IN THE MATTER OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA
AND IN THE MATTER OF THE INTERNATIONAL SEABED AUTHORITY
AND IN THE MATTER OF THE SEABED DISPUTES CHAMBER

OPINION ON
DISPUTE RESOLUTION

INTRODUCTION

1. In February 2023, Professor Zachary Douglas KC, Taulapapa Brenda Heather-Latu, Jessica Jones, and I provided an opinion for The Pew Charitable Trusts ('**the February 2023 Opinion**') on whether a moratorium or precautionary pause on exploitation activities in the Area could be implemented consistently with the *UN Convention on the Law of the Sea* ('**UNCLOS'**) 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* (**'the 1994 Agreement**'). That opinion concluded that not only could the deferral of exploitation activities in the Area be consistent with international law, it was in fact required by it. This opinion should be read together with the February 2023 Opinion.

2. As described below, the International Seabed Authority ('**the Authority**') has not yet adopted rules, regulations and procedures ('**RRPs**') for the exploitation of the Area and is unlikely to do so for some time. There is a stark divergence of view among Member States of the Authority as to the legal obligations applicable in circumstances where an application for an exploitation plan of work is submitted before the elaboration and adoption of relevant RRPs. In that context, I am asked to advise on the advisory or dispute resolution options available to States Parties and to the ISA Assembly and Council in circumstances where agreement cannot be reached through negotiation, or where a dispute arises over the Council's approval of a plan of work.

DEVELOPMENTS SINCE THE FEBRUARY 2023 OPINION

3. Since the February 2023 Opinion, Members of the ISA Council and Assembly have engaged energetically in negotiations on the draft RRPs applicable to exploitation of the Area. However, as of 9 July 2023, the date on which the two-year period triggered by Nauru's invocation of section 1(15) of the Annex to the 1994 Agreement expired, substantial work was still needed to enable the adoption of robust RRPs.

4. In anticipation of that outcome, on 31 March 2023, the Council adopted Decision ISBA/28/C/9 which recorded, *inter alia*:

   a. the agreed position that commercial exploitation of mineral resources in the Area should not be carried out in absence of RRPs;[1]

   b. the existence of a variety of views among members of the Council regarding the interpretation and application of section 1 paragraph 15 of the Annex to the 1994 Agreement;[2]

   c. the lack of any obligation on the Legal and Technical Commission ('**LTC**') when providing recommendations to the Council on a plan of work to recommend approval or disapproval;[3]

   d. the requirement for the LTC to exercise its functions in accordance with such guidelines and directives as the Council may adopt;[4] and

   e. the Council's decision to clarify, through intersessional dialogue,[5] the following questions:[6]

      "(a) Is there a legal basis for the Council to postpone (i) the consideration and/or (ii) the provisional approval of a pending application for a plan of work under subparagraph (c), and if so, under what circumstances?

      (b) Is article 165(2)(b) applicable and is the LTC therefore required to review a plan of work and submit appropriate recommendations to the Council as part of the process of consideration of such plan of work under subparagraph (c)?

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1 Decision ISBA/28/C/9**,** preambular paragraph ('PP') 3.

2 Decision ISBA/28/C/9, PP9.

3 Decision ISBA/28/C/9 operative paragraph ('OP') 3; and see paragraph 118 of the February 2023 Opinion.

4 Decision ISBA/28/C/9 OP4; and see paragraph 118 of the February 2023 Opinion.

5 Continuing the intersessional dialogue previously established in Council Decision ISBA/27/C/45

6 Decision ISBA/28/C/9, OP7.

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

(d) What considerations and procedures apply after a plan of work for exploitation has been provisionally approved and leading up to the conclusion of a contract for exploitation?"

5. Intersessional dialogue was progressed through the preparation of a briefing note, via a widely attended webinar held on 30 May 2023, and through written representations.[7] A second briefing note prepared by the co-facilitators of the intersessional dialogue highlighted the points of convergence and disagreement by Member States as regards the questions considered but indicated no clear agreement on the understanding and application of the two-year rule.[8]

6. On 21 July 2023, at the conclusion of Part II of the Council's 28th Session, the Council adopted:

   a. Decision ISBA/28/C/24 by which the Council:
      i. reiterated its view that the commercial exploitation of mineral resources in the Area should not be carried out in the absence of RRPs relating to exploitation;
      ii. agreed to continue negotiations on those RRPs in accordance with a 'Roadmap' that envisaged adoption of RRPs by August 2024;
      iii. acknowledged that the timetable in the Roadmap may not be met and proposed a review of the Roadmap in July 2024;
      iv. decided that if an application for a plan of work for exploitation were to be submitted before the adoption of RRPs, the Council would consider as a matter of priority the *"understanding and application of"* the two-year rule.

   b. Decision ISBA/28/C/25 by which the Council:
      i. reiterated its view that the commercial exploitation of mineral resources in the Area should not be carried out in the absence of RRPs relating to exploitation;
      ii. decided to further consider actions that the Council may take if an application for a plan of work for exploitation were to be submitted before the Council has completed the RRPs relating to exploitation; and

7 All available at https://www.isa.org.jm/events/follow-up-webinar-informal-intersessional-dialogue/

8 Co-facilitator's Second Briefing Note to the Council on the informal intersessional dialogue established under Council decision ISBA/27/C/45 and Council decision ISBA/28/C/9.

iii. decided that if an application for a plan of work for exploitation were to be submitted before the completion of RRPs, the Council would consider as a matter of priority (and before the LTC finalises its review of the application) its consideration of the understanding and application of the two-year rule with a view to reaching a common understanding and accordingly reaching a decision, including the possible issuance of guidelines or directives, without prejudice to the mandate of the Commission.

7. At the 28th Session of the Assembly which took place between 24 – 28 July 2023, a number of States expressed significant concerns as to the expiry of the two-year period and the need to ensure the protection of the marine environment. Chile, France, Palau and Vanuatu proposed as a supplementary agenda item a discussion on the establishment of a General Policy by the Assembly related to the conservation of the marine environment, including in consideration of the effects of the two year rule.[9] The draft decision adopting the general policy contained the following operative paragraph:

> "the Authority will not approve exploitation work plans, until all rules, regulations and procedures are approved and adopted, fulfilling the provisions of Article 6 of Annex III of the Convention, including those on operational requirements, financial contributions and the undertaking concerning the transfer of technology, among other relevant provisions of the Convention and the Agreement of Part XI."

8. China opposed the inclusion of this supplementary agenda item, but a further proposal for a General Policy for the protection and preservation of the marine environment, this time co-sponsored by Brazil, Chile, Costa Rica, France, Germany, Ireland, Palau, Switzerland, and Vanuatu, was discussed in July 2024 at the 29th Session of the Assembly.[10] No agreement was reached on the proposal.

9. In July 2024, The Metals Company announced that its subsidiary Nauru Ocean Resources Inc ('**NORI**') intends to apply to the International Seabed Authority ('**the Authority**') for the approval of an exploitation plan of work on 27 June 2025.[11] On 12 November 2024, in a letter to the Secretary-General of the Authority, Nauru confirmed its intention to sponsor

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9 ISBA/28/A/INF/8.

10 Note verbale dated 19 April 2024 from the Permanent Mission of the Republic of Chile to the International Seabed Authority addressed to the Secretariat of the Authority

11 See press release: https://investors.metals.co/news-releases/news-release-details/tmc-announces-june-27-2025-submission-date-subsidiary-noris-isa

NORI's application on that timescale.[12] As it is highly unlikely that the Authority will have fully elaborated and adopted its RRPs applicable to the exploitation of the Area by June 2025, Nauru asked the President of the Council of the Authority to add to the agenda of the March 2025 Council meeting the following item: *"Consideration and adoption of a process for the Authority's consideration and approval of applications for Plans of Work for exploitation in the absence of adopted regulations on the exploitation of mineral resources in the Area".*

10. Nauru's letter contends that: i) the Authority is in continuing breach of its obligation under section 1(15)(b) of the Annex to the 1994 Agreement to adopt exploitation RRPs by 9 July 2023; and ii) the Authority must, pursuant to section 1(15)(c) of the Annex to the 1994 Agreement, provisionally approve the application by NORI if RRPs have not been adopted by July 2025. Both of those contentions are contrary to the broad agreement reached by Member States in the 2023 intersessional dialogue.[13] Further, for reasons set out in paragraphs 114 – 117 of the February 2023 Opinion, neither contention is likely to be correct as a matter of law. Nonetheless, set alongside the ongoing efforts by some Members of the Authority to promote the adoption of a General Policy for the protection and preservation of the marine environment, it is clear that there is a stark divergence of view as to the correct interpretation and application of section 1(15)(c) of the 1994 Agreement in the wider context of UNCLOS, and in light of other relevant rules of international law applicable in the relations between the Parties, including the precautionary approach.

11. In that context, I am asked to advise Pew on what advisory or dispute resolution options are available to States Parties if: i) agreement on the way forward cannot be reached before the submission of NORI's application for a plan of work; and/or ii) the Council decides to provisionally approve NORI's plan of work under section 1(15)(c) of the Annex to the 1994 Agreement.

OPTION 1: ADVISORY PROCEEDINGS

12. As set out in ISBA/28/C/24 and 25, the Council has agreed that, if presented with an application for a plan of work prior to the adoption of exploitation RRPs, it will consider as a matter of priority the interpretation and application of the two-year rule with a view to

[12] See letter from the Permanent Representative of the Republic of Nauru to the ISA addressed to the President of the ISA Council https://www.isa.org.jm/wp-content/uploads/2024/11/Nauru-Letter-to-ISA-Council-President-re-Process-for-Plan-of-Work_10112024.pdf

[13] See Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45 at paragraphs 9 and 24(a).

reaching a common understanding. If a common understanding cannot be reached through dialogue, the Council may choose to refer certain legal questions to the Seabed Disputes Chamber ('**SDC**') of the International Tribunal for the Law of the Sea ('**ITLOS**').

13. Article 191 UNCLOS provides that the SDC shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Although non-binding, an advisory opinion could help resolve legal uncertainties and guide the Council in its treatment of NORI's (and any future) applications.

14. Such questions might include those that were unresolved in the 2023 intersessional dialogue, as set out in paragraph 7 of ISBA/28/C/9 (and set out at paragraph 5(e) above). Other questions might be framed to seek advice on the following difficult issues that arise in the interpretation and application of section 1(15)(c) of the Annex to the 1994 Agreement :

    a. what *"provisions of the Convention"*,*"norms contained in the Convention"*, and *"terms and principles contained in th[e] Annex"* ('**provisions, norms, terms or principles**') are to be applied when considering an application for a plan of work under section 1(15)(c)? In particular:
        i. in the absence of adopted RRPs under Article 145 UNCLOS relating to the protection of the marine environment, against what environmental standard/threshold (e.g. "serious harm", "harmful effects", "damage to", "interference with the ecological balance" "effective protection", "prevention, reduction and control of pollution", "protection and preservation") is an application under section 1(15)(c) to be considered?
        ii. in the absence of adopted RRPs under Articles 151(10) and 160(2)(f)(i) UNCLOS and section 8(1) of the Annex to the 1994 Agreement (which together relate to compensation for developing countries, the equitable sharing of financial and other economic benefits, and the financial terms of contracts) what provisions, norms, terms or principles should guide the Council when deciding on contractual terms to ensure compliance with Article 140(2) UNCLOS.
        iii. In the absence of adopted RRPs under Article 153(4) UNCLOS relating to the Authority's control over activities in the Area, what provisions, norms, terms or principles should guide the Council when assessing the qualification of applicants under Article 4 of Annex III UNCLOS and deciding on contractual terms to secure the Authority's control over activities in the Area.

b. Having regard to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, are there other relevant rules of international law applicable between the parties that are relevant to the interpretation or application of section 1(15)(c) of the Annex to the 1994 Agreement. In particular, to what extent is the precautionary approach relevant?

c. How is the Council to ensure non-discrimination between early applicants whose applications are considered under section 1(15)(c) of the Annex to the 1994 Agreement as compared to later applicants whose applications are considered against more detailed RRPs that may include, for example, specific requirements for environmental impact assessment and environmental management and monitoring, specific provisions on financial contributions, and specific provisions on liability and compensation including compulsory insurance or contributions to a compensation fund?

d. Having regard to the concern raised by ITLOS about the spread of "sponsoring States of convenience" in its Advisory Opinion on the Responsibilities and Obligations of States with Regard to Activities in the Area,[14] what is the meaning of "effective control" as used in Annex III article 4(3) and Article 153(2)(b).[15]

15. Independently, the Assembly is also empowered to seek an advisory opinion on these or any other legal questions within the scope of its activities. Although it might be argued that questions relating to the consideration of an application for a plan of work under section 1(15)(c) of the Annex to the 1994 Agreement are not legal questions within the scope of the Assembly's activities, that would be misguided. The Assembly is the supreme organ of the Authority and has overarching responsibility to ensure that activities in the Area are organized, carried out and controlled by the Authority in the interests of humankind as a whole. Procedurally, a request could be made by the Assembly adopting a resolution which sets the legal questions and directs the Secretariat to apply to the SDC for an advisory opinion.

16. While an advisory opinion may assist States Parties in the interpretation and application of UNCLOS, and support the lawful consideration of an application submitted under section

[14] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion,* ITLOS Case No 17, [2011] ITLOS Rep 10, ICGJ 449 (ITLOS 2011), 1st February 2011 ('Area Advisory Opinion').

[15] On which, see the Authority's 2023 discussion paper, '*Discussion Paper: Effective control 01/2023'*

1(15)(c) of the Annex to the 1994 Agreement, provisional measures are not available in the context of advisory proceedings. Accordingly, where provisional measures are needed to stay the issue of a contract or the commencement of exploitation activities, Member States will need to look to the SDC's binding dispute resolution jurisdiction instead.

OPTION 2: DISPUTE RESOLUTION UNDER PART XI UNCLOS

17. In circumstances where the Council were to provisionally approve a plan of work under section 1(15)(c) of the Annex to the 1994 Agreement, an aggrieved Member State may wish to raise a dispute. There are two dispute resolution routes available under Part XI of UNCLOS: resolution by consent; and resolution by binding decision.

Resolution by consent

18. By Article 285 UNCLOS, section 1 of Part XV UNCLOS applies to disputes arising under Part XI. Under section 1 of Part XV, parties to a dispute have an obligation to settle the dispute by peaceful means. Where no settlement can be reached, the parties must exchange views and may agree to conciliation.

Resolution by binding dispute resolution

19. By Article 286 UNCLOS, binding dispute resolution is available where no settlement has been reached by consent under section 1 of Part XV UNCLOS. In those circumstances, section 5 of Part XI of UNCLOS provides for a special judicial system for the resolution of disputes relating to activities in the Area.

20. Article 187 confers jurisdiction of the Seabed Disputes Chamber ('**SDC**') in relation to a wide range of disputes as follows:

> *"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;*
> *(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."

21. Article 187 therefore confers jurisdiction to hear disputes *"with respect to activities in the Area"* between States Parties; between a State Party and the Authority; between the Authority and a prospective contractor; and between the parties to a contract, including state enterprises and natural or juridical persons. For the purposes of this advice, I am primarily interested in the SDC's jurisdiction under Article 187(b) (disputes between a State Party and the Authority).

22. Although it is arguable that Article 187(b) was intended only to provide access to a remedy to States Parties with specific interests affected by the decisions of the Authority (e.g. as a sponsoring state), rather than States with general interests in the Authority's compliance with its legal obligations, the text of UNCLOS is not drafted in such a limited way and – in my view – clearly confers standing on States Parties *per se*. That is consistent with all States having a direct interest in the management of the common heritage of humankind.

23. For a State Party to bring a claim under Article 187(b), the dispute must relate to the Authority's acts or omissions relating to *"activities in the Area"*. To fall within Article 187(b)(i), the dispute must also include an allegation of a violation of Part XI UNCLOS and/or its Annexes. As the provisions of the 1994 Agreement and Part XI UNCLOS are to be interpreted and applied together as a single instrument,[16] alleged violations of the 1994 Agreement fall within the scope of Article 187(b)(i).

24. The SDC's jurisdiction under Article 187 is subject to limitations imposed by Article 189 as follows:

"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, regulations and procedures. Its jurisdiction in this regard shall be confined to deciding claims that the

[16] Section 2(1) of the 1994 Agreement.

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."

25. That provision requires some unpacking. Although the SDC has no jurisdiction *"with regard to the exercise by the Authority of its discretionary powers"*, that must be read alongside Article 187(b)(ii) which provides that the SDC has jurisdiction to hear disputes between States Parties and the Authority in relation to *"acts of the Authority alleged to be in excess of jurisdiction or misuse of power…".*[17] The scope of the SDC's power to review *"excess of jurisdiction"* and *"misuse of power"* has not been tested. However, excess of jurisdiction is likely synonymous with the well-known concept of *ultra vires.*

26. Accordingly, read together, Articles 187(b) and 189 UNCLOS are likely to mean that the SDC may not substitute its own discretionary judgement for the Authority's judgement, but it is entitled to review the exercise of the Authority's discretion to ensure it falls within the lawful confines of that discretion. This is likely to permit the SDC, at least, to assess:

    a. the consistency of the Authority's decisions with the provisions of UNCLOS, its Annexes and the 1994 Agreement;

    b. compliance of the decision-making process with relevant procedural rules; and

    c. the logical coherence of the reasoning justifying the decision.

Options for States Parties aggrieved by a decision to provisionally approve a plan of work

27. States Parties to UNCLOS who are aggrieved by a decision of the Council to provisionally approve an exploitation plan of work under section 1(15)(c) of the Annex to the 1994 Agreement are required in the first instance to engage with the Authority to seek a consensual solution. The aggrieved States Parties must, at least, engage in an exchange of views with the Authority to seek to resolve the dispute through dialogue and may wish to propose conciliation.

[17] Early negotiating texts at UNCLOS III omitted the language concerning "excess of jurisdiction or misuse of power": see 1977 Informal Composite Negotiating Text UN Doc A/CONF.62/WP.10. The insertion of these words suggests the negotiating Parties' intended to ensure the availability of judicial review of the exercise of discretionary powers.

28. A negotiated solution is, however, only likely to be possible when the Council has approved a plan of work but the Secretary-General has not yet issued an exploitation contact. As explained in the February 2023 Opinion, it is the contract that confers security of tenure and enables the commencement of exploitation activity. If a contract has not been issued, and the Council has directed the Secretary-General not to do so pending the outcome of negotiations, then a negotiated solution may be possible. If, however, if the Council has not given such a direction to the Secretary-General and there is a real risk the Secretary-General would issue a contract upon the Council's provisional approval of a plan of work, aggrieved States Parties may need provisional measures from the SDC to prevent the issue of a contract and/or the commencement of exploitation activities and the concomitant risk of serious harm to the marine environment.

29. In the event that a negotiated solution is not possible, aggrieved States Parties would be entitled to apply to the SDC in accordance with Article 24 of Annex VI of UNCLOS. Their application would rely on Article 187(b) UNCLOS and allege that the Council's approval of the exploitation plan of work was:

    a. a violation of Part XI UNCLOS and/or Annex III UNCLOS and/or the 1994 Agreement; and/or

    b. an excess of jurisdiction or a misuse of power.

30. Pursuant to Art 293 UNCLOS, the applicable law when determining the dispute would be UNCLOS, the 1994 Agreement, and *"other rules of international law not incompatible with this Convention."* Some of the more important *"other rules of international law"* that may be applicable are set out in section 2.3 of the February 2023 Opinion and include the precautionary principle, the ecosystem approach, and the suite of biodiversity commitments applicable in the relations between States Parties.

31. The grounds on which an application might be made would turn on the specific facts and the content of the plan of work. However, in principle, a challenge to the provisional approval of a plan of work for exploitation might be based on the following non-exhaustive list of allegations:

a. The decision is a violation of section 1(15)(c) of the 1994 Agreement and/or was taken in excess of jurisdiction because the approval of the plan of work is inconsistent with, or taken without regard to, the provisions, norms, terms or principles the Council is required to apply under section 1(15)(c) of the Annex to the 1994 Agreement, as read in light of relevant rules of international law applicable in the relations between the parties.

b. The decision is a violation of Article 3(4)(a) of Annex III UNCLOS and/or was taken in excess of jurisdiction because the approved plan of work is not in accordance with the Convention, for example because it fails to comply with the obligation to protect and preserve the marine environment, as specifically applied to Part XI by Article 145 UNCLOS and more generally applied in Part XII by Article 192 UNCLOS, and as read in light of relevant rules of international law applicable in the relations between the parties, including the precautionary principle and ecosystem approach.[18]

c. The decision is a violation of section 1(7) of the Annex to the 1994 Agreement and/or was taken in excess of jurisdiction because, having regard to the precautionary principle, the ecosystem approach, the established practice of the Authority with regard to exploration activities in the Area, and the customary international law requirement to undertake an environmental impact assessment[19] the application was not accompanied by an adequate assessment of the potential environmental impacts of the proposed activities.[20]

d. The decision is a violation of the requirements in Annex III of UNCLOS and taken in excess of jurisdiction because the applicant is not properly qualified by reference to Annex III, article 4 UNCLOS, for example because the applicant was not properly subject to the "effective control" of the relevant State Party, as required by Annex III article 4(3) and Article 153(2)(b)[21] or because the applicant is otherwise not qualified

[18] ibid.

[19] See *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April, ICJ Reports, 2010, p. 14* para. 204; *Activities in the Area* case, *cit. supra* note 16, para. 147; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April, ITLOS Reports, 2015, p. 4, para. 131–132; and applied in the context of the Area in *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion of 1 February, ITLOS Reports, 2011, p. 10 para 148.

[20] See section 4.3 of the February 2023 Opinion.

[21] The Authority has, to date, treated mere regulatory control as sufficient to establish effective control. It is at least arguable that mere regulatory control does not satisfy the requirements of UNCLOS: see *ISA, 'Discussion Paper: Effective Control,' 01/2023;* and note paragraph 159 of the *Area Advisory Opinion*, supra n.13.

having regard to the provisions, norms, terms or principles the Council is required to apply in the absence of RRPs under section 1(15)(c) of the Annex to the 1994 Agreement.

e. The decision is a violation of the requirements in section 1(15)(c) and taken in excess of jurisdiction because the Council failed to follow the correct decision-making procedure, for example by wrongly treating Article 165(2)(b) as applicable to a decision under section 1(15)(c) and therefore wrongly applying section 3(11)(a) of the Annex to the 1994 Agreement and requiring a two-thirds majority in the Council to overturn a recommendation for approval from the LTC.

f. was taken in excess of jurisdiction because the Council's reasons for approving the plan of work were logically incoherent and/or involved misunderstandings of the relevant legal requirements.[22]

32. Separately, a challenge to the Secretary-General's issue of an exploitation contract might additionally allege that the decision was taken in excess of jurisdiction because (non-exhaustively):

a. the Secretary-General is not empowered to issue an exploitation contract granting security of tenure when the Council has only "provisionally" approved the plan of work under section 1(15)(c) of the Annex to the 1994 Agreement;[23] and

b. the terms of the contract fail to secure compliance with core obligations in UNCLOS and the 1994 Agreement, for example by failing to secure the equitable sharing of financial and other economic benefits, or the Authority's effective control over activities in the Area.

33. While it is impossible, in the abstract, to advise properly on the prospects of success of any these proposed grounds of claim, all the listed grounds are reasonably arguable.

[22] The availability of this ground is likely to depend on the reasoning underpinning the recommendation from the LTC under Article 165(2)(b) UNCLOS, and may – in the absence of RRPs to govern matters such as the equitable sharing of the benefits of exploitation – turn on how the Council ensures compliance with its overarching duty to organize, carry out and control exploitation activities for the behalf of humankind as a whole.

[23] See paragraph 119 of the February 2023 Opinion.

Engaging the SDC's dispute resolution jurisdiction at an earlier stage?

34. I have focused on the possibility of binding dispute resolution to resolve a dispute over the provisional approval of a contract because that is the point at which binding dispute resolution is likely to be the only realistic option available to States aggrieved by such a decision. However, it is at least arguable that the SDC's binding dispute resolution jurisdiction could also be engaged by earlier procedural decisions by the Council in the treatment of an application submitted under section 1(15)(c) of the Annex to the 1994 Agreement. For example, a State Party might be entitled to bring a dispute under Article 187(a) UNCLOS (disputes between States Parties concerning the interpretation or application of Part XI UNCLOS and the Annexes relating thereto) and/or under Article 187(b) UNCLOS in relation to procedural decisions of the Secretary-General or Council to:

    a. send the application for consideration by the LTC under Article 165(2)(b) UNCLOS (where it might be alleged that Article 165(2)(b) has no application to the consideration of an application for a plan of work under section 1(15)(c) of the Annex to the 1994 Agreement);[24]

    b. send the application for consideration by the LTC under Article 165(2)(b) UNCLOS or direct the LTC under Article 165(2)(a) UNCLOS to provide recommendations on the application without any guidance as to the provisions, norms, terms, or principles against which the application is to be considered (where it might be alleged that it is for the Assembly, as the supreme organ of the Authority, or the Council, as the executive organ of the Authority, and not for the LTC as a technical subsidiary body, to define the provisions, norms, terms, or principles against which an application for a plan of work submitted under section 1(15)(c) is to be considered);

    c. direct the LTC to provide recommendations on the application against provisions, norms, terms, or principles defined for the LTC by the Council (where it might be alleged that the Council has misdirected the LTC by identifying irrelevant provisions, norms, terms, or principles or failing to identify relevant provisions, norms, terms, or principles).

[24] I note that, if Article 165(2)(b) is inapplicable to an application considered under Article 165(2)(b), the Council is likely still empowered to invite the LTC to provide recommendations on such an application under Article 165(2)(a), albeit section 3(11)(a) of the Annex to the 1994 Agreement may not apply in those circumstances.

35. While an application to the SDC might be available in these circumstances, it seems to me that prior to the provisional approval of a plan of work, when provisional measures are likely to be required, the disputed issues of interpretation or application of the Convention could and should preferably be resolved through negotiation or through advisory proceedings.

Procedure for a contentious dispute

Provisional measures

36. As identified above, aggrieved States Parties may seek provisional measures from the SDC to prevent the commencement of exploitation activity pending the resolution of the dispute. The SDC's power to grant such measures is conferred by Article 290 UNCLOS. Provisional measures are always discretionary but may be awarded where the Tribunal has *prima facie* jurisdiction and it considers it appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.

37. A request for provisional measures must be in writing and must specify the measures requested, the reasons therefor, and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment.[25] Provisional measures are awarded on an urgent basis and usually within 1 – 4 months of the request.

38. On a challenge to the provisional approval of an exploitation plan of work, the SDC would be entitled to order provisional measures requiring the deferral of the issue of a contract by the Secretary-General until the conclusion of proceedings. On a challenge to the grant of a contract by the Secretary-General, the SDC would be entitled to order provisional measures requiring the deferral of the commencement of exploitation activities until the conclusion of proceedings.

Intervention

39. Aggrieved States Parties may choose to apply to the SDC collectively as co-applicants, or may decide to identify a lead applicant with others appearing as intervenors. There may be presentational advantages in a collective application from members of the Assembly who are not also members of the Council.

[25] Rules of the Tribunal, article 89, paragraph 3.

40. States that are not applicants may intervene under Article 31 or 32 of the ITLOS Statute. It is not entirely clear that affected non-state parties, including contractors, are entitled to intervene if they are not a formal party to the dispute.[26] If not, the Tribunal could ensure their participation in the proceedings under Article 37 of the ITLOS Statute. NGOs are not permitted to intervene in contested proceedings. However, the Tribunal has, in previous instances, accepted and shared submissions from NGOs with the involved parties.

Remedy

41. Provided no exploitation activity had commenced, the remedy in proceedings to challenge the provisional approval of a plan of work under section 1(15)(c) of the Annex to the 1994 Agreement would be simple: an order recording that the approval of the plan of work / conclusion of the contract was in violation of legal requirements and invalid.

Timeframe

42. It is difficult to predict the duration of such proceedings. On average, proceedings before ITLOS take between two to four years. It is likely the SDC would prioritise an application made on the basis considered above but it is unlikely that would lead to a final order in less than two years from the date of the initial application.

16 December 2024

TOBY FISHER
Matrix Chambers
London

[26] In a challenge to the Council's decisions to provisionally approve a plan of work, or issue a contract, the non-state applicant should, in my view, be a party to the proceedings.