee expanded upon the provisions contained in the ISNT, Part I, by including the possibility of conferring jurisdiction to the Tribunal over disputes involving nationals of States Parties. The Revised Single Negotiating Text (RSNT) provided the possibility in Art. 36 for State Parties to question in front of the Tribunal the legality of measures taken by any organ of the Council or of the Assembly on grounds of a violation of this Part of the Convention.[4] The article also included the possibility for any national of a State Party to bring a complaint to the Tribunal, and affirmed the opportunity of the sponsoring State to participate in the proceedings. Art. 29 of Annex III of the RSNT, dealing with the statute of the sea-bed dispute settlement system, described the case in which a complaint is considered well-founded by the Tribunal, and the possibility for the judgment to determine the extent to which and the date from which the measure in question is void and the measure to be taken to redress the situation. If one considers this provision in tandem with the restriction upon the jurisdiction of the Tribunal, the right of access to the latter clearly raised concerns amongst the drafters about the possibility of the Authority's exercise of its discretionary powers being subject to challenge.

5 During the sixth session, in 1977, Mr. Engo, Chairman of the First Committee, presented his observations concerning the two types of disputes that might be submitted:

> '[f]irst, those which relate to the implementation of this part of the convention, and second, those dealing with the rights and duties of States parties under this part of the convention and the interpretation of the provisions of the convention'.[5]

He specifically pointed out the opportunity 'to distinguish these two categories of dispute and provide a more simplified and expeditious procedure for the former'.[6] At a meeting during the following month, the Chairman returned to the same theme, and suggested that possible grounds for challenging the actions of the organs of the Assembly or the Council were a violation of this part of the Convention, lack of jurisdiction, infringement of any fundamental rule of procedure, and misuse of power. He also noted that the controversies that arose on those grounds could regard various levels: the level of rejection or acceptance of an application, the level of award of contract, or the levels of numerous issues related to

[3] *A. O. Adede*, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea (1987), 195.

[4] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART I (1975), OR IV, 137, 147 (Art. 58).

[5] UNCLOS III, Statement made by Mr. P. B. Engo, Chairman of the First Committee, at the 38th Meeting on 25 May 1977, UN Doc. A/CONF.62/C.1/L.20 (1977), OR VII, 74, 76.

[6] *Ibid.*

actual performance under the terms of the contracts.[7] Further, in 1977, the Chairman and President of the First Committee convened upon a position that:

> 'the part of the Convention relating to First Committee matters would deal only with the jurisdictional aspects of settling sea-bed disputes and that the institutional and procedural aspects would be covered by the part of the Convention dealing with the general question of settlement of disputes, viz. part XV and the relevant annexes.'[8]

6 The limits upon the powers of the Seabed Disputes Chamber were considered in Art. 191 of the Informal Composite Negotiating Text (ICNT). The article made clear that

> '[t]he Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Assembly or by the Council or any of its organs of their discretionary powers under this Part of the present Convention; in no case shall it substitute its discretion for that of the Authority'.[9]

This textual arrangement represents a significant alteration, insofar as moves have clearly been made to protect the Assembly and the Council from undue interference on the part of the Chamber. The latter may only decide whether certain rules and regulations ought to apply in a given case, and may not criticise the Assembly or the Council or their exercise of discretionary powers. The Group of Legal Experts was allowed to consider the provisions of the ICNT. Art. 191 became Art. 190, and several of its provisions underwent substantial amendment. The revised text read as follows:

> 'The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 109, in exercising its jurisdiction pursuant to article 187, the Sea-Bod Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations or procedures adopted by the Authority are in conformity with the provisions of this Convention, nor declare any such rule, regulation or procedure invalid. Its jurisdiction shall be confined to determining whether the application of any rules, regulations or procedures to individual cases would be in conflict with the contractual and Conventional obligation:- , of the parties to the dispute, and to claims concerning lack of competence or misuse of power, as well as to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its Conventional or contractual obligations.'[10]

7 The Report compiled by the Chairman of the Group of Legal Experts makes clear why these alterations were decided upon. In particular, the wording 'scope of' was replaced with 'limitation on', indicating that the Group intended that the object of the article in question should be doubly explicit, since it 'clearly restrains the Chamber'. In addition, the Chamber may not substitute its discretion for that of the Authority, since to do so 'would be tantamount to shifting the competence or jurisdiction of the Authority to the Chamber'. The Group agreed that the Chamber 'should limit itself to claims concerning the lack of competence or misuse of power.' However, a further provision was included within the new formulation, allowing the Chamber 'to determine whether a remedy shall be given to a party who has suffered damage by virtue of an act of the other party who has suffered damage by virtue of an act of the other party in violation of its conventional or contractual obligations.'[11]

8 In the Draft Convention, upon the recommendation of the Drafting Committee, the order of the final three articles in Section 5 of Part XI was reversed. A number of further textual changes were enacted to the article that became Art. 189, which became the final text as it stands in the Convention itself. Neither the omissions or additions that were enacted

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[7] UNCLOS III, Statement made by Mr. P. B. Engo, Chairman of the First Committee, at the 39th Meeting on 14 June 1977, UN Doc. A/CONF.62/C.1/L.21 (1977), OR VII, 78, 83.

[8] UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/Add.1 (1977), OR VIII, 65, 66.

[9] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 34 (Art. 191).

[10] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 1, 100 (Art. 190).

[11] See Nordquist/Nandan/Rosenne (note 2), 635 (MN. 189.8).

substantially changed the provisions, but they often clarified particular phrases and slightly expanded the powers of the Chamber.

III. Elements

1. 'The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers'

9 Art. 189 makes a distinction between those claims which may be submitted to the Chamber, and those over which the Chamber will not be entitled to exercise its jurisdiction. The first two sentences of the article limit the jurisdiction of the Chamber, while important exceptions to these limitations are prescribed by the final two sentences.

10 The fact that the Chamber will be unable to exercise jurisdiction over the exercise of the discretionary powers of the Authority in accordance with Part XI is made plain by the first sentence of the article. The Chamber shall 'in no case […] substitute its discretion for that of the Authority.' This phrasing is probably indicative of the fact that the Annexes to Part XI are included, although elsewhere in the Convention, the fact that the Annexes are included is usually expressly mentioned. A further provision precludes the Chamber from pronouncing itself 'on the question of whether any rules, regulations and procedures of the Authority are in conformity with [the] Convention.' The Chamber is further precluded from declaring such rules, regulations and procedures invalid. It should be noted that this restriction would not appear to apply in respect to Advisory Opinions under Art. 191,[12] mainly due to the fact that due to the nature of advisory proceedings, the Chamber is not at risk of 'substitut[ing] its discretion for that of the Authority'.

11 This limitation stems from the nature and purpose of the Authority, which is to 'organize and control activities in the Area' (Art. 157). The Authority is an extension of the States Parties' will and thus the desire to limit the Chambers influence on the Authority is not surprising. Nevertheless, Art. 189 contains several wide-ranging exceptions to this limitation.

2. Exception: 'claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention'

12 This provision contains a logical exception, as a State that would have to commit a perceived violation of international law by applying the rules, regulations and procedures of the Authority cannot be expected to have a respective claim decided upon by the Authority, i. e. other States that may have an interest in compelling them to act.

3. Exception: 'claims concerning excess of jurisdiction or misuse of power'

13 This provision mirrors Art. 187 (b)(ii).[13]

[12] In the one case submitted to the Chamber to date, it did not pronounce itself on rules, regulations or procedures of the Authority, ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: https://www.itlos.org/cases/list-of-cases/case-no-17/.

[13] See *Burke* on Art. 187 MN 13.

4. Exception: 'claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention'

This exception deals with conflicts between members of the Authority, or States and sponsored contractors. Again, sovereign States cannot be expected to accept decisions on claims for damages or other remedies made by other States. The same goes for sponsored entities, due to the close link between them and the sponsoring State. 14

Article 190
Participation and appearance of sponsoring States Parties in proceedings

1. If a natural or juridical person is a party to a dispute referred to in article 187, the sponsoring State shall be given notice thereof and shall have the right to participate in the proceedings by submitting written or oral statements.

2. If an action is brought against a State Party by a natural or juridical person sponsored by another State Party in a dispute referred to in article 187, subparagraph (c), the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person. Failing such appearance, the respondent State may arrange to be represented by a juridical person of its nationality.

Bibliography: Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011

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I. Purpose and Function

Art. 190 devotes specific attention to one of the key distinctive features of the International Tribunal on the Law of the Sea (ITLOS), namely the potential participation in dispute settlement proceedings not only of States Parties, but also of non-State entities. This represents a crucial difference between ITLOS and the International Court of Justice (ICJ), for example. A number of particular arrangements were necessary to deal with this novelty. The article deals with two of these. Firstly, when a natural or legal person is party to a dispute relating to a contract, plan of work, or to a prospective contract, the Convention requires the 1

giving of notice to the State sponsoring that person, in order to permit the State to participate in the proceedings through the submission of oral or written statements to the Seabed Disputes Chamber or any other institution to which the dispute may be submitted. A further situation may arise where a State Party is the respondent in a given case, and where that State prefers that the dispute in question takes place on a purely interstate basis. In cases where the other State is willing to participate, no problem arises. However, if the plaintiff's State is not prepared to do so, another possible solution exists. The respondent State may be represented by a juridical person of his nationality.

II. Historical Background

2 The possibility of allowing State Parties' nationals to bring complaints before the Tribunal was first mooted in Art. 36 of the Revised Single Negotiating Text (RSNT), which contained a provision allowing such natural or legal persons who questioned the 'legality of measures taken by any organ of the Council or of the Assembly on grounds of a violation of [Part XI] of the Convention, lack of jurisdiction, infringement of any fundamental rule or misuse of power' would be entitled to bring a complaint before the Tribunal 'with regard to a decision directed to that person, or, in the case of a person conducting or seeking a contract to conduct activities in the Area, a decision which although in form directed to another person, is of direct interest to that person.' Paragraph 3 of the aforementioned article stipulated that in such cases, the State that sponsored the seabed activities of the person in question should be given notice and offered the opportunity to participate in the proceedings. If the Authority was a party, on the other hand, it could also request such participation. In such a case, the 'sponsoring State shall give serious consideration to any such request.' NORDQUIST *et al.* describe this as 'a complicated provision with a weak conclusion', and it is hard not to agree with this assessment.[1]

3 The Informal Composite Negotiating Text contained only one provision dealing with the participation of States Parties in cases that concerned their nationals. This was Art. 192, which provided:

> 'When in a dispute referred to in articles 187 and 189, a national of a State Party is a party, the sponsoring State shall be given notice thereof, and shall have a right to intervene in the proceedings.'[2]

This truncated article represented a more affirmative assessment of the position of States Parties in such cases, with the 'right to intervene' clearly protected. Arts. 187 and 189 are also explicitly mentioned, which provide for the various circumstances in which State nationals may participate, including disputes brought before the Seabed Disputes Chamber by a State Party against a national of another State Party, or by a national of one State against a national of another.

4 In the first revision of the Informal Composite Negotiating Text, a further paragraph was appended, imposing a duty upon any State Party sponsoring a natural or juridical person involved in a dispute with another State 'to intervene in the proceedings if the other State Party so requests, unless the parties to the contract otherwise agree.'[3] This revision had been the result of consultations undertaken by the Group of Legal Experts.[4] In the Draft Convention, the article was presented in a formulation that remained substantially un-

[1] See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 639 (MN 190.2).

[2] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 34 (Art. 192).

[3] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 1, 100 (Art. 190).

[4] UNCLOS III, Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text, UN Doc. A/CONF.62/C.1/L.25 and ADD.1 (1979), 109, 110 (para. 11).

changed in the final version, as only further minor stylistic changes were made to the draft text on the basis of recommendations submitted by the Drafting Committee.

III. Elements

1. 'If a natural or juridical person is a party to a dispute referred to in article 187, the sponsoring State shall be given notice thereof and shall have the right to participate'

The purpose of the institute of sponsorship is to make entities that are subjects of domestic legal systems comply with the rules of UNCLOS.[5] The sponsoring State thus becomes a conduit for international law and is closely connected to the sponsored natural or juridical person, who must either be or be controlled by the sponsoring States' nationals.[6] 5

Annex III contains several obligations incumbent upon the sponsoring State in connection with the sponsorship.[7] In this light, a right of the sponsoring State to not only be notified of but also participate in proceedings against the sponsored entity is a necessity. 6

2. 'If an action is brought against a State Party by a natural or juridical person sponsored by another State Party in a dispute referred to in article 187, subparagraph (c)'

The only type of disputes 'referred to' in Art. 187 (c) that are of possible relevance are those between a sponsored natural or juridical person and a State. Notably, should a sponsored entity bring an action against the Authority, the Enterprise or another sponsored entity, Art. 190 (2) seems to be inapplicable. The omission of 'state enterprises' mentioned in Art. 187 (c) is of little consequence, as they are usually juridical persons and thus covered by Art. 190 (2). 7

3. 'the respondent State may request the State sponsoring that person to appear in the proceedings on behalf of that person.'

This provision is the counterpart to Art. 190 (1) and also results from the fact that the sponsoring State is under a multitude of obligations to ensure that the sponsoring entity complies with international law. 8

4. 'Failing such appearance, the respondent State may arrange to be represented by a juridical person of its nationality'

This provision clarifies that the respondent State is under no obligation to appear in the proceedings; conversely, there is also no duty for a sponsoring State to participate under Art. 190 (1). 9

[5] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* Advisory Opinion of 1 February 2011, para. 75, available at: https://www.itlos.org/cases/list-of-cases/case-no-17/.

[6] *Ibid.*, para. 74; Art. 153 (2)(b).

[7] See *Le Gurun* on Annex III.

Article 191
Advisory opinions

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

Bibliography: *Donald K. Anton/Robert A. Makgill/Cymie R. Payne*, Seabed Mining: Advisory Opinion on Responsibility and Liability, EnvtlPolyL 41 (2011), 60–65; *Tafsir Malick Ndiaye*, The Advisory Function of the International Tribunal for the Law of the Sea, Chinese JIL, 9 (2010), 565–587; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002)

Documents: ISA, Rules of Procedure of the Assembly of the International Seabed Authority, available at: https://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf; ISA, Rules of Procedure of the Council of the International Seabed Authority, available at: https://www.isa.org.jm/files/documents/EN/Regs/ROP_Council.pdf

Cases: ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, ICJ Reports (2010), 403; ICJ *Western Sahara* (Request for Advisory Opinion), Advisory Opinion of 16 October 1975, ICJ Reports (1975), 12; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011; PCIJ, *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University)* (Czechoslovakia *v.* Hungary), Judgment of 15th December 1933, PCIJ Series A/B, No 61

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I. Purpose and Function

1 Art. 191 confers the Seabed Disputes Chamber with the jurisdiction to issue advisory opinions. Such opinions may be sought either by the Council or by the Assembly on matters relating to the scope of their activities. Such opinions shall be given as a matter of urgency by the Chamber. This provision corresponds to the power of the International Court of Justice (ICJ) to issue advisory opinions under Art. 65 of the Statute of the ICJ (ICJ Statute), with the distinction that while the power of the ICJ to give such opinions is discretionary, the Chamber is obliged to do so. Underlying the Chamber's advisory jurisdiction is the possibility of the Authority requiring an independent[1] and impartial judicial body.[2]

2 Art. 191 effectively empowers both the Assembly and the Council to request advisory opinions from the Chamber. This power may also be inferred from the articles prescribing the generality of powers relating to those organs, namely Arts. 160 and 163 respectively. Further, such a position certainly follows from subsequent case law.[3] In addition, Art. 159 (10)

[1] *Tafsir Malick Ndiaye*, The Advisory Function of the International Tribunal for the Law of the Sea, Chinese JIL 9 (2010), 565, 569.

[2] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 26, available at: https://www.itlos.org/cases/list-of-cases/case-no-17/.

[3] See *ibid.*, para. 33: '… article 191 of the Convention confers on the Assembly and the Council the power to request advisory opinions from the Chamber.' See also *Ndiaye* (note 1), 570.

obliges the Assembly to request such an advisory opinion in the circumstances contemplated in that paragraph. Further, Art. 185, which deals with the suspension of the rights and privileges of membership in the Authority, requires a finding on the part of the Chamber that a State party has grossly and persistently violated Part XI. Such a finding could be made in the course of an advisory opinion, provided that the proper procedural safeguards in favour of the impugned State are maintained, as set out in Annex VI, Art. 40 (2).

II. Historical Background

The Draft Convention submitted by the United States to the Sea-Bed Committee in 1970 was the first juncture at which the question of advisory opinions was addressed. Its Art. 46 stated: 3

> '1. The Tribunal shall decide all disputes and advise on all questions relating to the interpretation and application of the Convention that have been submitted to it in accordance with the provisions of this Convention. In its decisions and advisory opinions the Tribunal shall also apply relevant principles of international law.
>
> 2. Subject to an authorisation under Article 96 of the Charter of the United Nations, the Tribunal may request the International Court of Justice to give an advisory opinion on any question of international law.'[4]

Such a proposal would have required a decision by the General Assembly of the United Nations under Art. 96 of the Charter of the United Nations that the Sea-bed Chamber constituted an organ of a specialised agency of the United Nations. A later Canadian proposal also contemplated appeals from the tribunal to the ICJ on questions of international law.[5] The creation of such an appeal mechanism may be authorised by any bilateral or multilateral agreement.[6]

The Informal Single Negotiating Text Part 1 included two references to advisory opinions, with Art. 33 foreseeing that the Tribunal, as well as settling any questions relating to the interpretation of the relevant section of the Convention, should also render advisory opinions at the request of any organ of the Authority, with Arts. 61 and 62 foreseeing a reciprocal system of advisory opinions.[7] 4

During the Sixth Session, when all previous proposed texts were combined in the Informal Composite Negotiating Text (ICNT), they were renumbered, and the article concerning advisory opinions became Art. 190. In the first revision of the ICNT, the provision was again renumbered as Art. 189 and presented a text substantially mirroring that which would become the final version. An explanation for this change was furnished by the Chairman of the Group of Legal Experts. In particular, he pointed out that: 5

> '[i]n the new article 190 the deletion of the reference to the organs of the Council brings it in line with the general United Nations practice where only the General Assembly or the Security Council may request advisory opinions. Advisory opinions on legal questions arising within the scope of the activities of subsidiary organs of the Authority would therefore have to be requested, either through the Assembly or the Council'.[8]

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[4] Sea-Bed Committee, United States of America: Draft United Nations Convention on the International Sea-Bed Area: Working Paper, UN Doc. A/AC/138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021).

[5] See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002), 642 (MN 191.2).

[6] As an example, a number of cases were brought before the Permanent Court of International Justice, which was the ICJ's predecessor, and constituted on the basis of a virtually identical statute in essence identical to that of the ICJ, *inter alia*, on the basis of the 1930 Paris Agreement between Hungary and three neighboring States. See, for example PCIJ, *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University)* (Czechoslovakia *v.* Hungary), Judgment of 15th December 1933, PCIJ Series A/B, No 61.

[7] UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc. A/CONF.62/WP.8/PART. 1 (1975), OR IV, 137, 144 and 147.

[8] UNCLOS III, Report of the Chairman of the Group of Legal Experts on the Settlement of Disputes Relating to Part XI of the Informal Composite Negotiating Text, UN Doc. A/CONF.62/C.1/L.25 and ADD.1 (1979), OR XI, 109, 110.

6 Only a minor change was made thereafter, upon the request of the Drafting Committee, changing the wording 'when requested to do so by the Assembly or the Council' to 'at the request of the Assembly or the Council.'

III. Elements

1. On the request of the Assembly or the Council: the procedure

7 While *prima facie*, Art. 191 would seem to indicate that the Assembly and the Council are permitted to request that the Chamber give an advisory opinion on any legal question within the scope of activities of the Assembly and the Council, the procedures prescribed by Art. 159 (10) are confined to one particular circumstance, namely that 'at least one fourth of the members of the Assembly' are permitted to request the Assembly to ask for an advisory opinion 'on the conformity with [the] Convention of a proposal before the Assembly on any matter.' The Assembly is bound to send such a proposal, and to postpone voting on the said matter until the opinion has been issued. It is uncertain as to whether a more general power of the Assembly and the Council may be derived from Art. 160 (2)(n) and Art. 162 (2). Requests outside of the procedures in Art. 159 (10), must comply with the Assembly and Council's respective procedural rules, chiefly the consensus requirement.[9]

2. On the request of the Assembly or the Council: the contents

8 The request must concern 'legal questions', meaning they must be framed in terms of law and raise problems of international law.[10] It must also be 'within the scope of [the] Assembly and Council's activities.' The powers and functions of the Council are set out in Arts. 161–165 UNCLOS (in particular Art. 162, read together with the Agreement Relating to the Implementation of Part XI of UNCLOS), while those of the Assembly can be found in Arts. 159 and 160 UNCLOS.

3. Admissibility of the request

9 It is unclear whether the Seabed Disputes Chamber is permitted to decide on the admissibility of a request, or if, having established its advisory jurisdiction, the Chamber is obliged to deliver an opinion.[11] The question arises due to the difference in wording between Art. 191 UNCLOS ('shall give') and Art. 65 (1) of the ICJ Statute ('may give'). The Chamber's stance on this issue is somewhat ambiguous: It refrained from deciding the issue, but at the same time did also not elaborate in any way on the admissibility of the request in the *Responsibilities and Obligations of Sponsoring States* advisory opinion.

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[9] ISA, Rules of Procedure of the Assembly of the International Seabed Authority, para. 61 (1), available at: https://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf; ISA, Rules of Procedure of the Council of the International Seabed Authority, para. 56 (1), available at: https://www.isa.org.jm/files/documents/EN/Regs/ROP_Council.pdf.

[10] *Responsibilities and Obligations of Sponsoring States* (note 2), para. 39; ICJ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, ICJ Reports (2010), 403, para. 25; ICJ *Western Sahara* (Request for Advisory Opinion), Advisory Opinion of 16 October 1975, ICJ Reports (1975), 12, para. 15.

[11] *Responsibilities and Obligations of States Sponsoring* (note 2), Written Statement of the International Seabed Authority, para. 2.6; *ibid*., Written Statement of Mexico, para. 51; *ibid.*, Written Statement of the United Kingdom, para. 2.7; *Donald K. Anton/Robert A. Makgill/Cymie R. Payne*, Seabed Mining: Advisory Opinion on Responsibility and Liability, EnvtlPolyL 41 (2011), 60, 61.