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The International Seabed Authority and the Push for Exploitation of Deep Seabed Minerals: Does the Doctrine of Legitimate Expectations Apply?

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Abstract

The International Seabed Authority (or ISA) is nearing a world-first decision: whether to approve, on behalf of humankind, potentially in the absence of regulations, an application for exploitation rights over deep sea minerals. We assess whether an operator, who invested in exploration activities but whose application to mine was refused by the ISA, may successfully take legal action against the ISA based on their 'legitimate expectations' to be granted exploitation rights. We find significant obstacles for such a claim. Firstly, the ISA has with contractors a legal relationship that differs from that between sovereign states and foreign investors. Furthermore, exploration contractors assumed the risk of carrying exploration despite knowing that, due to its complex institutional structures, and need to adapt to evolving international norms and new scientific information, the ISA could ultimately decide to proceed in a different direction. Finally, there are sizeable procedural challenges for any prospective claimant against the ISA relying on 'legitimate expectations', both in accessing the relevant forum and in identifying an enforceable remedy.

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Keywords

common heritage of humankind – deep seabed mining – International Seabed Authority – legitimate expectations – non-state actor dispute resolution – United Nations Conventions on the Law of the Sea

1 Context: Deep Seabed Mining beyond National Jurisdiction

Part XI of the UN Convention on the Law of the Sea (UNCLOS) and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS establish a regime to regulate the exploration and exploitation of mineral resources located in and on the seafloor beyond national jurisdiction ('the Area'). The regime is overseen by an intergovernmental body created for this purpose: the International Seabed Authority (ISA). All contracting parties to UNCLOS are automatically member States to the ISA.

The ISA's regulatory mandate is founded on the principle of the Common Heritage of [Hu]mankind (CHM). This can be understood as "a bundle of rules, principles and theories such as the stewardship doctrine and the theory of inter and intra generational justice and the principle of sustainable development."[1] Under the CHM principle, as formulated in Part XI of UNCLOS, no State or person can appropriate unilaterally the Area or its mineral resources[2] and the Area can be used only for peaceful purposes.[3] UNCLOS establishes the ISA as the intergovernmental organisation through which member states collectively shall organise and control mining activities in the Area. UNCLOS also requires the ISA to develop a mechanism for the equitable sharing of benefits derived from mining in the Area; and Article 145 of UNCLOS imposes an obligation for the ISA to take necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from exploration and exploitation activities in the Area. Neither UNCLOS nor the 1994 Agreement relating to the Implementation of Part XI of UNCLOS affirm any hierarchy between the different objectives of the ISA's regime.[4]

1 Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) 3.

2 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396, art 137.

3 ibid, art 141.

4 Zachary Douglas and others, Opinion in the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction (Pew Charitable Trusts, 30 June

On this basis, the ISA is mandated to produce a series of rules, regulations, and procedures (RRPs) for deep seabed mining activities in the Area.[5] RRPs inter alia set out the process and conditions by which an applicant can receive permission to explore or exploit minerals of the Area, which requires submission of an application to the ISA (containing a plan of work and supporting instruments). Upon evaluation of an application, and if approved by the ISA, a contract is drawn up between the ISA and the successful applicant. The contract subjects the contractor to the ISA's RRPs and gives the contractor the rights to carry out the plan of work. The contractor can be either a State Party, an entity (state-owned or private actor) sponsored by a State Party, or the Enterprise (the ISA's in-house mining company, which is yet to be operationalised). Since 2001, the ISA has developed its RRPs for exploration and granted thirty-one exploration contracts, of which thirty are currently operational.[6] Over the exploration period, contractors are expected to perform their contractual obligations, including the delivery of a program of scientific work to understand the geological potential, and the environmental baseline conditions of the exploration site, as agreed in the plan of work.[7] There are no exploitation activities to date, although some actors are pushing for the transition from exploration to exploitation to occur. Since 2014, the ISA has been working on developing RRPs for exploitation, which will require substantial information from a contract applicant to inform the ISA's evaluation and decision, including an environmental impact statement and environmental management and monitoring plan for future mining activities.

The executive body of the ISA (the Council) decided in July 2023 that "commercial exploitation of mineral resources in the Area should not be carried out in the absence of RRPs relating to exploitation".[8] Developing the RRPs is proving time-consuming for the ISA and several fundamental policy decisions

2023) para 100, available at: <https://www.pewtrusts.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf?v=01> accessed 28 September 2024.

5 See UNCLOS arts 154, 146, 147, 160, 162, 170; and Implementation Agreement: Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (opened for signature 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (1994 Agreement), ss 1, 2, 6 and 9.

6 ISA, Exploration Contracts, <www.isa.org.jm/exploration-contracts/> accessed 28 September 2024.

7 There are three sets of Exploration Regulations, each one pertaining to a different mineral resource type. Copies of each can be accessed here: <https://www.isa.org.jm/the-mining-code/exploration-regulations/> accessed 28 September 2024.

8 Eg Decision of the Council of the International Seabed Authority Relating to the Understanding and Application of Section 1, para 15, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,

remain unsettled.[9] This gives rise to a situation in which contractors have invested in exploration work, without knowing if mining will be feasible for them (technologically and economically) under the finalised exploitation regime (and without clarity on when that regime will be completed). 'Deal-breakers' as to project viability could include issues such as:

- the environmental obligations and thresholds that contractors would be required to meet in performing their mining project,[10]
- the royalty regime,[11] and
- other contractor obligations that may be difficult or costly to meet (e.g. insurance, financial security, upfront payment into a compensation fund, and the requirement to build and test mining equipment before obtaining the exploitation contract).[12]

The question this paper examines is whether prospective applicants for exploitation activities in the Area have legal grounds to claim against the ISA through the dispute resolution mechanisms established by UNCLOS, if legal or policy decisions are taken that impair their ability to move to exploitation. As there is no precedent specific to the ISA and decisions about mining in the Area, the paper examines this question from the point of view of general international law, international investment law and the doctrine of 'legitimate expectations'.

In sections 2, 3 and 4 of the paper, we consider how the doctrine of legitimate expectations has been applied in relation to other international disputes, and what analogies, if any, can be drawn for the ISA scenario. In sections 5 and 6, we specifically consider whether the doctrine of legitimate expectations can apply to the ISA as a multilateral body, and the extent to which UNCLOS – as

ISBA/28/C/25, 21 July 2023, <https://www.isa.org.jm/wp-content/uploads/2023/07/2314461E.pdf> accessed 28 September 2024.

9 Chris Pickens and others (2024), 'From What-if to What-now: Status of the Deep-sea Mining Regulations and Underlying Drivers for Outstanding Issues' (2024) 169 Marine Policy 105967 <https://doi.org/10.1016/j.marpol.2023.105967>; Pradeep Singh, 'A "Deadline" Expires: Quo Vadis, International Seabed Authority? Research Institute for Sustainability' (July 2023) RIFS Discussion Paper 11; Daniel Wilde and others, 'Equitable Sharing of Deep-sea Mining Benefits: More Questions Than Answers' (2023) 151 Marine Policy 105572 <https://doi.org/10.1016/j.marpol.2023.105572> both accessed 28 September 2024.

10 See Draft Regulations on Exploitation of Mineral Resources in the Area, ISBA/25/C/WP.1, 15–19 July 2019, Part IV and in particular reg 44, <https://www.isa.org.jm/wp-content/uploads/2022/06/isba_25_c_wp1-e_0.pdf> accessed 28 September 2024.

11 ibid, reg 64 and Appendix IV.

12 ibid, regs 36, 26, 54–56. See Draft Regulations on Exploitation of Mineral Resources in the Area: The Facilitator's fourth revised draft text on Parts IV and VI and related Annexes, ISBA/28/C/IWG/ENV/CRP.3/Rev.1, 16 October 2023, reg 48ter, <https://www.isa.org.jm/wp-content/uploads/2023/10/Facilitators-fourth-revised_text-16OCT23.pdf> accessed 28 September 2024.

the governing instrument for deep seabed mineral activities – may or may not provide a legal basis for a claim based upon legitimate expectations. In sections 7 and 8, we examine potential challenges to accessing a relevant forum, and remedies, for any such claim.

The invocation of legitimate expectations in the ISA's context has already been argued by one legal commentator:

> [A moratorium on deep seabed mining] also likely amounts to an unlawful expropriation or a breach of F[air] and E[quitable] T[reatment] in relation to contractors, who have *legitimately relied upon their well-founded expectations* that member States and the Authority would act in accordance with their Convention obligations. By refusing to consider applications for exploitation, the Authority may in effect be expropriating the value of contractors' current investments in the Area under exploration contracts without proper compensation. The adoption of any such decision is also likely to be considered arbitrary, unfair and in bad faith, given the clear terms of the 1994 Agreement [emphasis added].[13]

The doctrine of legitimate expectations has also been recently invoked by one member State which is sponsoring exploration activities. In a 2023 ISA Council session, the delegation of Nauru raised the idea that 'legitimate expectations' could be invoked if the ISA Council were to refuse altogether to consider an application for exploitation that is submitted prior to finalisation of the relevant RRPs.[14] In 2024, in a "non-paper" submitted to the ISA, the Republic of Nauru argued that a proposed change in the interpretation of "effective control" under article 4(3) in Annex III "would run contrary to .... the legitimate expectations of contractors".[15]

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13 See Nathan Eastwood and others, 'Deep Seabed Mining Insights: Potential Pitfalls with a Precautionary Pause to Deep Seabed Mining', 15 August 2023, available at: <https://www.wfw.com/articles/deep-seabed-mining-insights-potential-pitfalls-with-a-precautionary-pause-to-deep-seabed-mining/> accessed 28 September 2024.

14 The Republic of Nauru, 'Opinion Paper on Certain Issues Relating to the Interpretation of Paragraph 15(c) of the Annex to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea', <https://www.isa.org.jm/wp-content/uploads/2023/05/Nauru.pdf> accessed 28 September 2024.

15 'Non-Paper by Nauru on State Sponsorship of Activities in the Area and the Interpretation of the "Effective Control" Requirements, Permanent Mission of the Republic of Nauru to the International Seabed Authority', NV 24 – 02, para 1.3, <https://www.isa.org.jm/wp-content/uploads/2024/05/Non-Paper-by-Nauru.pdf> accessed 28 September 2024.

Against this backdrop, we consider the plausibility that a legitimate expectations claim could be successful if made by a prospective contractor against the ISA, starting from a description of the principle in international investment law. We consider whether the doctrine of legitimate expectation is: a) part of general international law and; b) generally applicable to all decision-making by States and by international organizations.

2 'Legitimate Expectations' in International Investment Law

The principle of legitimate expectations may be described as the protection of an actor's right to rely upon a position taken by a public authority.[16] It can be seen as a general principle of law, stemming from a variety of legal systems.[17] The basic premise is that, where clear actions or statements by a State induced a person to act, the State, as a general rule, should not be able subsequently to renege on those commitments without generating liability.[18] Established by several investment arbitral decisions, the doctrine of legitimate expectations is difficult to categorise as being drawn from one specific source of international law.[19]

Legitimate expectations' has been described in investment tribunals as a "general principle of law … indissolubly linked to the good faith rule under customary international law;"[20] and as a general principle of law, based on the fact that several legal systems protected legitimate expectations and acquired rights.[21]

16 Rudolph Dolzer, Ursula Kriebaum, Cristoph Schreuer, *Principles of International Investment Law* (OUP 2022) 208.

17 Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectation – Recognizing and Delimiting a General Principle' (2006) 21 ICSID Rev 2.

18 Jack Biggs, 'The Scope of Investors' Legitimate Expectation under the FET Standard in the European Renewable Energy Cases' (2021) 36(1) ICSID Rev 88, 100.

19 *Antaris Solar GmbH and Dr Michael Göde v Czech Republic*, PCA Case No. 2014-01, Award (2 May 2018) para 360: the tribunal holds that "there will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability" without elaborating on the doctrine's relationship with the different sources of international law.

20 *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No ARB/16/41, Partial Dissenting Opinion of Horacio A Grigera Naon (9 September 2021) para 9.

21 *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) para 576, the tribunal reflects on the existence of 'legitimate expectation' principles in numerous legal systems "based on converging considerations of good faith and legal security".

Legitimate expectations has been prominently relied upon in investment treaty arbitration between foreign investors and a host State, where the treaty contains clauses requiring 'fair and equitable treatment' or refers to the 'international minimum standard of treatment'.[22] The investment treaty clause of 'international minimum standard of treatment' has been described in arbitral decisions as involving an element of legitimate expectations:

> [such a standard is] infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, *it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant* [emphasis added].[23]

In the 2012 *Mobil* case, the Tribunal developed this point, listing the following as relevant factors: '(i) clear and explicit representations made by or attributable to the [State] in order to induce the investment, and (ii) were, by reference to an objective standard reasonably relied on by the investor, and (iii) were subsequently repudiated by the host state.'[24]

The 'legitimate expectations' principle, in relation to the treaty-based 'fair and equitable treatment' standard, has been described in *Waste Management v Mexico II* as requiring the following elements: (i) an expectation that is attributable to the relevant authority (government), (ii) an investment that relied upon that expectation, (iii) legitimacy of that expectation, and (iv) reasonableness in the investor's reliance upon it.[25] The importance of these latter two factors, i.e. the legality of the representation relied upon, and the investor's

22 *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Separate Opinion of Professor Walde (26 January 2006) para 1.

23 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Jurisdiction and Liability (10 November 2017) paras 805–10.

24 *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) para 152.

25 *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004), (Waste Management II) para 98.

reliance having been reasonable, have been emphasised by other tribunals subsequently.[26]

More recent jurisprudence has questioned the distinction between standards of 'fair and equitable treatment' in international investment treaties and the customary 'international minimum standard of treatment' so that:

> In the end, the name assigned to the standard does not really matter. What matters is that the standard protects against all such acts or behaviour that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equitableness and reasonableness cannot be defined precisely: they require to be applied to the facts of the case.[27]

Legitimate expectations has also been relied upon in disputes between investor and State based on 'established principles of international law' and not on specific treaty obligations.[28] For instance, in *SPP v Egypt* the tribunal spoke of "expectations protected by established principles of international law" to then explain that "a determination that [domestic] acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts [of the state]."[29] The fact that this arbitration took place within the framework of the ICSID Convention, where tribunals can and must apply international law,[30] suggests that the arbitrators speak of legitimate expectations as a general principle of law.

According to Dolzer and Schreuer, *SPP v Egypt* is an authority to the effect that "the investor's legitimate expectations are protected even without a treaty's guarantee of fair and equitable treatment."[31] However, in more recent cases,

26 *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) para 445; *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID Case No ARB/18/21, Award (30 March 2022) para 431.

27 *Thomas Gosling and others v Republic of Mauritius*, ICSID Case No ARB/16/32, Award (18 February 2020) para 243. See also *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Award (29 June 2012) para 219.

28 See for example *Affaire Aboilard* (*France c Haïti*), Recueil des Sentences Arbitrales, Volume XI, 80; *Southern Pacific Properties* (*Middle East*) *Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) para 81, *Stans Energy Corp and Kutisay Mining LLC v The Kyrgyz Republic*, PCA Case No 2015-32, Award (20 August 2019) para 646.

29 *Southern Pacific Properties* (*Middle East*) *Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) para 81.

30 ICSID Convention, arat 42.

31 Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) ICSID Rev 99, 101, quoting

investment tribunals that applied this principle did not say explicitly whether they used it as part of international or of the applicable national law. In *Balkan Energy v Ghana*, the tribunal applied the principle of legitimate expectations to protect a contract considered to be ultra vires by national authorities. It invoked this principle as a common law principle which is "part of the laws of the Republic of Ghana".[32] Similarly, in *Stans Energy Corp v Kyrgyzstan*, the tribunal applied the principle of legitimate expectations – without naming it – as part of a national law which promised a fair and equitable regime to foreign investors.[33] Hence, while the applicability of the doctrine of legitimate expectations outside of investment treaties is plausible, the practice of international tribunals on this point is neither well developed nor reliable. Whether the doctrine applies outside of investor-State disputes is even less clear: on the one hand, some inter-State disputes have seen references to this doctrine.[34] On the other hand, however, the International Court of Justice has more recently concluded that "*it does not follow from such references* [*in investment arbitral awards concerning disputes between a foreign investor and a host state*] *that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation*."[35]

To summarise, the doctrine of legitimate expectations has been associated with specific treaty obligations requiring either the international minimum standard or fair and equitable treatment. Occasionally, these two standards have been conflated. However, it is unclear whether 'legitimate expectations' may be recognised as general international law or customary international law, either as a component element of one or both of those two standards, or as a standalone principle. In this respect, the status of the doctrine of legitimate expectations as a recognized principle of international law remains inconclusive and challengeable.

Rudolph Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (OUP 2008) 135.

32 *Balkan Energy (Ghana) Limited v Republic of Ghana*, PCA Case No 2010-7, Award on Merits (1 April 2014) para 397. Compare this with the *Bankswitch v Ghana* decision, where the tribunal ostensibly applied the principle of *estoppel* (rather than legitimate expectations) as part of international law, holding that the government was estopped from invoking an investment contract's unconstitutionality to evade its obligations.

33 *Stans Energy Corp and Kutisay Mining LLC v Kyrgyz Republic* (II), PCA Case No 2015-32, Award (20 August 2019) para 646.

34 Julien Chaisse, Sum-yu (Ruby) Ng, 'The Doctrine of Legitimate Expectations: International Law, Common Law and Lessons for Hong Kong' (2018) 48(1) Hong Kong Law Journal 86.

35 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, Judgment, ICJ Reports 2018, 507 at para 162.

3 Examining the Required Components of 'Legitimate Expectations'

On the assumption that 'legitimate expectations' can be treated as a general principle of law applicable outside of investment treaty clauses, the above-cited authorities suggest that the following four elements are required to make out an argument of 'legitimate expectations':

(i) Conduct that leads to expectation;
(ii) Investment reliant upon that expectation;
(iii) Legitimacy of that expectation;
(iv) Reasonableness of the investor's reliance.

These will now be considered in turn. Section (5), below, will consider how these elements may apply in the context of the ISA.

3.1 *Conduct That Leads to Expectation*

'Legitimate expectations' is premised on the existence of a clear and specific representation, assurance, or commitment made by the State (which was relied upon by the investor).[36] Such representations must be formulated in a manner which indicates an intention to create an obligation for the State.[37] According to MacLachlan, Sore and Weiniger "a claim based upon a specific assurance from the host state generally arises from the creation of a bilateral relationship between the host state administrator and the investor – whether by contract, licence or a relationship of specific representation."[38]

Arbitral tribunals have generally held that legislation applicable to a plurality of persons or a category of persons cannot create legitimate expectations that there will be no change in law.[39] While the notion of regulatory certainty was cited in older cases, more recent jurisprudence suggest that an investor can only legitimately expect that "the state will not act unreasonably, disproportionately or contrary to public interest" when modifying the regulatory framework based on which an investment was made.[40]

36 *Infinito Gold v Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021) para 515. See also *Peter A Allard v The Government of Barbados*, PCA Case No 2012-06, Award (27 June 2016) para 198.

37 *Peter A Allard v The Government of Barbados*, PCA Case No 2012-06, Award (27 June 2016) para 198.

38 Campbell MacLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration – Substantive Principles*, (2nd edn, OUP 2017) 7.166.

39 *Antaris Solar GmbH and Dr Michael Göde v Czech Republic*, PCA Case No 2014-01, Award (2 May 2018) para 360; and *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 429.

40 See for instance *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB/14/3, Final Award (27 December 2017) para 317, citing *Charanne*

But the situation may be different where general rules are replicated in a contract.[41] Also "a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behaviour of the state, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely."[42] Consistency, clarity and specificity of the representations appear to be relevant factors, from the case law.

3.2 *Investment Reliant upon That Expectation*

Arbitral case-law suggests that it is the investor's reliance on government conduct (in taking the decision to invest), and the State's alteration of that conduct,[43] which provides the basis for the recognition of legitimate expectations.[44] Here we should not be concerned with the investor's actual subjective perceptions: the criterion is an objective standard grounded on a representation made by the State.[45] Additionally, in order to be protected, "the investor's expectations must be legitimate and reasonable *at the time* when the investor makes the investment" [emphasis added].[46] It is not always easy to determine when an investment was made, particularly in investments (such as in mining) which involve a large number of negotiations, permitting applications, financing, acquisitions and so forth. It has been held – in the context of a solar power plant project in Spain – that the "timing of the investor's decision to invest

and Construction Investments v Spain, SCC Case No V 062/2012, Award (21 January 2016) para 510.

41 *ESPF Beteilegungs Gmbh v Italian Republic*, ICSID Case No ARB/16/5, Award (14 September 2020) para 512. Also *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No V 2015/095, Final Award (23 December 2018).

42 *El Paso Energy International Company v The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 337.

43 *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 154.

44 See for example *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 85, 87, 89; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) para 262.

45 See for example *Rusoro Mining Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award (22 August 2016) para 532: at the time of investment Venezuela had a favourable general exchange control regime, which was surely an important factor for the investor but did not – without more – create a legitimate expectation that there will be no legislative change to that regime.

46 *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) para 340. See also *Tecmed v Mexico*, which speaks at para 64 of "expectations that were taken into account by the foreign investor to make the investment."

[that being the acquisition of a 100% interest in the power plant] sets a backstop date for the evaluation of legitimate expectations."[47]

3.3 *Legitimacy of That Expectation*

"To be legitimate, investors' expectations must not be frivolous or unrealistic and must be grounded in reality".[48] In assessing the legitimacy of the expectation, it is relevant to consider "the host state's domestic legislation and regulations, as well as its international law obligations, any contractual arrangements concluded between the investor and the state, and the specific representation or undertakings made by the state."[49] It bears mentioning that international investment law recognizes the State's "inherent right to regulate in the public interest."[50] Accordingly, "changes to general legislation (at least in the absence of a stabilisation clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest. and do not modify the regulatory framework relied upon by the investor at the time of its investment outside of the acceptable margin of change."[51]

International norms can play a decisive role in the assessment of the "legitimacy" of an expectation but will not automatically trump precise and specific representations to the opposite made by regulators under their own national law – as in *Rockhopper v Italy*. In this case, Italy passed a law prohibiting offshore petroleum production within its territorial sea, despite previously permitting exploration activities. While it was noted that "the granting of an exploration permit … in no way entailed in domestic law the automatic granting of an exploitation permit";[52] the issue was that a declaration of environmental compatibility had also been granted to this claimant, which, under national law,

47 *Novenergia II v The Kingdom of Spain*, SCC Case No 2015/063, Award (15 February 2018) para 539.

48 *Belenergia SA v Italian Republic*, ICSID Case No ARB 15/40, Award (6 August 2019) para 243.

49 *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5, Award (14 September 2020) para 513.

50 Federico Ortino, 'The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?' (2018) 21 JIEL 845, 847.

51 *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) paras 422, 423. But see also *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 352 and 367–68; *Blusun v Italy*, ICSID Case No ARB/14/3, Award (27 December 2016) para 320.

52 *Rockhopper Exploration Plc, Rockhopper Italia SpA and Rockhopper Mediterranean Ltd v Italian Republic*, ICSID Case No ARB/17/14, Opinion of Pierre-Marie Dupuy (23 August 2023) para 2.

entitled them to receive a concession for petroleum production. To justify its rule change, Italy invoked the precautionary principle. While recognising the importance of the precautionary principle, the Tribunal considered that Italy's conduct had "move[d] the goalposts", given that it had already carefully examined the environmental issues and provided its imprimatur to the project.[53]

3.4 *Reasonableness of the Investor's Reliance*

In assessing the 'reasonableness' of an investor's decision to invest, tribunals consider how a 'prudent' investor would have acted based on the amount of information that the investor knew or should reasonably have known at the time of the investment.[54]

This test should specifically take into account that "no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged".[55] A 'prudent' investor is also expected to recognise specifically that legitimate regulatory activity in the public interest may adversely affect investor interests, without giving rise to a claim for unfair treatment by the investor.[56] This was illustrated, for example, by the arbitral decision in *Philip Morris v. Uruguay*, where the tribunal held that the State's measures did not violate the relevant treaty because they "have been adopted in fulfilment of Uruguay's national and international legal obligations for the protection of public health."[57] In this case, the tribunal referred to the instruments of the World Health Organisation as a relevant point of reference to determine the reasonableness and proportionality of the challenged national measures. This, alongside the "widely accepted articulations of international concern for the harmful effect of tobacco" meant that "the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products."[58] Other cases have supported this idea that an evolving social and political context, and its impact on markets and regulatory

53 *Rockhopper Exploration Plc, Rockhopper Italia SpA and Rockhopper Mediterranean Ltd v Italian Republic*, ICSID Case No ARB/17/14, Award (23 August 2022), para 153.
54 *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Award (25 November 2015) para 7.78.
55 *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 305.
56 *Belenergia SA v Italian Republic*, ICSID Case No ARB 15/40, Award (6 August 2019) para 243.
57 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 302.
58 ibid, para 430.

processes, is highly relevant to this 'reasonableness' test.[59] Similarly, investment tribunals have noted that the application of international environmental law at domestic level is a relevant factor to be taken into account in assessing an investor's legitimate expectations.[60]

3.5 *Remedies for Breach of Legitimate Expectations in International Investment Law*

Customary international law explicitly foresees restitution (i.e. putting the claimant into the position they would have occupied if they had not been wronged) as the preferred remedy, unless its performance is materially impossible or unless it involves a burden out of proportion for the State involved.[61] Investment tribunals have held that they do have the power, in specific circumstances, to award restitution.[62] In *Enron v Argentina* the tribunal justified its power to issue injunctive relief referring to the "inherent power of a competent tribunal which is confronted with the continuing breach of an obligation which is in force and continues to be in force".[63]

However, the vast majority of investment arbitrations have only awarded remedies in the form of monetary compensation.[64] Such tendency is favoured by Article 54 of the ICSID Convention, which requires national courts to enforce "the pecuniary obligations imposed by that award" within their territory "as if it were a final judgement of a court in that state."[65] Another relevant consideration is that compensation is often seen as less intrusive than an order to carry out a particular act. Accordingly, the *LIAMCO v Libya* tribunal argued

59 *Methanex Corporation v United States*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part IV – Chapter D, para. 7.

60 *Peter A Allard v The Government of Barbados*, PCA Case No 2012-06, Award (17 June 2016) para 244.

61 See also *Factory at Chorzów* (Merits) PCIJ Series A No 17, Judgment (13 September 1928) at 48, "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible".

62 See *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]*, ICSID Case No ARB/05/20, Final Award (11 December 2013) para 166; *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No V (064/2008), Final Award, paras 42, 47. Also see History of the ICSID Convention, vol II, 991 cited by *Von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) para 694.

63 ILC art 35. *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) para 79, citing *Rainbow Warrior* (*New Zealand v France*), RIAA, Vol. XX, 1990, 217 at 270, para 114.

64 Berk Demirkol, 'Remedies in Investment Treaty Arbitration' (2015) 6 JIDS 403 at 407–08.

65 ICSID Convention, art 54.

that restitution which "presupposes the cancellation of the nationalisation measures at issue" violates the sovereignty of the nationalising state.[66] Hence, the tribunal refused to agree to the restitution of the petroleum company's contractual rights. Unsurprisingly, the few cases where legitimate expectations were relied on as a general principle of law considered compensation only, as a remedy to the State's alleged violations.[67]

In one case where an investment tribunal did unusually grant relief in the form of restitution, the tribunal specifically distinguished between the case before it, that concerned property rights, and a situation "where a State has, in the exercise of sovereign power put an end to a contract or a licence or any other foreign investor's entitlement", in which case "specific performance must be deemed legally impossible."[68]

4 Application of 'Legitimate Expectations' to Mining Cases within National Jurisdiction

Before turning to the potential application of the 'legitimate expectations' doctrine to the ISA, it is useful to note precedent from land-based mining. Decisions not to grant or renew mining permits – often on environmental or socio-political grounds[69] – have been the starting point of numerous investment treaty arbitrations.[70]

In this context it is interesting to note that extractive industries have seen in the 21st century "a shift in the terms of trade in favour of host countries exerting greater sovereign control over the conditions of access to [mineral]

66 *Libyan American Oil Company v The Government of the Libyan Arab Republic*, Award (12 April 1977) para 271.

67 See for example *Affaire Aboilard* (*France c Haïti*), Recueil des Sentences Arbitrales, Volume XI, 81–82; *Southern Pacific Properties* (*Middle East*) *Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1990) para 179 et seq; *Stans Energy Corp and Kutisay Mining LLC v Kyrgyz Republic* (*II*), PCA Case No 2015-32, Award (20 August 2019) para 673.

68 *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) para 709 et seq, para 726.

69 UNEP, 'Mineral Resource Governance in the Twenty-First Century: Gearing Extractive Industries towards Sustainable Development' (2020); IGF, 'Guidance for Governments: Environmental Management and Mining Governance' (2021).

70 Columbia Center on Sustainable Development, 'International Investment Law and the Extractive Industries' (July 2022) 7, available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/International-Investment-Law-Extractive-Industries-2022-09-01-Final.pdf> accessed 28 September 2024.

resources and the sharing of benefits, while imposing stricter requirements for national procurement and hiring, and greater local participation in licensing, monitoring and benefits."[71] Various minerals-exporting countries have adopted new laws requiring that public authorities act as guardians of mineral resources owned by the people.[72] Additionally, the legislation of several States has shifted away from negotiated contracts and toward legislated rules to govern mining activities;[73] and host States have included community consultation, development and ecological restoration requirements in their mining legislation, expecting that extractive activities translate into real positive social and economic gains for mining-affected communities.[74] This has caused some disputes whereby long-standing presumptions about mining rights have been disrupted by these new policies.

In some mining cases, arbitral tribunals have noted that the granting of exploration rights does not by itself create legitimate expectations that mining rights will be granted regardless of whether the application satisfies applicable contractual and national requirements.[75] Nevertheless, there are individual instances where arbitral case law has found that a refusal to grant exploitation

71 John P Williams, 'Global Trends and Tribulations in Mining Regulation' (2012) 30(4) Journal of Energy & Natural Resources Law 391.

72 See for example the Constitution of the Pluri-national State of Bolivia, art 311(II)(2): "the natural resources are the property of the Bolivian people and shall be managed by the State" or the Constitution of the Republic of Colombia, art 361: "the revenues from the General System of Concession Fees shall be used for the financing of projects for the social, economic and ecological development of the territorial entities …" and South Africa's Mineral and Petroleum Resources Development Act, art 3(1): "mineral resources are the common heritage of all the peoples of South Africa and the state is the custodian thereof, for the benefit of all South Africans".

73 See for example, Indonesia's Law on Mineral and Coal Mining No 4 of 12 January 2009 which replaces the former contract of work (COW) regime for foreign investors and the former licensing regime for domestic companies with a unified licensing regime for domestic and foreign companies; see also Kazakhstan's Code on Subsoil and Subsoil Use dated 27 December 2017 replacing the former contractual framework with "a more streamlined licensing process, which follows from the Kazakh government's commitment to adopting Western Australia's standards" (OECD, Reform of the Mining Sector in Kazakhstan: Investment, Sustainability, Competitiveness, 2018, <https://www.oecd.org/eurasia/countries/Kazakhstan_Mining_report_ENG.pdf> accessed 28 September 2024).

74 Kendra E Dupuy, 'Community Development Requirements in Mining Laws' (2014) 1 The Extractive Industries and Society, 200, 202. See also: Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector (27 May 2009) (ECOWAS Directive); Sierra Leone's Mines and Minerals Act 2009, s 139(1); the Minerals Law of Mongolia (Amended) 2006, art 42.

75 See for example *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04, Decision on Jurisdiction and Liability (17 March 2015) para 447; *Bay View Group LLC*

rights frustrated the claimant's legitimate expectations. This tends to arise in narrow circumstances where State authorities have fettered their discretion through specific contractual language, for example, a contractual clause guaranteeing that exploitation rights would be granted to a project able to meet certain criteria (and where government conduct also suggested early indication that those criteria were likely to be met).[76] In *Eco Oro v Colombia*, another arbitral tribunal found an investor's legitimate expectations to have been breached where the State had failed to apply its own laws consistently (by granting a mining concession that overlapped with an area protected for ecological purposes).[77] In that case, the tribunal noted the expectation was compounded by the State's subsequent failure to clarify the investor's position in a timely manner.

5 Can 'Legitimate Expectations' Apply in Relation to the ISA *as an Intergovernmental Organisation Established by UNCLOS?*

Having discussed how the doctrine of legitimate expectations has been applied in a broader context, the remaining sections of the paper turn to consider its potential application to the ISA. As will be explored in more detail in section 7 (below), UNCLOS creates an elaborate dispute resolution mechanism for disputes brought by contractors against the ISA.[78] But first, this section 5 considers whether the doctrine of legitimate expectations can apply to the ISA as a multilateral body, and the following section 6 turns to examine whether UNCLOS provides a legal basis for a claim of legitimate expectations.

The investment arbitral examples considered in this paper relate to bilateral relations between an investor and a State concerning the application of clauses agreed under an investment treaty. However, as noted in a recent article by an

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and The Spalena Company LLC v Republic of Rwanda, ICSID Case No ARB/18/21, Award (30 March 2022) para 331.

76 Sofia de Murard, 'Tribunal Finds Pakistan Breached FET, Expropriation and Non-impairment Obligations in the Context of a Mining Joint Venture with Australian Investor Tethyan Copper Company' (Investment Treaty News, 17 December 2019), <https://www.iisd.org/itn/en/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/> accessed 28 September 2024.

77 *Eco Oro Minerals Corp v The Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) para 772.

78 UNCLOS arts 186–89.

international law firm, dispute resolution in the context of deep seabed mining in the Area is very different:

> [D]ispute resolution among sponsoring states and their commercial partners may differ from land-based mining or even seabed mining within the maritime territory. The involvement of the ISA as international regulator interjects an element of uncertainty in the relationship between the sponsoring state and its commercial partner that otherwise would not exist. And it is not clear that the commercial partners have the kind of protection provided by investment treaties that they would within the maritime territory. Most investment treaties expressly apply to a country's "territory," which should include their E[xclusive] E[conomic] Z[one]s and continental shelf entitlements, if applicable. But deep seabed mining occurs outside a state's defined maritime territory and it is not clear that an investment treaty would necessarily apply under those circumstances.[79]

The ISA has not entered into specific investment treaties. It is also unlikely that general international law rules on investment protection – such as the prohibition on uncompensated expropriation – will apply to the legal relationship between the ISA and contractors. Firstly, that is because the customary body of rules on foreign investment protection is addressed exclusively to States. For example, UNGA Resolution 1803 identifies only States as having obligations deriving from permanent sovereignty over their natural resources.[80] The application of international investment law is premised on the existence of State sovereignty and the dichotomy between a national State and a foreign investor. Indeed, foreign nationals deserve special international legal protection because they "are more vulnerable to domestic legislation" and "will generally have played no part in the election or designation of its authors nor have been consulted on its adoption".[81]

Any dichotomy between a sovereign State and a foreign (or local) national is absent in the Area's legal framework, which explicitly excludes the exercise of sovereignty over the international seabed and its resources. As an international organisation created to act on behalf of the entire humankind and to

79 Allen & Overy, 'Deep Seabed Mining: The Next Frontier in Clean Energy Minerals', 9 October 2023, <https://www.allenovery.com/en-gb/global/news-and-insights/publications/deep-seabed-mining-the-next-frontier-in-clean-energy-minerals> accessed 28 September 2024.

80 United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources", at I(4).

81 *James and Others v United Kingdom*, ECHR Appl No 8763/79, Judgement (21 February 1986) para 63.

prevent the affirmation of sovereignty over the international seabed, the ISA does not possess the characteristics of a State (although, as an international organisation, it is a subject of international law). As a part of humankind, the contractor cannot be considered to be "foreign" *vis à vis* the International Seabed Authority. It is relevant in this regard also that an ISA contractor must also be sponsored by a State that is, itself, a member of the ISA, creating a specific contractor-State relationship, outside of the ISA's direct ambit.[82]

Where the ISA is decision-maker-cum-regulator, a dispute would be between an investor (ISA contractor – who may be a private sector entity, a State-owned entity, or a State itself)[83] and an international organisation. Precedents of 'legitimate expectations', applied in disputes involving international organisations, exist. However these do not relate to investment, but rather to internal organisational justice systems.[84] International administrative tribunals have affirmed the protection of legitimate expectations in employment matters, mirroring the elements described in investment proceedings (as set out above) both on the basis of the relevant international organisation's founding statute, and also on the basis of general legal principles such as 'good faith'[85] and 'fairness'.[86] Therefore, there is clear precedent for the principle of legitimate expectations to apply against international organisations when dealing with their agents.

However, aside from the employment context, the applicability of the legitimate expectations doctrine is less clear. In particular, that is true for the decisions adopted by international organisations following a vote by their member states. International administrative tribunals have affirmed that, for a legitimate expectation to exist, "the position in law should not have altered

82 UNCLOS, art 153(2)(b).

83 There also appears to be caution in case law, in extrapolating the application of 'legitimate expectations' to inter-State negotiations (which may also be a relevant analogy for the ISA, should a future dispute involve a State contractor). For example in an ICJ decision, *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v Chile*), Judgment, ICJ Reports (2018) 50, para 162, the Court found no principle in general international law that gave rise to an obligation for Chile to negotiate with Bolivia on the basis of what could be considered legitimate expectations: "it does not follow [from references to legitimate expectation in investment arbitration] that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation."

84 Mathias Forteau, 'Organisations internationales et Sources du droit' in Evelyne Lagrange and Jean-Marc Sorel (eds), *Droit des organisations internationales* (LGDJ 2013) 257.

85 Louise Otis, Jeremy Boulanger-Bonnelly, 'The Protection of Legitimate Expectation in Global Administrative Law' in Georges P Politakis, Tomi Kohiyama, Thomas Lieby (eds), *ILO 100: Law for Social Justice*, (International Labour Office Geneva 2019) 408, citing ILOAT Judgment No 782 (1986).

86 ibid, citing WBAT Decision No 301 (2003) at 24.

between the date of the promise and the date on which fulfilment is due."[87] Rejecting claims that regulatory amendments breached individual legitimate expectations, they considered that there may be no expectation of being treated in a way other than that which the applicable regulations – as amended from time to time – expressly envisage.[88] This limit stems from the "sovereignty" of the governing bodies of international organisations, who enjoy the prerogative of adopting the applicable statutes and regulations.[89] Arguably, such distinction is at the heart of article 17 of Annex III in UNCLOS requiring the ISA to adopt and *uniformly apply* rules, regulations and procedures.[90]

The rejection of this principle by the WTO Appellate Body and the ICJ shows that the doctrine of legitimate expectations is not easily stretched to interstate relations. In *EC – Computer Equipment*, the Appellate Body rejected the concept's application to violation complaints as doing otherwise would "meld the legally distinct bases for violation and non-violation complaints" under the GATT.[91] It also referred to language in article II(5) of the GATT, which speaks of the treatment contemplated by all parties, as opposed to one party's understanding.[92] Previously, GATT panels had considered the concept of reasonable expectation in the context of non-violation complaints under article XXIII of that treaty.[93] It is worth mentioning that UNCLOS does not contain a provision allowing non-violation complaints such as that which brought the notion of reasonable expectations into the orbit of WTO law. Finally, as noted above, the International Court of Justice has held that the acceptance of the doctrine of legitimate expectations in investment treaty arbitration does not entail that "there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation."[94]

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87 *A-K and Others v WHO*, ILOAT, Case No 4527, Judgment (10 July 2022) para 10.

88 *R v Secretary-General*, ATOECD, Judgment, Case No 40 (1999), see also Gieser, ILOAT Judgment No 782 (1986) para 1.

89 Louise Otis, Jeremy Boulanger-Bonnelly, 'The Protection of Legitimate Expectation in Global Administrative Law' in Georges P Politakis, Tomi Kohiyama, Thomas Lieby (eds), *ILO 100: Law for Social Justice* (International Labour Office Geneva 2019) 408.

90 UNCLOS, Annex III, art 17.

91 *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, Appellate Body Report (5 June 1998) para 80.

92 ibid, para 81.

93 ibid, see also art XXIII of the GATT 1947: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of … (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement".

94 *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v Chile*), Judgment, ICJ Reports (2018) 507, para 162.

In this regard it is notable that a decision by the ISA, for example, not to award a mining contract is a political decision of a multilateral treaty body representing diverse and competing interests, and as such may be argued to be distinct from the type of administrative decision taken by a public authority, that would be subject to administrative law. In any event, it seems likely that a tribunal hearing a dispute against the ISA would adhere closely to the obligations placed upon the ISA by its governing treaty, UNCLOS.

An obstacle for a contractor to bring a claim of legitimate expectations against the ISA, may be a lack of contractual or treaty provisions requiring 'fair and equitable treatment', or an 'international minimum standard of treatment'. Though UNCLOS does refer to 'fair and reasonable terms', this is specifically in relation to two circumstances: (i) a joint venture agreement between a contractor and the Enterprise, and (ii) the terms on which the Enterprise or a developing country may seek technology transfer. UNCLOS Part XI also leans heavily on the concept of equity, but this is in terms of sharing of the economic and other benefits of deep seabed mining in the Area with all of humankind and especially developing States, and not in terms of a contractor's rights.

Specific aspects of fair and equitable treatment may be reflected in provisions that regulate the activities of the ISA.[95] For example, when considering whether to recommend approval of a plan of work, the ISA must consider applications in accordance with the uniform and non-discriminatory requirements in its RRPs.[96] Furthermore, it has been observed that the duty imposed on the ISA to "adopt and uniformly apply rules" pursuant to Article 17 in Annex III calls for "a coherent approach to regulation by the Authority in relation to a single operator."[97] Finally, Article 293 of UNCLOS requires treaty-based dispute settlement bodies to apply "other rules of international law not incompatible with" that convention when interpreting and applying it. Nonetheless – unlike with reasonableness, necessity and proportionality – tribunals have never resorted to Article 293 to import legitimate expectations within UNCLOS.[98] From the above analysis, in the absence of a specific treaty

95 Joanna Dingwall, *International Law and Corporate Actors in Deep Seabed Mining*, (OUP 2021) 244.

96 UNCLOS, Annex III, art 6(3).

97 James Harrison, 'Checks and Balances on the Regulatory Powers of the International Seabed Authority' in Alfonso Ascencio-Herrera and Myron H Nordquist (eds), *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority: A Twenty-Five Year Journey* (Brill Nijhoff, 2022).

98 *Duzgit Integrity Arbitration* (*Malta v São Tomé and Príncipe*), PCA Case No 2014-07, Award (5 September 2016) para 209: "The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also

obligation that gives rise to it, it can be difficult to argue that 'legitimate expectations' is a relevant doctrine in the context of the ISA at all. However, noting the possibility (remote as it may be) that a tribunal may find (i) 'legitimate expectations' relevant as an 'established principle of international law' (or as part of a general 'reasonableness' obligation) even absent express treaty obligations, and (ii) that the principle can be applied in the context of decisions of the ISA (as an intergovernmental organisation), we will now consider the circumstances in which legitimate expectation may or may not be established in the context of ISA decision-making.

6 Applying the 'Legitimate Expectations' Doctrine to the ISA Exploitation Contract Context

6.1 *Scope of the Issue*

In the event that an exploration contractor is prevented from moving to an exploitation contract by a decision of the ISA, there are potentially three separate types of dispute claims that could be brought: (i) applicant vs ISA; (ii) sponsoring State vs ISA; (iii) applicant vs sponsoring State. The grounds, fora, available remedies and prospects for success, for each type of claim may differ. This paper considers just the first of these options.[99]

There are also different reasons why or how the applicant may be prevented from moving to an exploitation contract by a decision of the ISA. An understanding of the decision-making process at the ISA, the 'two-year rule', and current movements towards a moratorium, are relevant to these scenarios.[100] Details are set out in Table 1.

governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality. These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention."

99 See supra (n 13).

100 For more detailed analyses on these issues, see Pradeep Singh, 'The Invocation of the "Two-Year Rule" at the International Seabed Authority: Legal Consequences and Implications' (2022) 37(3) International Journal of Marine and Coastal Law 375–412, <https://doi.org/10.1163/15718085-bja10098>, and Pradeep Singh, 'What Are the Next Steps for the International Seabed Authority after the Invocation of the "Two-year Rule"?' (2022) 37(1) International Journal of Marine and Coastal Law 152–165, <https://doi.org/10.1163/15718085-bja10078> both accessed 28 September 2024.

TABLE 1 ISA decision-making processes, the two-year rule, a potential moratorium at the ISA

ISA Decision-making on Development of RRPs:
- The Council (based on an advanced draft prepared by its subsidiary organ, the Legal and Technical Commission or 'LTC') negotiates the RRPs and decides on their adoption. The adoption of the RRPs at the Council requires consensus. This means just one member State out of the 36 in the Council can raise an objection and thereby block the adoption of the regulations. This scenario was one of the reasons why a provision known as the "two-year rule" was inserted in the 1994 Agreement, to address the prospect that just one State could hold everyone back (see below).
- Once the RRPs are adopted by the Council, they will then go to the Assembly for their approval. Meanwhile, the Council can provisionally apply the RRPs pending the Assembly's approval.
- The Assembly does not have the power to reject the Council's adopted RRPs outright, but may send them back to the Council with recommendations that the Council is expected to incorporate. In practice to date, the Assembly approved the three sets of exploration regulations adopted by the Council without significant debate.

ISA Decision-making on an Application for the Approval of a Plan of Work:
- An application for a plan of work will go to the LTC for review. The LTC has the role of evaluating the application based on the criteria contained in the RRPs and UNCLOS and providing appropriate recommendations to the Council.
- As a general rule the LTC aims for consensus but may resort to voting by majority of members present.[a]
- If the LTC recommends approval of a plan of work, the application goes to the Council for consideration with the default position that the application is approved, unless the Council decides to overturn that recommendation with a super majority (requiring support from two-thirds of the Council's members present and voting, and also a majority in each of the four different voting chambers of the Council, which represent different interest groups).[b]
- If the LTC does not recommend approving an application or decides to give no recommendations, the default is that the application will be rejected unless the Council decides to reverse that recommendation and approve the application by a two-thirds majority.
- The Assembly does not play a role in the consideration and approval or rejection of individual applications for an approval of a plan of work (and contract).[c]

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a ISA, 'Decision of the Council of the Authority Concerning the Rules of Procedure of the Legal And Technical Commission' ISBA/6/C/9, July 2000, <https://www.isa.org.jm/wp-content/uploads/2023/05/isba_6_c_9_rop_of_ltc.pdf> accessed 28 September 2024.

b 1994 Implementation Agreement, Annex, s 3.

c ibid.

TABLE 1 ISA decision-making processes, the two-year rule, a potential moratorium at the ISA (*cont.*)

The 'Two-year Rule':

- Section 1, paragraph 15 of the 1994 Agreement allows any member State of the ISA whose national intends to conduct exploitation activities to submit a notice to the Council requesting for the RRPs to be adopted.
- Once such a request is made, the provision requires the Council to complete the adoption of the RRPs in two years but goes on to stipulate that if the two-year deadline has expired and the RRPs remain incomplete, applications can be submitted, considered and approved (provisionally) by the ISA, notwithstanding the RRP's absence.
- Section 1, paragraph 15 was invoked by Nauru in 2021 and the two-year prescribed time expired on 9 July 2023. As such, the possibility of an application being submitted in the absence of RRPs now looms over the Council.
- During discussions in the July 2023 session of the Council, delegates proposed that, were an application received before the RRPs were adopted, its review could be postponed, pending completion of the RRPs.[d] The Government of Nauru raised concern about this proposal, noting "legitimate expectations" under UNCLOS, espousing its sovereign right, to be able to sponsor an application for exploitation and to have it considered for approval, that would be breached if Member States were to refuse to consider the application once received.

Moratorium

In a response to the push by some actors to transition to exploitation of the minerals of the Area, thirty-two ISA member States (including a quarter of ISA Council's membership: Brazil, Canada, Fiji, France, Germany, Costa Rica, Mexico, Spain, UK), have expressed their national position to be in favour of a ban, moratorium or 'precautionary pause' on exploitation, unless and until certain conditions are met.[e]

d See 'Co-Facilitators' Second Briefing Note to the Council on the Informal Intersessional Dialogue Established under Council Decision ISBA/27/C/45 and Council Decision ISBA/28/C/9' available at <https://www.isa.org.jm/wp-content/uploads/2023/07/Co-Facilitators-Second-Briefing-Note.pdf> accessed 28 September 2024. Formal decisions of the Council also have clarified the intention that commercial exploitation of mineral resources in the Area should not be carried out in the absence of RRPs relating to exploitation (see ISBA/28/C/5 (n 8)).

e Deep Sea Conservation Coalition, 'Voices Calling for a Moratorium, Governments and Parliamentarians', <https://deep-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/governments-and-parliamentarians> accessed 6 August 2024.

Table 1 shows that the following situations may arise, in which a contractor may wish to bring a claim against the ISA for failure to grant an exploitation contract:

(i) Council rejecting (or refusing to consider) an application for exploitation in the absence of RRPs, by Council either:

  a. agreeing with a recommendation of the LTC (or where the LTC gives no recommendations) to refuse the application; or
  b. disagreeing with a recommendation of the LTC to approve the application.

(ii) Council accepting and provisionally approving a plan of work but subsequently refusing a contract or withholding permission for commercial-scale mineral extraction;

(iii) inability of ISA to adopt RRPs due to absence of consensus, or RRPs adopted by the ISA that contain standards or requirements that the contractor deems impossible to achieve, preventing the contractor from making an application;

(iv) rejection of an application considered against the RRPs, either:
  a. agreeing with a recommendation of the LTC to reject the application; or
  b. disagreeing with a recommendation of the LTC to approve the application; and

(v) a policy decision by Council or Assembly to impose a form of moratorium that prevents the grant of exploitation contracts.

With each of these scenarios in mind, the following sections will consider the factual circumstances that a contractor might attempt to rely on in bringing a claim against the ISA.

6.2 *Factual Circumstances: Is There an Expectation, from a Legitimate Source?*

Following the criteria for legitimate expectations outlined above, it is first necessary to consider whether the ISA has made a specific representation to exploration contractors that gives rise to an expectation of rights relating to future exploitation, and whether that comes from a legitimate source. As noted above, the ISA operates under the regulatory framework conferred upon it by UNCLOS Part XI. UNCLOS (and the 1994 Agreement) is explicit in providing the constraints and guardrails upon which member States are to negotiate, agree and adopt RRPs for exploration and exploitation. It is therefore a credible source for contractors to turn, in seeking an understanding of the legal regime in which they operate. In Table 2, we consider whether UNCLOS contains any provisions that may be taken as giving rise to an expectation.

The excerpts in Table 2 demonstrate that, for any ISA exploration contractor wishing to move to exploitation, there will be an application process, subject to procedures and criteria (some of which are to be determined via RRPs over time), which may lead to a decision either of approval or rejection. From this, and seeing nothing in the Exploration Regulations or other

TABLE 2

UNCLOS	Commentary: does this give rise to an expectation?
Article 153(6) provides that an ISA 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*" (and UNCLOS Annex III, Article 16 provides "*the operator shall have security of tenure in accordance with article 153, paragraph 6.*")	While this demonstrates that an existing contract can only be suspended or terminated in limited circumstances (set out in UNCLOS Annex III, Articles 18 and 19, requiring serious, persistent and wilful violation by contractor), it also indicates that the rights of contractors to claim security of tenure are limited to those specific provisions of UNCLOS. In this case, an exploration contractor would have security of tenure over an existing or concluded exploration contract. The provision does not apply to an application for the approval of a plan of work; and clearly does not confer any express right to move from exploration to exploitation phase.
UNCLOS Annex III, Articles 3, 4, 6(2) and 6(3) set out that exploitation may only be carried out in accordance with a Plan of Work approved by the ISA in accordance with its RRPs, which shall include specific qualification procedure and standards, relating to the financial and technical capabilities of the applicant and performance under any previous contracts, as well as additional requirements that the ISA can set in RRPs. Article 6(3) also specifies that those requirements shall be applied in a uniform and non-discriminatory matter.	This indicates that a separate application and evaluation process is required, before any applicant would be awarded a right to exploit, and that process will be overseen by relevant organs of the ISA. It indicates that evaluation criteria for an application can be developed over time by the ISA as it negotiates and adopts RRPs. It does not suggest a general presumption of eligibility for a mining contract, though Article 6(3) does state that a Plan of Work that conforms to the relevant requirements 'shall' be approved by the ISA. However, determining whether or not requirements have been met is a subjective question, and the ISA member states can prescribe all such procedures, conditions or safeguards as may be deemed necessary through the promulgation of RRPs.

TABLE 2 (*cont.*)

UNCLOS Annex III, Article 10 gives an exploration contractor '*a preference and priority among applicants for a plan of work covering exploitation of the same area and resources*', and also indicates that the preference or priority may be withdrawn if the applicant's previous performance has not been satisfactory (i.e. the contractor failed to comply with the requirements of an approved plan of work previously).	This 'preference and priority' clause is limited to a very specific situation in which more than one applicant applies for the same mineral resources in the same site. This does not appear to provide any particular representation about rights to exploitation.
UNCLOS Annex III, Article 17 reiterates that the ISA shall 'adopt and uniformly apply' RRPs.	This can give rise to an expectation that RRPs for exploitation will be adopted at some point, and that an individual contractor may expect to be treated the same as any other applicant/contractor in the way that the rules are applied, including those RRPs about evaluation of a contract application and contract award for exploitation. However, what this provision seeks to ensure is equality of treatment among applicants and to prevent discriminatory treatment. Uniformity in the application of rules may also imply a coherent approach to regulation in relation to a single operator, so that the ISA must be consistent in its treatment of a contractor over time.[a] However, the 'uniform application' rule does not confer any expectation to be able to conduct exploitation activities.

a James Harrison, 'Checks and Balances on the Regulatory Powers of the International Seabed Authority' in Ascencio-Herrera and Nordquist (n 97).

TABLE 2 (*cont.*)

1994 Agreement Annex s.3(11) requires the LTC to make a recommendation, and then the Council to take a decision, whether to approve or disapprove an application for the approval of a plan of work.	This wording indicates that the LTC and/or the Council may opt for a disapproval of an application for a plan of work. The same section of UNCLOS does give a presumptive right for an applicant to have its application accepted, in the event that the LTC recommends approval and the Council does not vote against that recommendation or exceeds a prescribed period without making a decision (which, in the case of the latter, the Council may decide to extend, without any maximum limit imposed).
1994 Agreement Annex s.71(9) states that "Upon the expiration of a plan of work for exploration, the contractor shall apply for a plan of work for exploitation unless the contractor has already done so or has obtained an extension for the plan of work for exploration." [emphasis added]	The use of 'shall' in this provision could be taken to suggest that the move from exploration to exploitation is not only expected, but in fact mandatory: the only two options identified are: extension of exploration, or proceeding to exploitation. This interpretation may be doubtful, as it would remove a contractor's freedom to explore and then decide not to move to exploitation at that time; or to await completion of the exploitation RRPs before making an application (given that UNCLOS also expressly requires applications to be evaluated against such RRPs, to ensure conformity).[b] (The potential exception provided by the 'two-year rule' is discussed above). But even if correct, it confers upon the exploration contractor the opportunity to apply. It places no onus (or expectation) on the ISA to approve.

b UNCLOS art 165(2)(b): the LTC is specifically required by UNCLOS to '*base its recommendations solely on the grounds stated in Annex III and shall report fully thereon to the Council;*'. The Annex III grounds refer multiple times to criteria and requirements contained in '**relevant RRPs**'. This point was also referenced in the March 2023 Co-Facilitators' Briefing Note to the Council on the Informal Intersessional Dialogue Established by Council Decision, ISBA/27/C/45, <https://www.isa.org.jm/wp-content/uploads/2023/03/Co_Facilitators_Briefing_Note.pdf> accessed 28 September 2024.

official instruments of the ISA that fetters discretion, it seems that an exploration contractor cannot legitimately expect an automatic right to be granted an exploitation contract by the ISA.

Generally speaking, a contractor may, however, anticipate the following: (a) RRPs for exploitation to be adopted once agreed upon by member states, (b) a right to submit an application for consideration pursuant to the relevant RRPs, (c) that an application would be considered in a uniform and non-discriminatory manner according to the requisite process and criteria, and (d) that the application should be approved through the voting procedures of the Council, if all relevant criteria are met.

This is different, however, from an expectation about *how* UNCLOS will be implemented, where there is an element of discretion on the part of member States. There is no guarantee provided in UNCLOS that the RRPs or ISA policy will ensure mining in the Area is achievable or viable for all potential contractors. There is also a temporal dimension. While there may be an expectation that mining will take place, there is no expectation that there will be mining now rather than later. It may be that standards are set e.g. to respect environmental protection imperatives, which are not achievable now, but which are realistically achievable in the future.

In this regard, although still unsettled and subject to negotiation, it is interesting to note that (at the time of writing) the draft text of the Exploitation Regulations contain a raft of different assessment criteria for an application for a mining contract, some of which may be very difficult to meet (e.g. ambitious and exacting environmental safeguards, compulsory insurance coverage that may not be available or may be prohibitively expensive), and/or some of which may be outside of an applicant's own control (e.g. the sites must be located within the coverage of a regional environmental management plan adopted by the ISA – who has only adopted such a plan for one geographical site out of four in which exploration currently takes place).[101] Whether the royalty rate is set at 2% or 30% surely will also be a decisive factor in the viability of an exploitation project.[102]

101 See the current iterations of draft Regulations 13 and 15, <https://www.isa.org.jm/wp-content/uploads/2023/10/IWG_IM_CoFacilitators_Text_Oct23.pdf> accessed 28 September 2024.

102 See 'Outcomes of the Intersessional Working Group on a Mechanism to Develop Equalization Measures for the Open-Ended Working Group on Financial Terms of Contract', 4, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.isa.org.jm%2Fwp-content%2Fuploads%2F2023%2F10%2FReport-Equalization-Measure.docx&wdOrigin=BROWSELINK> accessed 30 April 2024.

6.3 *Factual Circumstances: Is There an Investment?*

Thirty-two exploration contracts have been awarded by the ISA (to 22 different contractors) since 2001, with 30 contracts subsisting today (and one withdrawn, and another recently approved but pending contract negotiation and signature at the time of writing).[103] Legitimate expectations under investment law principles naturally requires evidence of an investment. An exploration contract's programme of scientific work and analysis can be costly, not least given the working conditions and technology required for scientific surveys at remote locations and at extreme depths. One ISA contractor has publicly reported their estimated total expenditure over a 20-year exploration period as around €40m (~US$43m)[104] another cites ~US$150 million.[105] As exploration in the Area is non-revenue-generating but aimed at future mining, it seems reasonable to presume that such level of investment is based on some kind of presumption about the ability to mine in the future. Though (as noted in the analysis above, from investment law precedents) the timing is relevant. Investment in this ISA context has been taking place for years, in some cases decades, before the ISA even began to discuss the regime for future mining.

6.4 *Factual Circumstances: Reasonableness of the Investor's Reliance*

There are some questions about the reasonableness of any reliance by an ISA contractor upon a particular expectation, even if derived from UNCLOS. Relevant factors here are that the ISA's regulatory regime for mining is yet to be developed; and will require consensus from a diverse and numerous membership of States with different interests and priorities, operating in an evolving socio-political environment, and in a triple planetary crisis in which concerns about ecological impacts have become priorities on the global agenda.[106] In such a context, trying to predict how such RRPs will land, can only be a matter of speculation up to the point they are finally adopted. To rely upon the

103 ISA, Exploration Contracts (n 6). See also <https://www.isa.org.jm/wp-content/uploads/2024/07/ISBA_29_C_23-AUV.pdf> accessed 28 September 2028, regarding the most recent approval from July 2024.

104 BGR, ISA Contract for Exploration – Public Information Template, Annex, ACM/2019/03, <https://www.isa.org.jm/wp-content/uploads/2023/05/Public_information_on_contracts_BGR_PMN_2023.pdf> accessed 28 September 2024.

105 The Metals Company, 'Researchers to Return to the Site of NORI's Nodule Collection System Test to Assess Seafloor Ecosystem Function A Year After the Test' (2023) at <https://investors.metals.co/news-releases/news-release-details/researchers-return-site-noris-nodule-collection-system-test> accessed 28 September 2024.

106 United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, <https://sdgs.un.org/2030agenda> accessed 28 September 2024.

mining regime being crafted in any particular way, or to presume the ability to get a mining application approved, would not seem reasonable action from a prudent investor in those circumstances. Indeed, having been aware of these circumstances, it can be contended that there was a calculated and voluntary assumption of risk on the part of exploration contractors and their investors in deciding to apply for an exploration contract despite having no knowledge on how long it would take member States to agree on regulations and how ambitious or demanding they would be.

Contractors would have been aware of uncertainties when they acquired exploration rights over the international seabed, including the incompleteness of the legal framework (as discussed above). UNCLOS and its related instruments have left many crucial questions open to successive negotiations.[107] It is interesting to note in this regard that in 2023, the LTC reported that some contractors "had indicated in their annual reports that the absence of a regulatory framework for exploitation had created legal uncertainty and served as an obstacle to proceeding with certain aspects of their plans of work, as a result of which they intended to limit efforts and focus mainly on desk-based study work."[108] This rather suggests that some contractors in deep seabed mining at this time *are* sufficiently aware of uncertainties about future exploitation, so as to reduce expenditure.

As noted above, the RRPs must include measures to ensure the effective protection of the marine environment from the harmful effects of any mining activities in the Area. How this will be operationalised in practice through the RRPs is not possible to predict and is subject to the ISA's negotiations. The RRPs must be informed by best environmental practices, techniques and information.[109] But at this time, there are the glaring gaps in the scientific knowledge of deep-sea ecosystems[110] – *a fortiori* in the earlier years when

107 Including elements that are outside the exploitation regulations themselves, but are also required by UNCLOS, including agreement on an equitable mechanism for the sharing of benefit, the development of a system of compensation to land-based mining developing countries, and operationalization of the Enterprise.

108 Report of the Chair of the Legal and Technical Commission on the Work of the Commission at the Second Part of its Twenty-eighth Session, ISBA/28/C/5/Add.1, para 15 <https://www.isa.org.jm/wp-content/uploads/2023/07/2313299E.pdf> accessed 28 September 2024.

109 Xiangxin Xu, Minghao Li and Guifang Xue (2023) 'Operationalization of the Best Available Techniques and Best Environmental Practices in Deep Seabed Mining Regime: A Regulatory Perspective' (2023) 10 <https://doi.org/10.3389/fmars.2023.1153104> accessed 28 September 2024.

110 See Diva Amon and others, 'Assessment of Scientific Gaps Related to the Effective Environmental Management of Deep-seabed Mining' (2022) 138 Marine Policy 105006.

exploration contracts were granted by the ISA. Contractors have themselves highlighted current gaps in knowledge, and how these may hinder rule-making and future mining decisions.[111] The precautionary principle has also been given prominence within the Area's legal framework.[112]

Interestingly, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which has jurisdiction under UNCLOS in relation to the ISA, observed that "it is to be expected that the Authority will either repeat or further develop [the precautionary] approach when it regulates exploitation activities and activities concerning other types of minerals [emphasis added]."[113] Indeed, stakeholders may reasonably argue an expectation that the ISA's Exploitation Regulations, once adopted, should align with applicable international norms. In this context, UNCLOS Part XI does not operate in isolation. ISA member States are also signatory to other international instruments and participate in other international processes, addressing matters that intersect with the ISA's competence, including, inter alia, sustainable development, climate change, protection of biodiversity, prevention of pollution, Indigenous and other human rights. States will therefore need to interpret their obligations at the ISA in a way that integrates commitments made at, and evolving norms from, such other multilateral processes, many of which can be seen to militate towards conservation rather than exploitation.[114]

Indeed, the various calls for a precautionary pause which, made by various States, as well as international society, and members of the scientific community may be seen as a development of the precautionary approach, in the current state of scientific uncertainty.[115] Just like the *Philip Morris v Uruguay*

111 For example: "Deep seabed mining is not settled science. There are gaps in knowledge and until these gaps are addressed it is not possible for final conclusions to be drawn about the appropriateness or otherwise of obtaining minerals from the seabed. Independent scientific research into the environmental effects of deep seabed mining is essential for good decision-making and well-informed regulation." Ocean Mining Intel, 'Deep Seabed Mining Exploratory Mission Begins' (12 April 2021), <https://oceanminingintel.com/news/industry/deep-seabed-mining-exploratory-mission-begins> accessed 26 April 2024.

112 Draft Regulations on Exploitation of Mineral Resources in the Area, ISBA/25/C/WP.1, Regulation 2(e)(ii) on Fundamental Policies and Principles: "The application of the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development."

113 Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011 (1 February 2011) para 130.

114 Pradeep Singh and Aline Jaeckel, 'Undermining by Mining? Deep Seabed Mining in Light of International Marine Environmental Law' (2024) 118 AJIL Unbound 72–77. doi:10.1017/aju.2024.8.

115 Douglas and others (n 4) para 100. Different actors' and sector's call for a precautionary pause can be seen on the website of the Deep Sea Conservation Coalition here <https://deep

tribunal, one may conclude that "in light of widely accepted articulations of international concern […], the expectation could only have been of progressively more stringent regulation."[116] It seems likely that a decision by the ISA (to adopt regulatory standards that an applicant is not able to meet, a decision to reject a mining application after objective and uniform evaluation, or even a decision to delay a decision upon a mining application), may not support a claim of legitimate expectations. Relying on that occurrence, in an operating context of such extreme and publicly acknowledged scientific and regulatory uncertainty (and public interest), and evolving international law, would be unreasonable.[117]

Furthermore, it has been noted that "international organization responsibility might be invoked if the ISA were to issue mining licenses that failed to adequately consider its international legal obligations to protect the marine environment and human life, [and] to act on behalf of mankind as a whole […]".[118] Member States of the ISA may then, with potential exposure to litigation in mind, be more motivated to reject, rather than to approve, early applications for mining in the Area.

Rather than expecting specific rules or decision-making by the ISA in its favour, it may be more reasonable for a contractor to rely upon an expectation that an application for mining will be received, evaluated and decided upon in accordance with prescribed criteria, that are applied in a uniform and non-discriminatory manner to each contractor. In this context, a decision by the ISA that outright prevented such evaluation (e.g. in the event of a moratorium or ban decision from Council or Assembly) may be one circumstance in which an applicant could argue a frustration of their legitimate expectations to have a fair evaluation of their application.

-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/> accessed 16 February 2024. *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 394: "Uruguay's measures were adopted based on the substantial body of evidence that had been made available in the course of its active participation in the [Framework Connection on Tobacco Control] negotiations and in the drafting of implementing guidelines through the newly created Advisory Commission."

116 ibid, para 430.

117 Amon and others (n 110).

118 Cymie Payne, 'State Responsibility for Deep Seabed Mining Obligations' in Virginie Tassin Campanella (ed), *Routledge Handbook of Seabed Mining and the Law of the Sea* (Routledge 2023). See also, Singh (n 9) 12: "[favouring] mining applicants would expose the Authority to potential litigation from dissatisfied member states that should be able to argue convincingly that the Authority is not in a position to allow mining activities to commence, and certainly not in the absence of regulations".

Similarly, a claim of legitimate expectations may arise (though potentially could end up being unsuccessful) if the ISA were to decide under the two-year rule to provisionally approve a plan of work but then subsequently decides to withhold the granting of a contract or specific permission for commercial extraction to commence, either indefinitely or until RRPs are adopted. It is hard to say with certainty at this stage whether a court would find such a claim reasonable, or what remedies would be appropriate. Not least as this would be only a temporary deferral. Also, as UNCLOS is explicit in that mining applications are to be considered and decided upon based on the relevant RRPs, it would seem advantageous in fact for any investor to await adoption of those RRPs, before applying. This means it is hard to quantify what advantage or benefit would be lost should the ISA prove unwilling to evaluate an application in the RRP's absence. The applicant would perhaps need to show a legitimate and reasonable reliance on a particular time-frame from the ISA, which may be more difficult to justify, given the slow and unpredictable nature of ISA negotiations. Therefore, for the Council to reject an application for exploitation submitted under the two-year rule and in the absence of RRPs can be argued to be a defensible decision. Indeed, the converse decision, i.e. approving an application in the absence of RRPs, might in turn expose the ISA to potential litigation from its own member States.

7 Forum

In the above analysis, we find significant challenges for an exploration contractor or other exploitation applicant at the ISA seeking to establish legal or factual grounds for a legitimate expectation to mine. This section considers how such a claim may be dealt with, if brought nonetheless.

There have been no legal challenges against ISA decision-making to date, so how any such claim by a contractor may play out remains uncharted territory. UNCLOS Part XI does seem clear that the appropriate forum would be the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea ('SDC'): a specially created body specifically for disputes relating to the ISA's jurisdiction and activities in the Area.[119]

Article 187(b) of UNCLOS allows States parties to challenge ISA decision-making before the SDC. However, it is unclear whether Article 187(b) allows a State claim, on behalf of the prospective contractor, akin to diplomatic

119 UNCLOS arts 186–189.

protection.[120] Even though Part XI does not address explicitly the interaction between remedies for contractors and for States, some inferences may be drawn from the treaty provisions on the participation of sponsoring States to disputes. Under Article 190(1), a sponsoring State shall be given notice of and may intervene in disputes involving its sponsored entity. In claims made under Article 187(c) (only), a sponsoring State sued by a person sponsored by another State may require that the claimant be substituted by the latter's sponsoring State.[121] It is telling that this substitution is only possible for a narrow category of contract-based disputes involving sponsoring States. Aside from this case, it seems that UNCLOS considers the rights and duties of contractors (i.e. contractual obligations) and of sponsoring States (i.e. obligations under international law) to be separate and vindicated by distinct remedies. In any way, the contractors' own access to the dispute settlement mechanisms under Part XI makes this type of claim less attractive.

Notwithstanding the above, any State party (including the sponsoring state of an unsuccessful applicant), may yet decide to commence separate litigation against the ISA under Articles 187(a) and (b) with respect to disputes pertaining to the interpretation and application of the provisions of UNCLOS and the 1994 Agreement, as well as for any acts or omissions on the part of the ISA that are allegedly in excess of jurisdiction or an abuse of power. Such litigation may be commenced by State parties against the ISA independently of a claim by a prospective contractor or unsuccessful application. Nevertheless, it would seem unlikely that the doctrine of legitimate expectations would form a central part of such proceedings between a State party or parties and the ISA.[122]

On the contrary, an aggrieved applicant of a plan of work for exploitation would likely resort to Articles 187(c) or (d) of UNCLOS of UNCLOS.

120 Under general international law, the home State of a corporation's shareholder has no standing to pursue a claim based on harm suffered by a corporation with another nationality. This situation will differ only for state measures aimed at the direct rights of the shareholder such as for instance the right to dividends. See *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports (1970) para 46. However, note that under Article 11(b) ILC Draft Articles on Diplomatic Protection, "the State of nationality of the shareholders may seek diplomatic protection for injury to the local subsidiary where incorporation in that State was required by it as a precondition for doing business there." However, the legal status of this exception is not clear, albeit it was applied by the ICJ in *Ahmadou Siado Diallo* (*Guinea v Democratic Republic of Congo*) (Preliminary Objections) [2007] 10 Rep 582, para 92.

121 UNCLOS art 190.

122 And if so raised as a cause of action, the argument on legitimate expectations could likely end up being unsuccessful, premised on the earlier discussed 2018 precedent of the International Court of Justice in the Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v Chile*) case.

Article 187(c) deals with disputes among parties to a contract, which clearly presumes the existence of a binding contract with the ISA. The said provision anticipates two scenarios: first, under sub-paragraph (i), 'concerning the interpretation or application of a relevant contract or a plan of work', and second, under subparagraph (ii), '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'.

Under the present circumstances under discussion here, there is no exploitation contract in place (given that the application for the approval of a plan of work is unsuccessful); however, the possibility to commence action premised on the existing exploration contract cannot be excluded, at least in theory. The likely argument here would be that the conduct of activities under an exploration contract with the ISA gives rise to the expectation on the part of the said exploration contractor to eventually be eligible to apply for exploitation, in which case, the avenue under Article 187(c)(ii) would seem appealing to the exploration contractor as a matter 'directly affecting its legitimate interests'. Here, it is important to take cognizance of Section 1(9) of the Annex to the 1994 Agreement, which provides that upon the expiry of a plan of work for exploration, the exploration contractor 'shall apply for a plan of work for exploitation unless the contractor has already done so or has obtained an extension for the plan of work for exploration'.[123]

Be that as it may, UNCLOS also prescribes that activities in the Area, which includes exploitation, shall be carried out in accordance with the relevant RRPs adopted by the ISA.[124] In other words, exploration contractors should not expect, as a legal right, that they will be allowed to proceed with commercial exploitation for as long as the RRPs remain absent.[125] Likewise, even if and once the RRPs do come into existence, and an application for exploitation is rejected thereunder, it would seem inappropriate for an action to be brought by the frustrated applicant under Article 187(c) and premised on an existing exploration contract, simply because of the absence of any specific clause in the exploration contract that purports to guarantee the transition from exploration to exploitation.

In any case, UNCLOS Article 187(d) may be of greater relevance to an (unsuccessful) applicant for exploitation because it specifically gives the SDC

123 As discussed earlier, being eligible to submit an application does not mean that there is a corresponding legal expectation for approval from the ISA.

124 See UNCLOS art 137(2), among others.

125 This position that commercial exploitation should not commence in the absence of RRPs for exploitation has been confirmed by the Council in two decisions that were adopted in July 2023 (see ISBA/28/C/24 and ISBA/28/C/25).

jurisdiction to hear disputes between the ISA and a prospective contractor ‘concerning the refusal of a contract or a legal issue arising in the negotiation of the contract’ (provided the applicant has met State sponsorship requirements, and supplied the undertakings and application fee required by Annex III to UNCLOS Articles 4(6) and 13(2), respectively). Indeed, Section 3(12) of the Annex to the 1994 Agreement also confirms that ‘where a dispute arises relating to the disapproval of a plan of work, such dispute shall be submitted to the dispute settlement procedures set out in [UNCLOS]’. Consequently, Article 187(d) would appear to confer standing to a frustrated exploitation applicant to bring a claim against the ISA, which would allow for the case to be heard on its merits.

Procedurally speaking, the availability of the option(s) to litigate under Article 187(c) and/or under Article 187(d) could prove to be significant. In this respect, Article 188(2) of UNCLOS provides that any dispute concerning the interpretation or application of a contract under Article 187(c)(i) shall, at the request of any party to the dispute, be submitted to binding commercial arbitration. Interestingly, this privilege to unilaterally refer a dispute to binding commercial arbitration under Article 188(2) appears to be restricted to the litigation avenue provided for under Article 187(c)(i), and does not extend to Articles 187(c)(ii) or 187(d). As discussed above, the latter two provisions are the ones that would seem to be more applicable to the present context. In any case, in the context of the submission to private commercial arbitration based on a unilateral request pursuant to Article 187(c)(i), or even if there is mutual consent to opt for this avenue (which is hard to imagine in the present context), it is clear under Article 188(2)(a) that the ‘commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of [UNCLOS]’. The provision goes on to provide that where ‘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 SDC for a ruling’.[126]

Consequently, it would seem highly likely that any dispute between a frustrated exploitation applicant and the ISA premised on the doctrine of legitimate expectations would fall for determination by the SDC, and not private arbitration. In other words, any attempt to try to adjudicate the matter

126 Article 188(2)(b) further stipulates as follows: ‘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 SDC, the arbitral tribunal shall refer such question to the SDC for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the SDC’.

through commercial arbitration would almost certainly be met by strong resistance and face legal challenges, with the likely outcome being that the matter will be left to the SDC for adjudication. This could carry certain repercussions, because generally speaking, contractors, as well as prospective ones and unsuccessful applicants, would almost always favour alternative dispute resolution means like private arbitration, which are perceived as being better suited for commercial reasons, as opposed to other (public) dispute settlement bodies. As discussed earlier, arbitral proceedings might even be more inclined to sympathise with preserving private commercial interests and amenable to embracing the doctrine of legitimate expectations, as opposed to international judicial bodies.

Substantively speaking, even with this right to submit a claim to the SDC,[127] there are further questions around the matters that the SDC can properly adjudge. Article 189 of UNCLOS imposes limitations on the jurisdiction of the SDC with regard to decisions of the ISA and the subject matter of the SDC's jurisdiction.[128] In particular, the SDC cannot review a decision by the ISA that is taken in proper exercise of its discretionary powers, nor consider whether any RRPs of the ISA are valid and lawful. This suggests that a decision, properly taken with due procedural propriety, by the ISA's Council not to grant an exploitation contract under adopted RPPs, may not be successfully challenged before the SDC. The contractor would instead need to show that the ISA has acted with 'excess of jurisdiction or misuse of power' [Article 189]. An example of this may be where the LTC's process of evaluation (which results in a recommendation to reject the application) were found to be flawed. Another example may be where the ISA had failed even to receive and evaluate an application for exploitation or has rejected an application in the absence of RRPs under the two-year rule. It remains unclear however whether or how an applicant could introduce to the SDC arguments of 'legitimate expectations' and claims for resulting damages. The SDC's subject matter jurisdiction is Part XI of UNCLOS, which (as noted in section 5(iii), above) contains no 'fair and equitable treatment' or equivalent provision to those in investment

127 Although, it is worth contemplating whether those provisions in Article 187(d) of UNCLOS and Section 3(12) of the Annex to the 1994 Agreement were inserted by the drafters with the thought in mind that that these situations of rejection of an application would apply where RRPs are in place (as opposed to situations under the two-year rule where regulations remain absent).

128 Pradeep Singh, 'Commentary: Can the Invocation of the 'Two-year Rule' at the International Seabed Authority be Challenged?' (*DSM Observer*, 30 September 2021), <https://dsmobserver.com/2021/09/commentary-can-the-invocation-of-the-two-year-rule-at-the-international-seabed-authority-be-challenged/> accessed 28 September 2024.

law treaties that have given rise to legitimate expectations arguments from a frustrated investor.

To conclude this section on a more practical note, it seems more probable that frustrated exploitation applicants would attempt to exhaust all available political means as a first option, as well as to accept the initial rejection and work towards submitting a revised application as a second option, before turning to legal means like dispute resolution as a last resort. This includes working together with the sponsoring state(s) and other states to influence the direction of the political organs of the ISA, the Council and the Assembly, to push for more legal certainty, as well as safeguards and favourable measures to preserve the commercial interests of exploration contractors wishing to transition to exploitation. As noted earlier, due to the power dynamics and voting structures of the ISA organs, especially the Council, political support is indispensable in order to further consolidate any commercial rights and interests that can then be legally defensible. Nevertheless, as also discussed above, it is noteworthy that there is also a strong and increasingly growing movement at the opposite end of the spectrum, led by State parties aiming to set high standards for environmental protection and equity, and to consequently resist the commencement of exploitation activities until appropriate RRPs that are effective, enforceable and backed by robust science are agreed to and put in place.

8 Remedies

Following from the above section, an obvious question that arises concerns the remedies which may be awarded should a 'legitimate expectations' claim be accepted, and then prove successful. Article 189 of UNCLOS refers 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', indicating SDC's power to award remedies. The *travaux préparatoires* for UNCLOS also indicate an intention that the SDC would be able to set aside decisions that were adjudged to have been unlawfully taken.[129] But there is no further detail given in UNCLOS, nor is

129 Alexander Proelss and others, *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017) and UNCLOS III, Informal Single Negotiating Text (Part I), UN Doc A/Con A.62/WP.8/Part I (1975) or IV, 137, 147 (Article 58).

additional information on the SDC's approach or powers to award remedies contained in SDC procedural documents.[130]

In the event that the SDC does find it has the power to revisit and question a decision of the ISA to reject an application, it remains unclear what the SDC might do next. One likely option would be to make a finding that there has been an act committed in the excess of jurisdiction and simply refer the matter back to the relevant organ of the ISA for reconsideration.[131] If, as considered above, a claim were to be brought by a contractor against a decision by the ISA that prevented any evaluation at all of its application for exploitation, this may be one circumstance in which a the SDC could order the ISA to act in a certain way, i.e. to order the Council to consider and make a determination on the application (which must be differentiated from an order for the Council to decide on the application in a particular way).

Imposing a remedy of specific performance or injunctive relief (i.e. ordering the ISA to approve an application), does not seem legal or practicable in the circumstances (and has been described as 'legally impossible' in similar cases in international investment tribunals).[132] Only the ISA – as opposed to the SDC – has the power to "organise and control" activities within the boundaries set by UNCLOS and its related instruments.[133] In other words, it carries out the administration of the Area while the SDC interprets the law and sees that it is obeyed. Such situation is not dissimilar from that of national administrative laws, whereby courts "are concerned not with the decision, but with the decision-making process"[134] so that "it is not the province of courts, when judging the administration, to make their own evaluation of the public good, or to substitute their personal assessment of the social and economic advantage of a decision".[135]

130 Eg UNCLOS, Annex VI, Statute of the International Tribunal for the Law of the Sea; 2016, ITLOS, Rules of the International Tribunal for the Law of the Sea, ITLOS/8.25 (March 2021), <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf>; ITLOS, A Guide to Proceedings before the International Tribunal for the Law of the Sea, <https://www.itlos.org/fileadmin/itlos/documents/guide/1605-22024_Itlos_Guide_En.pdf> both accessed 28 September 2024.

131 R Higgins DBE QC, 'Remedies and the International Court of Justice: An Introduction', Themes and Theories (2009; Oxford Academic, 22 March 2012), <https://doi.org/10.1093/acprof:oso/9780198262350.003.0058> accessed 26 April 2024.

132 Supra (n 65) (*von Pezold v. Zimbabwe*).

133 See UNCLOS art 157 and Proelss and others (n 129) 1270.

134 *R v Chief Constable of North Wales Police, ex parte Evans* [1982] 1 WLR, 1155, 1173.

135 Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review', 1999, PL, 451. See also CE, 22 juin 2016, *Société SCCV Huit Douze Liberté et autres*, n°388276, considérant 45: « il n'appartient pas au Conseil d'État, statuant au contentieux, d'apprécier

Monetary compensation is another possible remedy the SDC can award.[136] Different circumstances may give rise to different types of financial claim for damages. Where a frustrated contractor considers they have been misled into expenditure on exploration and the costs of preparing an exploitation application and call for compensation for this, as has been suggested by one corporate law firm, the claim may extend to tens of millions of dollars.[137] This would be more than the ISA's total budget, which for a two-year period (2022–2024) was USD22,556,000.[138] The ISA's Assembly-agreed budget is funded largely by member State contributions (some of whom are in default of their regular payments). It is hard to see practically (leaving aside legal grounds), how even a proportion of the type of sum that a contractor may claim could be recovered by taking legal action against the ISA based on existing resources.

In terms of legal grounds, it is also unclear whether a tribunal would find such a claim plausible, in terms of representing compensation for loss. An ISA contractor is given exploration rights, signs a contract committing it to carry out certain expenditure on scientific and technical work, and obtains relevant data and knowledge from its exploration plan of work (which can be held as an asset, sold or transferred). As such, has any loss been incurred? The loss may rather be framed as the loss of future revenue that would have arisen from exploitation.[139] This seems highly speculative, especially bearing in mind

l'opportunité du projet retenu par comparaison avec d'autres projets d'infrastructures de transport ne répondant pas aux mêmes objectifs »; or Mexico's Federal Tribunal of Administrative Justice, Ruling of 21 March 2018, 211–212 as cited in *Odyssey Marine Exploration, Inc v Mexico*, ICSID Case No UNCT/20/1, Claimant's Memorial (4 September 2020) para 165.

136 UNCLOS art 189.

137 See N Eastwood and others, Deep Seabed Mining Insights: The Rights of Sponsored Contractors under the UNCLOS Regime (28 November 2023), <https://www.wfw.com/articles/deep-seabed-mining-insights-the-rights-of-sponsored-contractors-under-the-unclos-regime/> accessed 28 September 2024, which refers to potential to claim for 'monetary compensation for their sunk costs and loss of profit'.

138 Decision of the Assembly of the ISA Relating to Financial and Budgetary Matters, ISBA/27/A/10, 3 August 2022 <https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_10-2212174E.pdf> accessed 28 September 2024.

139 On this point see for example Juan Carlos Boué, '"Lying with numbers" in International Arbitration against States' (2024) 15(1) JIDS 5, 8: "it is now taken as read that, in most circumstances, the appropriate yardstick for measuring the adverse effect of a governmental measure on the value of an asset/right involves ascertaining the discounted expected present value of the profits which that asset/right would have generated, net of costs and applicable taxes versus the situation that would have prevailed in the absence of the governmental measure concerned (ie, the 'but for' scenario) … But 'in most circumstances' does not mean 'in all circumstances'. In particular, the World Bank's Guidelines for the Treatment of Foreign Investment stress that DCF valuation in the context of a dispute is

current conditions pertaining to metal trends/prices and doubts about the economic viability of exploitation activities. Article 137 of UNCLOS is clear that the mineral resources of the Area are not subject to alienation, no rights over the resources can be claimed outside of those contained in UNCLOS, and no alternative 'claim, acquisition or exercise of such rights shall be recognized'.

Likewise, even if a tribunal were to decide to award monetary compensation against the ISA, the question of enforcing such an award against an international organisation would arise, with the possibility that ISA member States might refuse to respect such a decision. Another possibility, if the SDC did accept that the applicant is indeed aggrieved and entitled to monetary compensation, would be for the SDC to order only a nominal or token amount since it will not be in the interest of humankind to award a large sum of money against the ISA.

9 Conclusion

From our examination of precedent in international investment law, it seems unclear whether 'legitimate expectations' would apply in a dispute brought by an investor against the ISA at all, given the doctrine usually relies upon a treaty clause requiring fair and equitable treatment of the investor, or at least upon a customary minimum standard of treatment owed by a host state to a foreign investor – and no such standards are invoked in UNCLOS or ISA instruments. To rely upon legitimate expectations as a cause of legal action, an ISA exploitation applicant would need first to argue that it is a general principle of international law, and also that this principle is binding on the ISA.

If this first hurdle were to be judicially accepted, then it seems the claimant would need to evidence that (i) there was a representation made to it from a legitimate source, (ii) giving rise to an expectation, (iii) relied upon in incurring expenditure, and (iv) which it was reasonable for an investor to rely upon. In our analysis, representations upon which investors may legitimately rely, would be obligations imposed upon the ISA in UNCLOS. Expectations may therefore include that the ISA will develop RRPs for exploitation, and that the ISA may consider any application for exploitation against those RRPs in a uniform manner. But we do not see obvious circumstances in which a claimant could argue that specific provisions in those RRPs, or application of

only suitable for going concerns 'in existence for a sufficient period of time to generate the data necessary for proving … profitability'".

them which leads to a disapproval of a contract for exploitation, went against legitimate expectations, insofar as those RRPs have been agreed according to mandated procedures, are within the discretion given to the ISA under UNCLOS, and are uniformly applied between applicants.

Accordingly, invocation of legitimate expectations in the ISA's context may in our analysis arise only in fairly limited circumstances, e.g. where an applicant puts together an application for exploitation based on its exploration work, and that application is not received and reviewed objectively against RRPs by the ISA, but is instead rejected outright without due consideration, or deferred indefinitely. As noted above, this narrow set of circumstances could arise, for example, if the ISA were to agree on a moratorium policy that prevented applications altogether or were to defer consideration of an application received under the two-year rule and in the absence of RRPs. Though timing and reasonableness dimensions would be highly relevant here. Pertinent factors may include whether the moratorium or deferral would be temporary, applied in a non-discriminatory manner, and could be argued as foreseeable and/or an appropriate fulfilment by the ISA or its individual member States of their legal duties.

Even should 'legitimate expectations' grounds seem well made-out by a frustrated applicant it is unclear whether such grounds could be relied upon in the forum established to hear such claims: the SDC; and further unclear what remedies might be awarded if the claim were to be heard and were to prove successful. There are then a significant series of hurdles to a 'legitimate expectations' claim against the ISA by an exploitation applicant. Nevertheless, it is possible such cases may be brought, because a frustrated exploration contractor may have little alternative option, or little to lose, particularly if being chased by their own investors and creditors, unhappy in parallel about the information *they* may have received from the contractor, inducing them to invest or lend.

Finally, even if there were narrow circumstances in which a claim of legitimate expectations (and its frustration) may be brought to a relevant forum, and can be made out in factual and legal terms, this should not deter the ISA and its member States from taking action that it considers imperative to the public interest or to delivery of its mandate under UNCLOS, including the parameters of environmental protection and overall benefit to all of humankind, as well as other norms of international law. As discussed above, it seems highly unlikely that a judicial body would intervene with such a decision taken by a multilateral body of near universal participation. Consequently, it is appropriate and responsible for the ISA to prioritise these factors over the private commercial interests of an individual investor; and the spectre of

'legitimate expectations' should not be used to intimidate ISA member states in their decision-making.

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